

ARGUMENTS OF THE PARTIES

Claimant asserts her industrial accident of October 27, 2001, which resulted in a 5% permanent impairment, has resulted in a permanent disability of at least 20%, inclusive of impairment. Defendants assert that Claimant is not entitled to any award of permanent disability beyond impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Claimant's Exhibits 1 through 17 admitted at hearing;
3. Defendants Employer and Surety's Exhibits A through R admitted at hearing;
4. Deposition of Claimant taken October 6, 2004; and
5. Deposition of Bryan Huntsman, R.P.T., taken May 11, 2006.

After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusion of law.

FINDINGS OF FACT

1. Claimant was 34 years old and resided in Blackfoot at the time of the hearing. She is married and has two minor children. Claimant was born in Hidalgo, Mexico where she attended school through the eighth or ninth grade. She speaks, reads, and writes Spanish fluently. At the age of 16 Claimant came to the United States in the Dallas area. After approximately one year she moved to eastern Idaho where she attended Snake River High School in Moreland. She moved to Blackfoot and graduated from Blackfoot High School in 1991.

2. During high school Claimant worked at Molinas Mexican Restaurant for a year as a cook. After graduating from high school she worked for three different potato processors until

approximately 1998, sorting and packaging potatoes. She earned up to \$7.75 per hour.

3. In January 1996, while working for Wada Farms Potatoes, Inc., Claimant had an industrial accident in which she hurt both of her shoulders. She was diagnosed with bilateral rotator cuff tendonitis with impingement, and treated with prescription anti-inflammatory medication and injections. She missed work only for doctor's appointments. Claimant still has residual problems with her shoulders in that she cannot hold her arms above her head for a long period.

4. In April 1996, while still working at Wada Farms, Claimant had a hand injury. She has no residual problems from her hand injury.

5. Claimant attended adult education for three months and obtained her certificate as a certified nurse's assistant (CNA).

6. Claimant started working part-time at the Willows Assisted Living Center for several months while working for Wada Farms. Upon ceasing employment with Wada Farms, she began working full-time as a CNA at the Willows where she helped elderly residents with daily care activities. She worked at the Willows about one year until 1999 or 2000. Claimant was earning \$6.75 per hour when she left.

7. Claimant next worked as a CNA for Bannock Hospital in the extended care area, where she lifted and cared for patients. She worked there one year and sustained a twisting wrist injury for which she received medical treatment. She had no wrist complaints at the time of the hearing. Claimant left Bannock Hospital because of the difficult winter commute from Blackfoot.

8. In May 2001, Claimant commenced working full-time as a CNA at Bingham Memorial Hospital in the extended care area.

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 3

9. On October 27, 2001, Claimant was making \$7.90 per hour when she suffered an industrial accident while lifting a patient out of bed. Claimant's back "popped" and within a few days became increasingly painful. She was directed to the emergency room where she was diagnosed with a lower back sprain and treated with prescription anti-inflammatory medications. Physical therapy was later prescribed which she performed but which did not significantly help her condition. Thereafter Claimant was referred to Richard Hill, M.D., in Blackfoot, who treated her with prescription pain relievers, muscle relaxers, and therapy.

10. On December 3, 2001, Claimant underwent a lumbar MRI which revealed a congenitally narrow spinal canal with a small disc protrusion to the right at L4-5, and a very small disc protrusion to the left at L5-S1.

11. Dr. Hill referred Claimant to Gary Walker, M.D., who she had seen previously for her shoulder injury. Dr. Walker commenced treating Claimant in January 2002. He characterized Claimant's disc injuries as small disc herniations, and recommended additional physical therapy and steroid injections which improved Claimant's condition temporarily.

12. On May 13, 2002, Claimant presented to David Hume, M.D., with continuing low back complaints. He advised her surgery would not help, and prescribed medications and more physical therapy. Claimant underwent a work hardening program.

13. In approximately June 2002, Claimant was laid off by Bingham Memorial Hospital because they did not have light duty work suitable for her.

14. In July 2002, Claimant commenced working full-time for the Migrant Council teaching in a head start program. She earned \$10.00 per hour. Her job lasted only two or three months after which she was laid off because the program was seasonal.

15. On July 25, 2002, Bryan Huntsman, R.P.T., performed a functional capacity

evaluation and concluded that Claimant could perform light-medium work, including lifting up to 35 pounds occasionally, up to 15 pounds frequently, and up to seven pounds continually.

16. In October 2002, Dr. Hume rated Claimant's permanent impairment at 5% of the whole person. Defendants have fully paid benefits according to this rating. Dr. Hume imposed permanent restrictions on Claimant of no lifting constantly, lifting only medium weight of 35 pounds occasionally, and avoiding bending and stooping.

17. In January 2003, Claimant returned to work for the Willows. She assisted residents as she had done before. She worked approximately one year and was making \$7.75 per hour when she left.

18. In April 2004, Claimant began working for Mountain River Birthing and Surgical Center where she assisted with phone calls, admissions, and general patient care.

19. In June 2004, Dr. Hill examined Claimant and recommended further epidural injections. He did not recommend surgery.

20. On January 22, 2005, Claimant underwent another lumbar MRI which revealed a small disc extrusion to the right at L4-5, and a transitional vertebra at L5.

21. In April 2005, Bingham Memorial Hospital bought Mountain River and became Claimant's employer.

22. On December 15, 2005, Bryan Huntsman performed another functional capacity evaluation of Claimant. He found Claimant was somewhat deconditioned. As a result of the functional capacity evaluation, Huntsman again concluded that Claimant could perform light to medium work, with lifting up to 35 pounds occasionally, up to 15 pounds frequently, and up to seven pounds continually. He also noted that Claimant needed to change her static posture every 15 to 20 minutes.

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 5

23. At the time of the hearing, Claimant continued to work at Mountain River, where she assists with phone calls, admissions, and patient care. No patient lifting is required. Her heaviest lifting duties include stocking supplies and helping deliver babies. Claimant makes \$9.10 per hour and plans to continue working there. She also plans to return to school for one year to obtain her licensed practical nurse (LPN) certificate at Eastern Idaho Technical College where she has been accepted into the program. She understands that as an LPN, she could obtain employment requiring less lifting and more supervisory duties.

24. Claimant presently experiences pain running down to her right leg and pain in the middle of her back at the belt line. She also has intermittent mild pain in her left leg. She has declined further steroid injections. Claimant's activities of daily living have been negatively impacted by the residual effects of her work accident. She finds vacuuming and gardening difficult. She can no longer run or play volleyball. Claimant walks for exercise.

25. Having closely reviewed the record and observed Claimant at hearing, the Referee finds that Claimant speaks English fluently and is a credible witness.

DISCUSSION AND FURTHER FINDINGS

26. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). 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. **Permanent Disability.** "Permanent disability" or "under 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. "Evaluation (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 provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

28. The degree of permanent disability suffered by a claimant is a factual question committed to the particular expertise of the Commission. McClurg v. Yanke Machine Shop, Inc., 123 Idaho 174, 176, 845 P.2d 1207, 1209 (1993). Wage loss may be a factor. Baldner v. Bennett's Inc., 103 Idaho 458, 649 P.2d 1214 (1982). The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

29. In the present case, Claimant was working as a CNA and earning \$7.90 per hour at the time of her industrial accident. At the time of hearing she was earning \$9.10 per hour.

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 7

Thus, by any reasoned comparison, Claimant is earning substantially more now than at the time of her industrial injury.

30. Dr. Hume imposed restrictions on Claimant of no lifting constantly, lifting only medium weight of 35 pounds occasionally, and avoiding bending and stooping. The functional capacity evaluation performed by Bryan Huntsman essentially confirmed these limitations and also documents Claimant's need for static posture changes every 15 to 20 minutes.

31. Claimant cannot return to potato sorting because it requires too much standing. The restrictions arising from Claimant's industrial injury also preclude her from many CNA positions. After her work injury she was terminated from her employment as a CNA at Bingham Memorial Hospital because she could no longer lift or transfer patients. Her employment at the Willows required less patient lifting, however even occasional patient lifting would exceed her 35-pound lifting restriction and risk further injury. Claimant worked for nearly a year at the Willows earning less than her time of injury wage ostensibly because she could find no better employment given her limitations. While Claimant eventually found employment as a CNA at Mountain River, which does not actually require heavy lifting, it is significant that even the present job description provided by Claimant's Employer indicates that her current duties may include "occasionally lift and/or move more than 100 pounds." Defendants' Exhibit B, p. 9.

32. Claimant is wisely planning to further her medical education by obtaining LPN training to develop more advanced nursing skills. Her present Employer appears supportive of her plans. However, if Claimant were to lose her present position, it would be difficult for her to find a CNA or other permanent position within her restrictions to restore her time of injury wage.

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33. Based on Claimant's impairment rating of 5% of the whole person and her various medical and non-medical factors, Claimant's ability to engage in gainful activity has been reduced. Claimant has established a permanent disability of 15%, inclusive of her permanent impairment.

CONCLUSION OF LAW

Claimant has proven she suffers permanent disability due to her industrial injury of 15%, inclusive of her permanent impairment.

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 28th day of September, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2006, a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

MONTE R WHITTIER
PO BOX 6358
BOISE ID 83707-6358

db

/s/ _____

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to the issue adjudicated.

DATED this __20th__ day of _____ October _____, 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 __20th__ day of __October_____, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
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/s/