

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANICE L. LOPEZ, f/k/a JANICE L. BABCOCK,)

Claimant,)

v.)

STATE OF IDAHO, INDUSTRIAL)

SPECIAL INDEMNITY FUND,)

Defendant.)

IC 97-038791

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

FILED DEC 21 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Idaho Falls, on June 6, 2006. Robert K. Beck represented Claimant. Paul B. Rippel represented State of Idaho, Industrial Special Indemnity Fund (“ISIF”). The parties presented oral and documentary evidence. They took one post-hearing deposition and submitted briefs. After an extended briefing schedule, the case came under advisement on December 7, 2006. It is now ready for decision.

ISSUES

The Notice of Hearing identified several issues which were reduced to the following:

1. Whether Claimant is totally and permanently disabled according to Idaho Workers’ Compensation Law, including consideration of the odd-lot doctrine; and
2. Whether and to what extent ISIF is liable for any benefits to Claimant pursuant to Idaho Code § 72-332.

CONTENTIONS OF THE PARTIES

Claimant contends she injured her head in a work-related motor vehicle accident. As a result of this accident and prior injuries, she is totally and permanently disabled. Claimant’s pre-existing physical impairments combine with her injuries from the subject accident and

require ISIF liability under Idaho Code § 72-332. Any post-accident employment has been obtained because of a sympathetic employer or has resulted in failure.

ISIF contends Claimant's medical records and post-accident work history show that she was not totally and permanently disabled by any standard of analysis.

EVIDENCE CONSIDERED

The record in the instant case consists of:

1. Oral testimony at hearing of Claimant, her husband, and Industrial Commission Rehabilitation Division ("ICRD") consultant Kari Rohrbach;
2. Claimant's Exhibits 1 – 27;
3. ISIF's Exhibits 1 – 7; and
4. The post-hearing deposition of physiatrist Robert H. Friedman, M.D.

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

1. Claimant has a prior medical history which includes carpal tunnel surgeries in 1992, an ulnar nerve surgery, degenerative disease in her neck – especially at C6-7 with a disc herniation diagnosed in 1996, and a diagnosis of fibromyalgia in 1996. She has a 10th grade education and was 48 years old at the time of accident.

2. Claimant worked as an aide, assisting and teaching handicapped adults about daily living skills. On November 11, 1997, while transporting a client, her vehicle struck a truck that ran a stop sign. The impact was significant. Claimant was not wearing her seatbelt. She struck her head.

3. Claimant was taken to Madison Memorial Hospital emergency room ("ER") where she was diagnosed with a forehead contusion and two large lacerations. A triage nurse

was unable to assess whether Claimant suffered a loss of consciousness. The doctor's report ambiguously states, "[S]he does not remember what happened except that a car appeared in front of her. . . . She is alert and oriented, remembers what happened in the accident and where she is." A CT scan of her head did not reveal any brain or skull injury. X-rays of her cervical spine were negative. She was sent to Idaho Falls to allow a plastic surgeon to suture the forehead laceration.

4. William Wilson, M.D., cleaned and sutured the lacerations. These cuts penetrated the skin and continued into the muscle, but not through it to the skull. Repeat X-rays showed chronic degenerative changes in her cervical spine. Claimant developed a cough. She remained hospitalized for three days for evaluation. Dr. Wilson's discharge diagnoses included: posttraumatic bronchitis, forehead lacerations, scalp avulsion, concussion, contusions of bilateral knees, and whiplash injury of her neck without bony injury.

5. In a follow-up visit on November 20, 1997, Claimant complained of vision changes which Dr. Wilson attributed to edema. The edema was subsiding and all other injuries appeared to be healing "nicely." Claimant also complained of multiple pains throughout her body. On an April 30, 1998 follow-up, Dr. Wilson was well pleased with the appearance of the scar. He suggested she did not need further treatment and suggested she revisit him about December 1998, near the one-year anniversary of the accident. At hearing, the Referee observed that Claimant had a mild scar on her forehead extending into her upper eyelid. The second scar was hidden by her hair. This very mild disfigurement does not impact Claimant's ability to get any job for which she is otherwise qualified.

6. Claimant's stitches were removed on November 21, 1997, and she began physical therapy on December 1, 1997.

7. On December 7, 1997, C.J. Zollinger, M.D., examined Claimant when she returned to the ER complaining of a pulsating headache. He characterized her injury as a

“significant head laceration and not a significant closed head injury.” On December 26, 1997, Dr. Zollinger released Claimant to return to work without restrictions.

8. On December 10, 1997, ICRD consultant Kari Rohrbach became involved in Claimant’s recovery. After interviewing Claimant’s employer, Ms. Rohrbach anticipated Claimant would return to her regular work. A job site evaluation (“JSE”) indicated the job could be modified to a doctor’s restrictions and to avoid travel if necessary. ICRD closed its file on June 3, 1998, upon Claimant’s refusal to return to work offered by her employer which was within the restrictions specified by her doctors.

9. In February 1998, Dr. Zollinger referred Claimant to the Elks LifeFit program because of her knee. This despite the absence of any objective findings by Dr. Zollinger. Claimant attended the four-week program in March 1998.

10. On May 4, 1998, Dr. Weiss released Claimant to work. He suggested a temporary restriction of four hours per day for the first week, six hours the next, then full-time without restriction. He found her medically stable.

11. On May 14, 1998, Dr. Friedman released Claimant to return to work with temporary restrictions. In deposition, Dr. Friedman opined these were precautionary to allow her to ease back into the work force. He opined she had no permanent restrictions and had suffered a 2% permanent impairment as a result of her brain injury, largely because her memory problems exceeded those normally expected as a result of fibromyalgia. He opined she had no permanent impairment from any neck injury or fibromyalgia.

12. Claimant’s employer scheduled her to return to work on May 23, 1998.

13. Claimant obtained an attorney who suggested additional job accommodations. Claimant’s employer was willing to make some of these personal accommodations in the interest of returning her to work. He sought out David T. Roberts, M.D., who examined Claimant

on May 21, 1998, and recommended she not return to work for at least four weeks.

14. Claimant returned to work in July 1998. She began complaining of increased memory problems and fatigue.

15. Records of Claimant's employer show she actually worked between 80 hours and 173 hours every month beginning January 2000 through December 2002, with the exception of the following months: October 2000, 10.5 hours; March 2001, 17 hours; July 2001, 24 hours; December 2001, 25.5 hours; and June 2002, 26 hours.

16. Cervical spine X-rays taken in 1996 showed significant degenerative disease, especially at C6-7 where a disc herniation was demonstrated. An August 18, 1998 MRI showed the C6-7 disc herniation was now pressing on the spinal cord. However, in September 1998, neurosurgeon Brent H. Greenwald, M.D., opined her symptoms were inconsistently mild compared to the radiologically demonstrated herniation. He opined surgery was not an option. In November 1998, he recorded that Claimant asserted her symptoms were the same as she felt from her fibromyalgia before the subject accident. In consideration of her disc herniation, he further recorded, "I warned her strongly against going to a chiropractor as they can cause a great amount of damage."

17. Claimant continued to visit a chiropractor for "myofascitis." She allowed him to manipulate her lumbar spine, but not her neck.

Discussion and Further Findings

18. **Permanent disability.** Permanent disability and its evaluation is defined by statute. Idaho Code §§ 72-423, -425, -430. The factors pertaining to disability are considered at the time of medical stability.

19. There are two methods by which a claimant can demonstrate she is totally and permanently disabled. First, a claimant may prove a total and permanent disability if her

medical impairment together with the pertinent nonmedical factors totals 100%. If the claimant has met this burden, then total and permanent disability has been established. If, however, the claimant has proven something less than 100% disability, she can still demonstrate total disability by fitting within the definition of an odd-lot worker. Boley v. ISIF, 130 Idaho 278, 939 P.2d 854 (1997).

20. That Claimant suffered physical injury which causes her pain and memory problems is not in dispute. She has been rated as having a permanent impairment. Further, Claimant suffers some permanent disability in excess of impairment. However, the record shows she believes she is more disabled than any objective measure can explain. In addition, aspects of the medical records are troubling in assessing Claimant's credibility. For example, she satisfactorily completed an MMPI-2 for Michael McClay, Ph.D., but told Craig Beaver, Ph.D., she could not read well enough to complete the MMPI-2 for his evaluation. Their examinations show inconsistent ability in other areas as well. Also, the Key Functional Assessment performed with the LifeFit program was deemed "conditionally valid" and noted that she failed to give maximum effort. Further, at hearing, Claimant's memory seemed inconsistent, often related to whether her attorney's question included the phrase "if you can remember." She testified at deposition that she could not remember the content of conversations "the next day." However, where it was helpful she could remember many specific conversations with her doctors from years ago. Her testimony about the most basic facts of her life history was inconsistent: born 12/12/48, at age 18 she quit school in the 10th grade to get married in 1962. Even if she quit school and married in the last two weeks of 1962, she would have only been 14 years old. Whether a function of memory loss due to brain injury or intentional manipulation, Claimant's testimony is not credible. Finally, Claimant actually worked after she achieved medical stability from the subject accident in 1998 through 2002.

Despite her seemingly genuine belief, she failed to show she was 100% disabled.

21. A claimant may satisfy her burden of proof and establish odd-lot disability by showing any one of the following three criteria: (1) she has attempted other types of employment without success; (2) she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available, or (3) any efforts to find suitable work would be futile. Id. After a protracted recovery, Claimant successfully worked for her previous employer. She did it well enough and long enough that all three criteria are affirmatively disproved.

22. Claimant asserted her employer was a sympathetic employer and thus her work was not of a type to exclude her from odd-lot status. Claimant's employer accommodated her protracted recovery. He modified the job to allow her to return to work. However, this job did not involve a sympathetic employer as that term is used to evaluate total and permanent disability or odd-lot status. There is no evidence that Claimant's post-accident employment was based upon anything other than her ability to actually perform productive work for her employer. Claimant was successful at working this job as long as she chose to be. Claimant failed to show she meets the requirements of any of the three criteria to establish she is an odd-lot worker.

23. Essentially, Claimant is trying to impose liability upon ISIF because her preexisting neck condition worsened for reasons unrelated to the subject accident and - five years after the accident - she required neck surgery. It is the sequelae of this surgery, in part, upon which she makes her claim for total and permanent disability. However, the medical record is clear that at the time of medical stability from the subject accident, Claimant was not remotely near to being totally and permanently disabled. The subsequent worsening of her preexisting condition cannot be retroactively applied any more than a claimant could wait 20 years and assert that her current age should be retroactively applied to

increase a permanent disability rating.

24. Claimant failed to show she was totally and permanently disabled at the time of hearing.

CONCLUSIONS OF LAW

1. Claimant failed to show she is totally and permanently disabled by any method of establishing it;

2. ISIF bears no liability as a result of the accident; and

3. All other issues are moot.

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 14TH day of December, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21ST day of DECEMBER, 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:

Robert K. Beck
2450 E. 25th Street, Ste. A
Idaho Falls, ID 83404

Paul B. Rippel
P.O. Box 51219
Idaho Falls, ID 83405-1219

db

/S/ _____

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

DATED this 21ST day of DECEMBER, 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 21ST day of DECEMBER, 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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