

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TAMMY REAVES,)
)
 Claimant,)
 v.)
)
 SPEARS MANUFACTURING COMPANY, INC.,)
)
 Employer,)
 and)
)
 AMERICAN HOME ASSURANCE COMPANY,)
)
 Surety,)
 and)
)
 ZURICH AMERICAN INSURANCE COMPANY,)
)
 Surety,)
 Defendants.)
 _____)

IC 99-027839
IC 03-010637

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed
September 6, 2005

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Twin Falls, Idaho, on September 24, 2004. Jeffrey R. Stoker represented Claimant. Alan K. Hull represented Employer and American Home Assurance Company (“Home”). Mark Peterson represented Employer and Zurich American Insurance Company (“Zurich”). The parties took posthearing depositions and submitted briefs. The case came under advisement on June 1, 2005, and is now ready for decision.

ISSUES

After due notice and by agreement of the parties, the following issues are to be decided:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment in 2003;

2. Whether the condition for which Claimant seeks benefits was caused by either alleged industrial accident;
3. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause;
4. Whether and to what extent Claimant is entitled to the following benefits:
 - (a) temporary partial or temporary total disability benefits (TTD/TPD),
 - (b) permanent partial impairment (PPI),
 - (c) disability in excess of impairment,
 - (d) retraining,
 - (e) medical care, and
 - (f) attorney fees; and
5. Apportionment.

CONTENTIONS OF THE PARTIES

Claimant contends she injured her back in 1999 and 2003. She is entitled to benefits as a result of these compensable work accidents. One Surety, probably Zurich, or both, are responsible for all benefits after the date of the 2003 accident. Claimant's disability is high; she is likely an odd-lot worker.

Home contends it paid all benefits due her from the 1999 accident. Home's policy with Employer expired in 2001. Under the last injury doctrine, it is not responsible for benefits after the 2003 accident. Regardless of liability, Claimant's permanent disability is 30-35%.

Zurich contends Claimant did not have an accident in 2003. She suffered an exacerbation of symptoms without a compensable precipitating event. It is not responsible for any benefits.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, her husband, Employer's plant manager Reuben Donaldson, and by Claimant's immediate supervisor Tamera Ahrendsen;

2. Claimant's exhibits A – I;
3. Defendant Home's exhibits 1 – 13, 15, 16;
4. Defendant Zurich's exhibits A – D, F;
5. Posthearing depositions of orthopedic surgeon Joseph Verska, M.D., and vocational rehabilitation consultants Jason Spooner and Douglas Crum; together with exhibits to those depositions, except that exhibit 3 to Jason Spooner's deposition is not admitted.

Objections raised in the posthearing depositions are overruled except those specifically sustained by the Referee when he was present.

FINDINGS OF FACT

1. Claimant began working for Employer on March 20, 1997. Employer manufactures PVC pipe fittings in sizes up to 36 inches in diameter. Claimant injured her back in a compensable accident on August 17, 1999. Home paid benefits for it and for flare-ups afterward without regard to whether a precipitating event preceded a flare-up. Claimant occasionally missed work for doctors' visits or recuperative time. Home ceased paying benefits sometime after July 22, 2002.

2. On September 7, 1999, Claimant's family doctor, Thomas H. Zepeda, M.D., diagnosed low back pain with radicular symptoms. A lumbar X-ray two days later was normal.

3. On September 13, 1999, an MRI showed a "mildly prominent central bulging disc" at L5-S1, smaller bulges in the discs above. It was considered a negative MRI.

4. Dr. Zepeda treated her conservatively and performed trigger point injections. By mid-November he referred her to Eric H. Widell, M.D., but he continued to see her for this and other unrelated conditions.

5. On November 29, 1999, Claimant visited Dr. Widell. He examined Claimant

and the MRI. He found no rupture of the disc and diagnosed a strain. He released her to return to regular work, no lifting over 50 pounds and no bending over. On December 23, 1999, he extended the work restrictions through February 1, 2000. He gradually lifted the restrictions but she had a flare-up in April. On May 21, 2000, Dr. Widell released Claimant to unrestricted work, five days per week. He opined she was not yet stable and that he considered the five-day work restriction to constitute “light duty” despite the absence of any lifting or motion restrictions.

6. Claimant continued to visit Dr. Zepeda’s office about her back pain into April 2000. On May 2, 2000, she visited for an unrelated matter. The doctor’s note states, “back is feeling much improved.” There is no further mention of back pain until July 9, 2001, with a note stating she takes an occasional Vicodin for back pain. Dr. Zepeda’s next note relating to back pain is dated January 24, 2002. Despite Claimant’s testimony that all Vicodin refills were for back pain, the records show Dr. Zepeda prescribed refills for reasons unrelated to her back as well.

7. On June 23, 2000, Claimant first visited Dr. Widell’s partner, David A. Hanscom, M.D. His note erroneously characterizes the September 1999 MRI as having occurred in November and showing a central disc rupture. There was no MRI taken in November 1999. The record does not suggest Dr. Hanscom actually viewed the September 1999 MRI. On August 28, 2000, Dr. Hanscom considered Claimant “asymptomatic. She has essentially no pain.” He discharged her from care without restriction. He did not see her again for a year.

8. On November 7, 2001, Claimant returned to Dr. Hanscom. He diagnosed, “Flare-up of chronic discogenic low back pain.” By November 15 he revised his diagnosis, “Ongoing flare of mechanical low back pain.” He continued conservative treatment.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

9. On February 1, 2002, Claimant visited Timothy Floyd, M.D. He examined her and significantly noted that she reported nonanatomical weakness and sensory loss in her left leg. He requested a second MRI.

10. On February 22, 2002, another MRI showed the L5-S1 disc bulge without nerve involvement and mild degenerative changes.

11. On March 19, 2002, Claimant first visited Clinton L. Dille, M.D., for pain management. His treatment consisted of occasional steroid injections, other injections, and eventually nerve ablations.

12. On July 22, 2002, Claimant visited Rheim B. Jones, M.D., for an IME. He concluded her subjective complaints were consistent with the objective findings without symptom magnification behavior. He diagnosed a lumbosacral strain dating to the 1999 accident, with flare-ups and mild degenerative disease at L5-S1. He opined the strain resolved completely by August 28, 2000, and the flare-ups were not related to the 1999 accident. He agreed with Dr. Hanscom's opinion finding her stable as of August 28, 2000, and opined she suffered no PPI. He found her able to return to work without restrictions.

13. On August 26, 2002, Dr. Hanscom opined Claimant suffered a 5% PPI.

14. On June 26, 2003, Claimant obtained another Vicodin refill for chronic back pain.

15. On July 9, 2003, she visited one of her regular doctors, David Arthurs, D.O., for recurring back pain. She reported back pain to Employer.

16. On July 17, 2003, she reported back pain and left work. Her supervisor considered this part of the "same I.I. [industrial injury] back injury as previous."

17. Also on July 17, 2003, Joseph Verska, M.D., first examined Claimant. The form prepared by Claimant dated "6-16-03" and "6-17-03" is in error. Claimant reported a "flare-up"

of her chronic back pain had begun two weeks ago.

18. On July 23, 2003, a third MRI showed a herniated disc at L5-S1 along with some arthritis.

19. On August 5, 2003, Claimant returned to Dr. Dille. He diagnosed a tear of the L5-S1 disc.

20. A September 18, 2003, discogram showed results consistent with discogenic low back pain.

21. On October 20, 2003, Dr. Verska removed the disc and fused the joint.

22. By December 4, 2003, Claimant reported great relief of her symptoms.

23. On May 20, 2004, Dr. Verska examined Claimant, found her medically stable, and rated her at 22% PPI. He imposed a permanent restriction of lifting 40 pounds, 35 pounds repetitively, with an allowance to sit or stand as tolerated.

24. On June 29, 2004, Claimant underwent a functional capacity evaluation (FCE) by Dean Mayes.

25. On August 14, 2004, when Dr. Verska opined Claimant's condition was entirely related to the 1999 accident, he had not evaluated the two prior MRIs and did not have access to prior records of other doctors. In deposition, upon review of the MRIs and some other records, he opined the herniated disc occurred between the February 22, 2002, and July 23, 2003, MRIs. By her history, it would correlate with the flare-up just before her July 17, 2003, visit to him.

He opined:

But there was obviously an injury that caused the flare-up of pain. An MRI was obtained and it showed an annular tear that most likely represented an acute injury that happened on or about, you know, July of '03. And I think that's what caused her to have pain and subsequent need for surgery.

26. Claimant has been evaluated by two vocational rehabilitation consultants, Jason Spooner, at Claimant's request, and Douglas Crum, at Home's request.

27. Mr. Spooner's opinions were based, in part, upon the assumptions that Claimant could perform only unskilled, sedentary work and that Claimant had access – pre-injury – to all such jobs which require no more than a high school diploma. Mr. Crum's opinions were based, in part, upon his evaluation of whether Claimant would have been a candidate – pre-injury – for specific jobs. As a result of competing assumptions, the universe of available jobs Mr. Spooner considered was more than five times higher (over 11,000 jobs) than the universe of available jobs (about 1800 jobs) Mr. Crum considered. Both expressed difficulty evaluating Dr. Verska's restriction about allowing Claimant to sit or stand as tolerated.

Discussion and Further Findings

28. Claimant appeared forthright at hearing. She did not embellish her symptoms. She could not entirely hide her physical discomfort while testifying but did not draw attention to it.

29. Claimant's attorney often asked leading questions to elicit testimony. Doing so is not prohibited under Industrial Commission rules, but at times it undermines a claimant's credibility. Here, the need to lead showed a weakness in the quality of her recollections of when, where, and whether she felt pain in the months and years after the 1999 accident. Moreover, her willingness to be led by the defense attorneys' questions resulted in some inconsistencies in her testimony.

30. From the transcript of Claimant's deposition, it appears she may have been more sure of her testimony than at hearing. However, this may be merely an artifact of the difference between reading a written record and actually observing Claimant at hearing.

Claimant's deposition testimony is given neither more nor less weight than her hearing testimony.

31. Overall, Claimant's testimony about the severity, location, and duration of her pain at times in the past received little weight. Claimant deferred to the accuracy of the medical records. The medical records are deemed more reliable.

32. **The 2003 incident.** Claimant reported back pain to Employer on July 9 and 17, 2003. She left work early and sought medical attention on July 17, 2003. She reported her back pain began "2 weeks ago." The July 23, 2003, MRI showed the L5-S1 annulus had torn.

33. Idaho Code § 72-102(17) defines an "accident." Where the strain of work overcomes the resistance of the claimant's body and causes an injury, the injury is compensable. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983); *see also*, Page v. McCain Foods, Inc., ___ Idaho ___, 2005 Opinion No. 21 (Feb. 17, 2005).

34. The July 23, 2003, MRI demonstrates a new injury. The "event" that constitutes the accident was somewhat obscured because of Claimant's familiarity with intermittent back pain. Nevertheless, she has reasonably located the event in place and time. On both July 9 and July 17, 2003, Claimant felt the sudden onset of increased pain in the midst of her work shift. Whether the event occurred on July 9 or July 17, 2003, is immaterial for any purpose under Idaho Workers' Compensation Law. Zurich covered the risk for all dates after October 1, 2001.

35. **Causation and apportionment.** Dr. Verska's earlier opinion linking the herniated disc to the 1999 accident was offered without the benefit of having compared the three MRIs. Upon more complete review, Dr. Verska's revised opinion is persuasive. Medical testimony shows the herniated disc was caused by the July 2003 accident.

36. In 2002, shortly after Dr. Jones opined Claimant recovered from the 1999

accident without residual symptoms, limitations, or permanent impairment, Dr. Hanscom opined Claimant sustained 5% PPI, but he imposed no restrictions.

37. Some doctors use the phrases “disc rupture,” “herniated disc,” and “disc bulge,” casually, interchangeably. Here, Dr. Hanscom mentioned a disc rupture. The MRIs provide clear medical evidence of the condition of Claimant’s L5-S1 disc before and after the July 2003 accident. Before July 2003, the disc bulged but did not impact the spinal cord or nerve roots, and the annulus was intact. The July 23, 2003, MRI showed the annulus had torn and the nucleus pulposus had extruded.

38. There is a dissonance created when a doctor opines PPI exists without any physical limitations or restrictions. By statutory definition, PPI is based upon anatomic or functional abnormality which affects a person’s activities. Idaho Code §§ 72-422, -424. This dissonance combines with Dr. Hanscom’s inexact language in describing Claimant’s disc condition to lessen the weight afforded his opinion about PPI. Dr. Jones’ opinion is persuasive. Claimant suffered no PPI as a result of the 1999 accident. The degenerative aspect of her lower back did not rise to the level of a ratable PPI before the 2003 accident. There is no basis for apportionment.

39. **Temporary disability.** The record establishes that Claimant became medically stable from the 1999 accident on August 28, 2000. She had occasional flare-ups of mechanical back pain associated with her work and other activities through June 2003. Claimant does not assert that benefits for such temporary disability associated with the 1999 accident and flare-ups went unpaid.

40. Claimant suffered compensable temporary disability after the July 2003 accident – and as a result of it – until she became medically stable on May 20, 2004.

41. **Permanent impairment.** The Commission is the ultimate fact finder in the evaluation of permanent impairment. Urry v. Walker and Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989). Dr. Verska opined Claimant suffered PPI rated at 22% as a result of the herniated disc. This opinion is persuasive.

42. **Permanent disability.** Permanent disability and its evaluation is defined by statute. Idaho Code §§ 72-423, -425. Here, the vocational rehabilitation consultants based their opinions of disability upon different assumptions. Each offered an opinion. Neither is wholly persuasive. Mr. Spooner's assumptions about Claimant's pre-injury access to the labor market did not sufficiently take into account Claimant's personal circumstances and abilities. His use of the FCE resulted in an opinion about disability grossly at odds with the restrictions imposed by Dr. Verska. Mr. Crum's assumptions about Claimant's pre-injury personal circumstances, interests, and abilities, are impossible to evaluate on an objective basis. Moreover, he used an incorrect time-of-injury wage.

43. Dr. Verska's unchallenged restrictions should be the dominant factor in assessing permanent disability. The FCE was insufficiently grounded to be afforded significant weight; Mr. Mayes did not testify, and Claimant belatedly attempted to have Dr. Verska approve its conclusions after the date of hearing.

44. Claimant is still officially an employee on leave of absence from Employer. The record casts considerable doubt upon whether Claimant will ever actually return to work for Employer.

45. Considering all bases for the opinions of the consultants, together with the medical and non-medical factors appropriate to a determination of permanent disability, Claimant suffered permanent disability equating to 40% of the whole person as a result of her

July 2003 accident which caused the disc injury and subsequent surgery, inclusive of impairment. Claimant suggested, but failed to show, that she is an odd-lot worker.

46. **Medical care.** Idaho Code § 72-432 requires an employer to provide reasonable care for a reasonable time. Zurich is liable for medical care Claimant received for her low back from July 9, 2003, to the date of hearing. Claimant does not assert benefits for medical care relating to the 1999 accident were unpaid.

47. **Attorney fees.** Dr. Jones' written opinion provided a reasonable basis upon which Home ceased paying benefits. Dr. Verska's written opinion on August 14, 2003, provided a reasonable basis upon which Zurich denied benefits. Claimant failed to show either Surety acted unreasonably, and she is not entitled to an award of attorney fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant suffered an accident causing compensable injury on August 17, 1999. She became medically stable from this injury on August 28, 2000, and suffered no permanent impairment from it, and Home has paid all benefits related to it;

2. Claimant suffered an accident causing compensable injury on or about July 9, 2003. She became medically stable from this injury on May 20, 2004;

3. Claimant is entitled to temporary disability for the relevant periods after July 9, 2003;

4. Claimant is entitled to medical care for the 2003 accident to the date of hearing;

5. As a result of the 2003 accident, Claimant suffered PPI of 22% and permanent disability rated at 40% of the whole person, inclusive of impairment;

6. Defendants failed to show any basis for apportionment of benefits; and
7. Claimant failed to show she is entitled to attorney fees.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 23rd day of August, 2005.

INDUSTRIAL COMMISSION

ATTEST: /s/
Douglas A. Donohue, Referee

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

R. Jeffrey Stoker
P.O. Box 1597
Twin Falls, ID 83303-1597

Alan K. Hull
P.O. Box 7426
Boise, ID 83707

Mark C. Peterson
P.O. Box 829
Boise, ID 83701

db /s/

2. Claimant suffered an accident causing compensable injury on or about July 9, 2003. She became medically stable from this injury on May 20, 2004.

3. Claimant is entitled to temporary disability for the relevant periods after July 9, 2003.

4. Claimant is entitled to medical care for the 2003 accident to the date of hearing.

5. As a result of the 2003 accident, Claimant suffered PPI of 22% and permanent disability rated at 40% of the whole person, inclusive of impairment.

6. Defendants failed to show any basis for apportionment of benefits.

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

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

DATED this 6th day of September, 2005.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
James F. Kile, Commissioner

/s/
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 6th day of September, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

R. Jeffrey Stoker
P.O. Box 1597
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