



- (b) disability in excess of impairment; and,
- (c) medical care;
- 4. Whether Claimant is entitled to total permanent disability as an odd-lot worker;
- 5. Whether Idaho Code § 72-403 bars benefits; and
- 6. Whether Claimant is entitled to attorney fees.

### **CONTENTIONS OF THE PARTIES**

Claimant contends she sustained a work-related back injury while working for Employer. She is entitled to a spinal cord stimulator until she becomes medically stable. Alternatively, she is totally and permanently disabled by pain.

Defendants contend Claimant did not have a work-related accident. Alternatively, she has received all reasonable medical care due her. Indeed, Claimant owes Defendants for unnecessary medical care and TTDs she inappropriately received. Claimant is not totally and permanently disabled, and could find work if she were motivated to do so.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

- 1. The testimony of Claimant;
- 2. Claimant's Exhibits A through D as admitted and supplemented;
- 3. Defendants' Exhibits 1 through 15; and
- 4. Post-hearing depositions of: orthopedic surgeon David B. Verst, M.D.; anesthesiologist Clinton Lamar Dille, M.D.; orthopedic surgeon Joseph H. Verska, M.D.; pain psychologist Robert F. Calhoun, Ph.D.; rehabilitation consultant Gregory Dean Taylor; and physical therapist Jerry Aiken.

Objections in the depositions are overruled. After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

## **FINDINGS OF FACT**

1. At the time of hearing, Claimant was 47 years of age and living in Twin Falls, Idaho. She earned a high school diploma and attended one year of college. She is certified as a nurse's assistant (CNA) and was working in that capacity at the time of the industrial accident. She has worked a range of jobs including assembly line worker, laundry worker, pizza pie maker, bowling alley worker, sandwich maker, receptionist, and as a trainer at Cactus Pete's.

2. Claimant suffered prior back injuries, the first about July 1988. Claimant "was off work for about a year" after her 1988 accident. After her 1988 injury, Claimant was restricted to lifting no more than 30 pounds. She did not understand this restriction to be permanent. However, upon advice of her regular doctor, she looked for lighter work.

3. About 2001, Claimant began working for Employer as a therapy technician. Her clients were mentally retarded and/or wheelchair-bound adults. She earned \$7.35 per hour.

4. Claimant suffered a work-related accident on June 27, 2002. A client, as she fell, grabbed Claimant and they fell together. Claimant felt "an instant burn" in her back. She reported the accident to her supervisor and sought medical attention.

5. Claimant has not looked for work since her accident.

6. Claimant has applied three times for Social Security Disability; she has been rejected twice and is uncertain of the status of her third claim.

7. Orthopedic surgeon David B. Verst, M.D., first saw Claimant on July 11, 2002. By history, Claimant reported no prior back problems. Dr. Verst diagnosed "acute back strain with discogenic pain." He also noted the presence of an L5-S1 desiccated disk.

8. Anesthesiologist Clinton Lamar Dille, M.D., specializes in chronic pain management. On August 20, 2002, Claimant visited Dr. Dille's office. Epidural injections were

performed but were not successful in relieving her pain.

9. On December 31, 2002, Dr. Verst opined Claimant could return to her pre-injury work.

10. On February 11, 2003, Dr. Dille performed diskograms. The L3-4 and L4-5 disks “were fairly normal.” The L5-S1 disk which showed age-related degeneration produced findings typical of her reported pain.

11. On March 3, 2003, Dr. Verst performed an anterior lumbar interbody fusion. By April 7, 2003, Claimant reported “zero back pain.” She continued to do well for several months.

12. In July of 2003, Dr. Verst recommended a work-hardening program.

13. On September 8, 2003, Claimant reported continuing back pain. Dr. Verst considered this a sudden change for the worse. A CT scan showed a good fusion. Treatment, including physical therapy, continued.

14. On December 15, 2003, despite Claimant’s continuing complaints, Dr. Verst concluded Claimant had reached MMI. Pursuant to AMA Guides, Fifth Edition, he gave her an 18% impairment rating, with 5% pre-existing. He imposed restrictions including occasional lifting of 21 up to 35 pounds and rarely lifting over 35 pounds.

15. Orthopedic surgeon, Joseph H. Verska M.D., evaluated Claimant in December 2003. He found no anatomical basis for her complaints and considered her medically stable as well.

16. Despite counselling by treating physicians to reassure Claimant, she continued to complain. Her care in 2004 was primarily managed by Dr. Dille.

17. On January 16, 2004, Dr. Dille examined Claimant. He noted her leg pain had improved significantly at that point, but she was still taking a significant amount of medication.

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

In deposition, Dr. Dille characterized the course of Claimant's symptoms as involving radicular leg pain. He opined a spinal cord stimulator can be especially helpful for that type of pain, but not so for back pain. He considered a spinal cord stimulator to be the "best option to try" rather than a morphine pump, but expressly refused to "guarantee" its success.

18. Dr. Verst opined that a dorsal spine stimulator "would not be effective." Asked about whether it would relieve her pain he compared to flipping a coin.

19. Dr. Verst last saw Claimant in April 2004. He opined she could return to work within the limitations he had set.

20. On April 7, 2004, Dr. Dille opined Claimant's condition was "directly related to her industrial injury that occurred on 6/27/2002 because this is directly related to her surgery as well."

21. Dr. Dille noted that Claimant had not been on medications prior to this accident and he does not regard her as a drug seeker. He did describe her as "fairly unsophisticated" when discounting the possibility that she was malingering.

22. On May 20, 2004, Dr. Verska suggested she see a pain psychologist before trying a spinal cord stimulator.

23. Pain psychologist Robert F. Calhoun, Ph.D., opined Claimant exhibited psychological overlay such that a spinal cord stimulator was unlikely to be of benefit. In August 2004, he recommended Claimant "enter into psychological treatment" for her chronic pain syndrome and, at that time, be "weaned off her opiate derivative medications." He further noted her family was "very solicitous in response to her pain behaviors. They reinforced her pain behaviors."

24. Rehabilitation consultant Gregory Dean Taylor and physical therapist Jerry Aiken

opined that Claimant could work if she overcame her self-perceived disability.

### **DISCUSSION AND FURTHER FINDINGS**

25. **Causation.** A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (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, 890 P.2d 732 (1995).

26. The provisions of the Workers' Compensation law are to be liberally construed in favor of the employee. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

27. Dr. Verst treated the Claimant the longest and most extensively. He opined that Claimant sustained a work-related back injury when she fell while assisting her disabled client.

28. In deposition, Dr. Verst speculated that, observing Claimant's response to surgery in hindsight and having a more complete record of Claimant's medical and psychological history than he previously had, he might not have performed the fusion. Contrary to Defendants' assertion, this speculation is a *non sequitur* to the issue of causation.

29. **Permanent Impairment.** "Permanent impairment" is defined by statute. Idaho Code §§ 72-422, -424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

30. Dr. Verst rated Claimant's PPI at 18%, with 5% pre-existing. Dr. Verska concurred, noting that the 5% could perhaps be increased, but at that point Dr. Verska had not seen enough of the prior records to quantify his suggested increase. The medical record shows Claimant had prior back problems and, at the time of surgery, had a desiccated disk – an age-related finding. Dr. Verst's rating of 18%, with 5% pre-existing is consistent with AMA guides and the record. His opinion is persuasive.

31. **Permanent Disability.** Permanent disability is also statutorily defined. Idaho Code §§ 72-423, -425, -430. The burden of establishing odd-lot status lies with the claimant who must prove the unavailability of suitable work. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). Claimant's current restrictions are not significantly greater than those imposed following her 1988 back injury. Doctors and others testified about the impact her history, motivation, social and psychological factors play in her self-perceived disability. Claimant failed to show she suffers permanent disability in excess of PPI. She failed to show she is an odd-lot worker.

32. **Medical Benefits.** The law requires an employer to provide reasonable medical treatment for a reasonable time. Idaho Code § 72-432(1). It is for the physician, not the Commission, to decide whether the treatment was required. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

33. Here, Claimant has had extensive medical treatment for her work-related accident. After the fusion, for a number of months, Claimant herself was satisfied that she had no pain. Attempts to recondition her to return to work began.

34. However, in September 2003, matters changed. Claimant again reported pain. More care was provided. All medical care to the date of hearing was reasonable when provided.

As of the date of hearing, reasonable medical care for Claimant has run its course. There is no work-related anatomical source for Claimant's pain. Dr. Dille is the lone medical voice supporting the use of a spinal cord stimulator. Even he is a cautious advocate, at best. Claimant is not entitled to a spinal cord stimulator.

35. **Malingering – Denial of Compensation.** Idaho Code § 72-403 provides that if an injured employee refuses or unreasonably fails to seek physically or mentally suitable work, or refuses or unreasonably fails or neglects to work after such suitable work is offered to, procured by or secured for the employee, the injured employee shall not be entitled to temporary disability benefits during the period of such refusal or failure.

36. Claimant's condition was exacerbated and obscured by numerous factors extraneous to the accident which caused her back injury. However, except for an unpersuasive opinion by Dr. Montalbano, there is no good evidence to support a finding that Claimant is malingering. Her actions may not have been based solely upon her physical condition, but they were not unreasonable.

37. **Attorney Fees.** Similar to the analysis of Idaho Code § 72-403 above, Defendants' actions have not been shown to be unreasonable for purposes of applying Idaho Code § 72-804.

### **CONCLUSIONS OF LAW**

1. Claimant injured her back in a work-related accident on June 27, 2002;
2. Claimant's PPI is rated at 18%, with 5% pre-existing, for a PPI rating of 13% of the whole person;
3. Claimant failed to show she suffered permanent disability in excess of impairment;

4. Claimant is entitled to benefits for the medical care provided to the date of the hearing. She failed to show she is entitled to further medical care, including a spinal cord stimulator;

5. Defendants failed to show Idaho Code § 72-403 should be applied to reduce Claimant's benefits;

6. Claimant failed to show she is entitled to an award of 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 12<sup>TH</sup> day of OCTOBER, 2005.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>TH</sup> day of OCTOBER, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Keith E. Hutchinson  
P.O. Box 207  
Twin Falls, ID 83303-0207

Neil D. McFeeley  
P.O. Box 1368  
Boise, ID 83701

db

/S/ \_\_\_\_\_



the hearing. She failed to show she is entitled to further medical care, including a spinal cord stimulator.

5. Defendants failed to show Idaho Code § 72-403 should be applied to reduce Claimant's benefits.

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

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

DATED this 14<sup>TH</sup> day of OCTOBER, 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 14<sup>TH</sup> day of OCTOBER, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Keith E. Hutchinson  
P.O. Box 207  
Twin Falls, ID 83303-0207

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