

not an event connected with the industry in which it occurred,” and thus Claimant has not met her burden of proving a work-related accident occurred.

Surety cites to the record a great deal to show how, in its opinion, the Commission failed to recognize that Claimant’s injury was not due to a work-related accident. Surety is in disagreement with the decision reached by the Commission and has merely presented facts and law already considered in the June 6 decision. Surety has not presented any new facts, or new arguments not considered in the original decision of June 6.

Surety cites to the June 6, Commission finding of fact that “she [Claimant] doesn’t recall whether she actually touched the box before experiencing the onset of pain.” Surety has a hard time reconciling that statement with the Commission statement that “Claimant’s act of lifting a box of office supplies down from a shelf is associated with her work environment; it is not an idiopathic event.” Surety states such a conclusion does not reconcile with the previous finding of fact. Surety is reading too much into the words of the June 6 decision. The two statements are easily reconciled when you consider the act Claimant was performing at the time of injury. Claimant was engaged in a work-related activity when the pain began. Claimant was attempting to retrieve a box of office supplies from a shelf. Whether she actually touched the box or not, she was still engaged in the activity of retrieving the box.

Moreover, Surety is attempting to somehow commingle the theories of accident and occupational disease. An accident does not require an untoward event to occur solely within a particular industry. Surety’s argument on this point has no legal basis and is without merit.

Surety further argues no medical professional associated the injury to the workplace. As stated by the Commission on page 33 of the June 6 decision, “all the medical evidence in the record attributes Claimant’s cervical condition to the lifting incident; there is none to the contrary.” Furthermore, Surety accepted Claimant’s claim for benefits early on and even had a Surety approved doctor (John W. Swartley, M.D.) approve the July 11, 2000 surgery.

2. Odd lot status

Surety argues the Commission erred in finding Claimant totally and permanently disabled via the odd lot doctrine. Surety points out that the burden of proving odd lot status lies with the claimant and focuses on one element of proving odd lot status: whether the claimant can show that any effort to find suitable work would be futile. Surety argues Claimant did not show that an effort to find work was, or would be, futile. Surety’s argument on this point is simply a difference of interpretation. The Commission fully considered all relevant facts and law when determining whether Claimant’s efforts in finding suitable work would be futile.

As indicated in the June 6 decision, once Claimant satisfies her burden of proving odd lot status, the burden then shifts to Employer/Surety to show that some form of suitable work is “regularly and continuously available to the claimant.” *See*: Discussion Item 6. Surety did not satisfy this burden. Surety did not show that Claimant is readily employable in her geographic market.

The Commission made the odd lot determination based on a full analysis of the record. Surety has not given the Commission any reason to scrutinize the odd lot

question further. The argument by Surety on the analysis of the Commission is without merit.

3. PPI clarification

Surety contends the Commission decision regarding PPI is unclear. “Surety contends that the determination of impairment is irrelevant when a finding of ‘odd lot’ status has been found.” *See*: Surety Brief in Support of Motion for Reconsideration p. 11. Surety raises this point out of fear that some of the parties may seek double recovery due to a misunderstanding regarding the relationship between the PPI rating and disability benefits. Surety further argues that all PPI benefits paid to date should be offset “against any total permanent benefits,” and that ruling otherwise would “make TTD benefits, PPI benefits and total permanent disability benefits equal which is inconsistent....”

In an attempt to clarify, the Commission finds it necessary to merely paraphrase the order of June 6. The Commission found Claimant is entitled to a PPI rating of 24% of the whole person. Surety is entitled to credit for any and all amounts previously paid towards PPI. TTD benefits have been paid; Claimant is not entitled to additional TTD benefits. There should be no confusion regarding PPI benefits and disability benefits as they are different sets of benefits, and they are to be paid separately.

CONCLUSIONS

The record fully supports the factual findings and legal conclusions made by the Commission in the June 6 order.

Based upon the foregoing reasons, Surety's Motion for Reconsideration should be, and is hereby, DENIED.

DATED this __22__ 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 this __22__ day of __September____2005, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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