

Claimant now seeks a disability rating. Claimant contends she changed jobs in 1998 and has received raises constituting 22.3% from October 1998 to October 2004, but had received raises of 43% in her old job and would have received greater raises if she had been able to remain in her old job. Those officers working her old job have received raises similar to those she received in her old job, and these have continued apace, providing a basis for establishing a loss of wage earning capacity and, in turn, permanent disability.

Defendants agree that Claimant had a work-related injury and resulting permanent impairment. Claimant is earning more than at her time of injury. They dispute whether Claimant's disability should be rated based upon raises she might have earned if she had been able to keep her time-of-accident job.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and Canyon County human resources specialist Amy Rosebrock;
2. Claimant's Exhibits 1 – 5;
3. Defendants' Exhibits A – B;
4. The record upon which the Commission's Order of December 3, 2004 was based; and
5. Post-hearing deposition of vocational consultant Douglas Crum.

After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. The findings of fact underlying the Commission's December 3, 2004 Order retaining jurisdiction are incorporated by reference.
2. The subject injury occurred in 1995. Claimant worked as a Canyon County

Juvenile Detention Center supervisor from 1992 to 1998. In 1998, treating wrist surgeon Troy B. Watkins, M.D., advised her she should change jobs because of the risks to her wrist associated with restraining offenders. Claimant changed jobs. She has worked for Canyon County as an adult probation officer since October 1998.

3. At the time of injury, Claimant also worked part-time as a licensed substance abuse evaluator for Canyon County courts. She allowed that license to lapse about 1996. The record provides no evidence that her wrist condition caused her to quit or prevents her from returning to this occupation on the same basis which she previously worked.

4. In 1996, Claimant began working as a part-time federal officer in addition to her regular job. She was offered a full-time federal position which would have paid substantially more, but refused it for personal reasons. On advice of Dr. Watkins, she quit the part-time federal job in 1998 because of her wrist condition.

5. Officers similarly situated to Claimant's time-of-injury job have received raises greater than Claimant has received in her new job. These comparable raises were greater both in absolute dollars as well as in percentage of wage.

6. Wages for Canyon County employees include two components: cost of living and merit. Cost of living raises are usually equal across the board whereas merit raises are entirely discretionary.

7. Claimant has substantially modified her routines to accommodate her wrist condition. It has worsened and required repeated surgeries. She has deferred a wrist fusion surgery and considers it "a last resort" that will someday be required.

8. Dr. Watkins opined Claimant's PPI is rated at 11% of the upper extremity and will be rated at 21% of the upper extremity after the fusion surgery. The rating is primarily

based upon loss of motion in the wrist. Claimant may undergo a partial fusion first, but a total fusion of her left wrist remains likely with or without an intervening partial fusion.

9. After surgery, Claimant will be able to continue working her current job. She may require up to two weeks of temporary disability.

10. Dr. Watkins imposes no restrictions currently. He does not expect to impose restrictions after her wrist fusion. He has allowed Claimant to restrict her left wrist activity to her pain tolerance. After the total fusion, Dr. Watkins anticipates her pain will be almost entirely ameliorated.

11. Claimant's wrist condition, now and after total fusion, does and will preclude her from reasonably working in law enforcement positions that regularly pose a genuine risk of physical altercation. She will also be precluded from other jobs which require full range of motion of both wrists.

12. Mr. Crum opined Claimant has suffered a 6.1% loss of labor market access as a result of her injury. He opined it "possible" (his emphasis) that she suffered a "modest reduction" of 9.8% in her earning potential as a result of her job change. He noted Claimant took a 3.8% pay cut when she changed jobs in 1998. However, her new wage in 1998 was greater than her time-of-injury wage in 1995. As of the date of the hearing, she is earning a wage 55% more than at the time of injury. He opined that overall, "it would be reasonable to propose" a 15% permanent disability inclusive of PPI.

DISCUSSION AND FURTHER FINDINGS OF FACT

13. Claimant is a credible witness who demonstrated a "can do" attitude and a healthy pain tolerance. She continued to work her time-of-injury job for about three years after the injury. Only after her wrist condition worsened over time and required subsequent surgeries

did she change to a somewhat less physically demanding and risky job.

14. Permanent disability is defined and evaluated according to statute. Idaho Code §§ 72-423, 424, 425, 430(1). Some factors are expressly defined by statute and other unexpressed factors may be considered. Idaho Code § 72-430(1). Wage earning capacity may be considered. Baldner v. Bennet's, 103 Idaho 458, 649 P.2d 1214 (1982). Earnings from a concurrent job may be considered when performing a Baldner analysis. Loya v. J.R. Simplot Co., 120 Idaho 62, 813 P.2d 873 (1991). Wage earning capacity may not be the sole factor considered in determining permanent disability. *Id.* The Commission is not required to analyze annual versus weekly or hourly wages when considering earnings history. McClurg v. Yanke Machine Shop, Inc., 123 Idaho 174, 845 P.2d 1207 (1993). However, evidentiary consideration of lost potential wage increases may be “unsupported by law and too speculative” to assign weight. *Id.* “Such increases are speculative and unsupported by law unless the claimant is performing the act being used as the test pre-injury and post-injury.” Reiher v. American Fine Foods, 126 Idaho 58, 61, 878 P.2d 757, 760 (1994)(Commission decision vacated and remanded on other grounds). The touchstone is injustice – whether injustice would result from failure to consider such increases. *See, McClurg, and Reiher, supra.*

15. The concurrent employment analysis allowed by Loya does not apply to the federal job. Claimant began the federal job after her injury. She did not have any earnings attributable to it at the time of injury. Thus it is not concurrent employment as contemplated by Loya. Moreover, Claimant, for personal reasons, refused an actual offer to work that job full time at substantially more than she ever earned with Canyon County.

16. In part, the law requires that the disability occur because of permanent impairment and “no fundamental or marked change in the future can be reasonably expected.”

Idaho Code § 72-423. Permanent disability may include an evaluation “of the injured employee’s present and *probable future ability* to engage in gainful activity.” Idaho Code § 72-425 (emphasis added). Consideration for and rating permanent disability from a probable future surgery is a factual determination for the Commission. See, Reynolds v. Browning Ferris Industries, 112 Idaho 965, 751 P.2d 113 (1988) (especially the concurring opinion of Bakes, J.). A preference for finality and the humane intent of the Idaho Workers’ Compensation Law support an avoidance of delay in determining benefits. See, McCall v. Potlatch Forests, 67 Idaho 415, 182 P.2d 156 (1947).

17. Here, Claimant’s permanent impairment after the wrist fusion surgery is expected to increase from 11% to 21% of the upper extremity, the latter of which converts to 13% of the whole person. Guides to the Evaluation of Permanent Impairment, 5th ed., p. 439. However, there is no evidence to suggest that her permanent disability from other factors is likely to change as a result. Moreover, Dr. Watkins testified Claimant may undergo the total wrist fusion whenever she is tired of her wrist pain. She may trade the amelioration of her continuing pain for the lost wrist motion which will result from the future surgery. Finally, the expected increase in impairment is specific and uncontested and, therefore, of sufficient reasonable probability upon which to include in an award of permanent disability.

18. Claimant’s loss of labor market access to the jobs she loves is more significant than her loss of labor market access to the jobs for which she, but for the accident, would be qualified and capable of performing. Indeed, she continued working for Canyon County in her old job for three years after the accident and continues working for Canyon County in law enforcement as of the date of the hearing. Except for the part-time federal job, she has not applied for jobs elsewhere.

19. Claimant's 1998 job change within Canyon County left her earning more than she did at the time of accident. She incurred only a 3.8% pay cut from her old job's 1998 wage and her new job's 1998 wage. The most salient and significant basis for evaluating Claimant's current and probable future disability is established by a combination of these two factors, the paragraphs above, and all factors set forth in Idaho Code § 72-430(1).

20. The record demonstrates Claimant is a good and hard worker. She and Employer enjoy a positive reciprocal relationship. Her continued employment in her new job suggests she may well have continued in her old job but for the accident. There is no evidence to show Claimant would not have received both cost of living and merit increases had she remained there, but the record does show a variance in the amounts of raises received by similarly situated employees. Claimant's "what might have been" argument is entitled to some small weight. Injustice does not result from assigning appropriate weight to this argument. This tail is too slender to wag the dog of traditional, statutory analysis of permanent disability.

21. As pointed out in Claimant's post-hearing briefs, Mr. Crum's analysis lacks solid foundation. He makes too many assumptions – as he must in the absence of specific physician-imposed restrictions. Moreover, he was not provided with all evidence which would assist a thorough analysis. However, Claimant provides no useful basis for evaluation of permanent disability beyond her inexpert analysis of potential lost wage increases.

22. Claimant suffered permanent disability rated at 20% of the whole person, inclusive of PPI of 13% of the whole person which is likely to result following Claimant's future wrist fusion surgery.

23. As the Commission previously retained jurisdiction and Dr. Watkins speculated Claimant's future wrist fusion surgery may require time loss which may entitle her to TTDs

for as much as two weeks, the proposed Order should not be deemed a final order. However, for Claimant to obtain additional PPI or permanent disability following the future wrist fusion surgery, she should be prepared to show conditions not anticipated by the record established to date.

CONCLUSIONS OF LAW

1. Claimant's permanent disability should be rated at 20% of the whole person, inclusive of PPI of 13% of the whole person which is likely to result following Claimant's future wrist fusion surgery;

2. The proposed Order should not be considered final, nor to supersede the Commission's Order dated December 8, 2004, retaining jurisdiction.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusion of Law as its own and issue an appropriate final order.

DATED this 31ST day of January, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15TH day of FEBRUARY, 2006, 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:

Richard S. Owen
P.O. Box 278
Nampa, ID 83653

Todd J. Wilcox
P.O. Box 947
McCall, ID 83638

db

/S/ _____

2. The proposed Order is not considered final, nor to supersede the Commission's Order dated December 8, 2004, retaining jurisdiction.

DATED this 15TH day of FEBRUARY, 2006.

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 15TH day of FEBRUARY, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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