

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROBIN ELLIS,	)	
	)	
Claimant,	)	<b>IC 02-015712</b>
	)	
v.	)	
	)	
HECLA MINING COMPANY,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND RECOMMENDATION</b>
Self-Insured Employer,	)	
	)	Filed: June 16, 2006
Defendant.	)	
_____	)	

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on March 1, 2006. Keith E. Hutchinson of Twin Falls represented Claimant. Charles L. A. Cox of Kellogg represented Defendant. The parties submitted oral and documentary evidence. There were no post-hearing depositions; the parties submitted post-hearing briefs. The matter came under advisement on April 21, 2006 and is now ready for decision.

**ISSUES**

By agreement of the parties at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to the following benefits:
  - A. Medical care; and
  - B. Disability in excess of impairment.

**CONTENTIONS OF THE PARTIES**

Claimant contends that as a result of her industrial injury and resultant work restrictions

she has lost access to more than 50% of her local labor market, and sustained a reduction of earning capacity of between 52% and 68%; these factors justify a permanent disability rating of 60%, inclusive of her 3% permanent partial impairment.

Defendant asserts that Claimant is employable in her labor market at a wage comparable to her time of injury wage and has failed to establish her entitlement to any permanent disability rating in excess of her 3% permanent partial impairment.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, Douglas Crum, David Berberick, and Valerie Fitte taken at hearing;
2. Claimant's Exhibits A through L; and
3. Defendant's Exhibits A through C.

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

### **FINDINGS OF FACT**

The following facts are undisputed:

1. At the time of hearing, Claimant was 42 years of age, and resided in Clayton, Idaho, with her disabled husband and one of her two children.
2. Claimant had an industrial accident on September 18, 2002, sustaining an injury to her right elbow that eventually required surgery.
3. Prior to her industrial injury, Claimant had no impairments or restrictions on her ability to work.
4. Claimant was declared medically stable in August 2004 and was given a 3%

permanent partial impairment rating as a result of her industrial injury.

5. Permanent restrictions were imposed as a result of Claimant's injury. She is prohibited from lifting in excess of 25 pounds with the right arm, may lift up to 15 pounds occasionally and may lift up to 10 pounds frequently. She is also prohibited from repetitive flexion and extension of the right upper extremity and from resting the right upper extremity on hard surfaces.

6. At the time of her injury, Claimant was earning approximately \$16.91 per hour plus a substantial benefit package including paid medical, dental and optical insurance for herself and her dependents as well as a retirement program. The value of the medical benefits alone was conservatively estimated to be \$5.00 per hour.

7. Claimant has a high school diploma and no further formal education.

8. Claimant lives in an extremely small and limited labor market. Clayton has a population of fewer than 20. Challis, approximately 31 miles from Clayton, has a population of only 1,500.

### ***ADDITIONAL FINDINGS***

9. Claimant's previous work history consists primarily of medium to medium-heavy unskilled or semi-skilled work. She has worked in a convenience store, as a bartender, a warehouseperson, a records clerk, a mine truck driver, and as a wastewater treatment technician at a mine. She has limited computer skills and has no keyboarding proficiency. She has performed some manual recordkeeping and has supervised convenience store workers.

10. Claimant first went to work for Employer in 1993. She was a dependable and valued employee. In 1997, the mine shut down and Claimant was laid off. She was rehired as a permanent employee during reclamation of the mine site. Following her injury in 2002,

Employer implemented a reduction in force and Claimant was again laid off. She was offered a seasonal position in 2004, which she took. In April 2005, Employer notified Claimant that she would not be offered a seasonal position for the summer of 2005. At hearing, Mr. Berberick stated that Claimant's physical restrictions were a factor in the decision not to extend an offer of seasonal employment.

11. Following her final layoff from Employer, Claimant submitted employment applications to Thompson Creek Mine (two applications), U.S. Postal Service, Jensen Oil (two applications), Lamb's Grocery (2 applications), Wells Fargo Bank, Village Square Store, East Idaho Credit Union, and Kimball Oil Company. In addition, she made inquiries at Round Valley Supply, a bookkeeping business, at the county courthouse, and a Challis area health center. None were taking applications.

12. Douglas Crum, a vocational expert retained by Claimant, prepared a report and testified at hearing. Mr. Crum has twenty years of experience as a vocational counselor. He is knowledgeable about the labor market in the Clayton/Challis area, having recently prepared some detailed labor market reports in an unrelated matter. Mr. Crum testified that in the two months preceding the hearing, Job Service had no listings for jobs in the area for which Claimant was qualified and which were within her restrictions.

13. Mr. Crum's vocational report concluded that Claimant had lost access to more than 50% of the labor market in the Challis/Clayton area as a result of her restrictions. He based this opinion on a review of occupational titles available to Claimant pre-injury and the number remaining available to her post-injury. Mr. Crum also opined that Claimant suffered a loss of wage-earning capacity of 52% to 68%. He based this opinion on his survey of the prevailing wage in the area for jobs within Claimant's restrictions, which he opined were in the \$7.00 to

\$8.00 per hour range.

14. Valerie Fitte, a rehabilitation consultant with the Industrial Commission Rehabilitation Division in Idaho Falls, prepared a labor market survey at the request of Defendant. Ms. Fitte has limited experience as a vocational rehabilitation consultant and little personal familiarity with the Clayton/Challis labor market. Ms. Fitte interviewed Claimant for purposes of preparing the report, but provided no vocational services to Claimant. Ms. Fitte did not dispute Mr. Crum's opinion that Claimant had lost access to a substantial portion of the labor market as a result of her physical restrictions. Neither did she dispute Mr. Crum's opinion regarding the prevailing wage in the Clayton/Challis labor market. In the addendum to her labor market survey, Ms. Fitte identified three occupational titles in the area that paid significantly in excess of the prevailing wage. Ms. Fitte contacted the employers by telephone and inquired as to the minimum qualifications. Based on those conversations, she believed Claimant was qualified for these positions based on her transferable skills and her high school diploma. Included in Ms. Fitte's survey were an office manager position (\$7.00-\$11.00), and an accounts payable clerk at Thompson Creek Mine (\$12.95). With some additional on-the-job training, Ms. Fitte identified two additional positions, including a payroll clerk at Thompson Creek Mine (\$17.30), and another office manager position (\$6.00-\$11.00).

#### **DISCUSSION AND FURTHER FINDINGS**

15. The definition of "disability" under the Idaho workers' compensation law is:

. . . 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 in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). A 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. A 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 permanent impairment and by pertinent nonmedical factors. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

16. In order to establish that she has sustained disability in excess of her impairment, Claimant must prove, by a preponderance of the evidence, that she has sustained a loss of earning capacity or a reduced ability to engage in gainful activity. *Ball v. Daw Forest Products Company*, 136 Idaho 155, 30 P.3d 933 (2001). "[T]he Workmen's [sic] Compensation law does not require any particular method of proof." *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 461, 649 P.2d 1217 (1982).

17. The Referee finds that Claimant has met her burden of proving that she has sustained permanent partial disability of 60% inclusive of her permanent partial impairment. This finding is based primarily on the report and testimony of Mr. Crum, which was substantially undisputed by Defendant's expert witness. The dispute between the two vocational experts, reduced to its essence, was whether there were actual jobs available to Claimant that would have approximated her time of injury wages.

Ms. Fitte identified three occupational titles in the labor market that could be available to

Claimant. While Claimant is obviously intelligent and capable, the Referee finds it doubtful that her limited and remote experience constitutes more than the bare minimum qualifications for the positions identified by Ms. Fitte. As noted by Mr. Crum, the unemployment rate in the Challis area is 29% higher than in the state as a whole. The relatively few well-paying positions rarely come open, and Claimant is not a competitive applicant with her minimal and remote experience. Even more fundamental to this analysis, it is undisputed that none of the positions identified by Ms. Fitte had recently been vacant, were not vacant at the time of hearing, and were unlikely to become vacant at any time in the near future.

18. While the issue of additional medical care was identified as an issue at hearing, neither party addressed this issue in briefing. The medical records suggest that Claimant may require some continuing medical care by way of prescription anti-inflammatories or analgesics. Idaho Code § 72-432 requires that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1).

Claimant is statutorily entitled to reasonable medical care that her treating physician may require as a result of her industrial injury.

### **CONCLUSIONS OF LAW**

1. Claimant is entitled to permanent partial disability rating of 60% inclusive of her permanent partial impairment.

2. Claimant is entitled to reasonable medical care as provided by Idaho Code § 72-432.

**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 1st day of June, 2006.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Rinda Just, Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of June, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

KEITH E HUTCHINSON  
PO BOX 207  
TWIN FALLS ID 83303-0207

CHARLES L A COX  
PO BOX 659  
KELLOGG ID 83837

djb

/s/ \_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROBIN ELLIS,	)	
	)	
Claimant,	)	<b>IC 02-015712</b>
	)	
v.	)	
	)	<b>ORDER</b>
HECLA MINING COMPANY,	)	
	)	Filed: June 16, 2006
Self-Insured Employer,	)	
	)	
Defendant.	)	
_____	)	

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 is entitled to permanent partial disability rating of 60% inclusive of her permanent partial impairment.
2. Claimant is entitled to reasonable medical care as provided by Idaho Code § 72-432.
3. Pursuant to Idaho Code § 72-734, all compensation due and payable pursuant to this decision shall accrue interest from the date of the Commission's Order at the statutory rate of 8.375% as set by the State Treasurer effective July 1, 2005.

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

DATED this 16th day of June, 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 the 16<sup>th</sup> day of June, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

KEITH E HUTCHINSON  
PO BOX 207  
TWIN FALLS ID 83303-0207

CHARLES L A COX  
PO BOX 659  
KELLOGG ID 83837

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/s/ \_\_\_\_\_