

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KATHY J. RAYMOND,)	
)	
Claimant,)	IC 1998-033326
)	
v.)	
)	
SNAKE RIVER SCHOOL DISTRICT)	
NO. 52,)	
)	FINDINGS OF FACT,
Employer,)	CONCLUSIONS OF LAW,
)	AND RECOMMENDATION
and)	
)	Filed December 21, 2006
STATE INSURANCE FUND,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Pocatello on April 20, 2006. Claimant was present and represented by James B. Green of Pocatello. Scott R. Hall of Idaho Falls represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of three post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on September 25, 2006.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether and to what extent Claimant is entitled to the following benefits:
 - (a) Medical;
 - (b) Total temporary disability (TTD);

- (c) Permanent partial impairment (PPI);
- (d) Permanent partial or permanent total disability (PPD/PTD);
- 2. Attorney fees for unreasonable denial of benefits; and,
- 3. Defendants' entitlement to an offset for monies paid in a third party claim pursuant to Idaho Code § 72-1023.

Claimant abandoned the issue of TTD benefits in her briefing.

CONTENTIONS OF THE PARTIES

Claimant contends she is entitled to reimbursement for a spinal cord stimulator (SCS) prescribed and installed by her treating pain specialist. She also contends that she is entitled to additional PPI and disability above impairment. Finally, Defendants are liable for attorney fees for their unreasonable denial of the SCS.

Defendants respond that according to their panel examination by a neurologist, hand specialist, and psychiatrist, Claimant is not a suitable candidate for the SCS and its installation inside Claimant's body is not reasonable and necessary medical treatment. Claimant has already required two surgeries in an attempt to get the SCS operating properly and, even when it does, it does not give Claimant significant pain relief. Further, the pain specialist who prescribed the SCS is not a credible or persuasive witness. Moreover, Claimant has not established her entitlement to any further PPI beyond what has been accepted and paid. Finally, while Claimant may be entitled to an award of PPD benefits for loss of access to her pre-injury labor market, she is not entitled to PPD anywhere near the extent advocated by her vocational expert.

Claimant counters by asserting that the SCS has greatly relieved Claimant's pain from her injured right wrist to the extent that she is no longer on narcotic pain medication and she

should be reimbursed for its cost as well as lifetime maintenance and upkeep. Further, because Surety “abandoned” Claimant with a low PPI rating, she should also be entitled to attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, her husband Ronald, her vocational expert Kathy Gammon, SCS representative Tim Orr, Claimant’s treating pain specialist Catherine L. Linderman, M.D., and for the defense, Snake River School District No. 52 representatives Edward Jackson, Karl Kroll, and Tracy Thompson.

2. Claimant’s Exhibits A-E admitted at the hearing.

3. Defendants’ Exhibits 1-15 admitted at the hearing.

4. The post-hearing depositions of William C. Jordan, M.A., C.R.C., Richard W. Wilson, M.D., and Eric F. Holt, M.D., all taken by Defendants on May 11, 2006.

Claimant’s objection at page 15 of Mr. Jordan’s deposition is overruled. Defendants’ objection to mentioning Dr. Harper’s records at page 43 of Mr. Jordan’s deposition is overruled because Dr. Harper’s records were contained within Dr. Linderman’s records and are properly part of the record.

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

1. Claimant was 52 years of age at the time of the hearing and resided in Blackfoot. At the time of her industrial accident and injury on September 11, 1998, she was employed as a school secretary, a position she held since 1989. On that date, the school principal asked her to locate an errant student and bring him back to class. She eventually located the student sitting on

a railing outside a heavy metal door. Claimant asked the student to come in and, “He came off the railing and threw his weight against the door, which caught my hand in the door.” Hearing Transcript, pp. 16-17. Claimant is right-hand dominant.

2. Claimant did not seek medical attention for her injured right hand and wrist until the first part of October 1998 as she thought she had merely bruised it. A detailed description of Claimant’s protracted medical treatment is not necessary. Suffice it to convey that she has had four surgical procedures to her right hand and wrist that included nerve ablations, a fusion, and right carpal tunnel release. She also developed an infection in her right arm that required treatment by a specialist. Surety accepted the claim and all medical bills have been paid with the exception of the SCS.

DISCUSSION AND FURTHER FINDINGS

Spinal cord stimulator:

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). 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). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No “magic” words are necessary where a physician plainly and unequivocally

conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979).

3. After her treating physicians exhausted their respective abilities to control Claimant's continued subjective complaints of right wrist/hand/arm pain, she came under the care of Catherine Linderman, M.D. Dr. Linderman practices in Idaho Falls and holds herself out as a pain specialist, although she is not board certified in that area or in anesthesiology, her original specialty. After treating Claimant with a series of stellate ganglion blocks and narcotic pain medications with no objectively verifiable beneficial results, Dr. Linderman began discussing a SCS with Claimant. After Surety denied authorization for the SCS, Claimant used her private health insurance to get the stimulator installed along with its battery pack. After two instances where the leads slipped, requiring two more surgeries, Claimant testified at hearing that the SCS had been properly installed and reprogrammed and as of February 2006 had cut her pain level to a 2/10 on the 0-10 pain scale.¹ However, as of the date of the hearing, Claimant was still complaining of pain and limited range of motion in her right wrist and hand and used that hand as only a "helper hand." Moreover, according to Dr. Linderman's hearing testimony, Claimant was still on the narcotic medication Methadone even with the SCS implanted and apparently working properly.

4. On January 12, 2004, and June 15, 2005, Claimant was evaluated at Surety's request by a panel consisting of Richard Wilson, M.D., a neurologist, Mark Clawson, M.D., an orthopedic hand surgeon, and Eric Holt, M.D., a psychiatrist. Dr. Holt testified in his deposition that he did not doubt Claimant's pain, but she exaggerated it. Even though Claimant testified

¹ Claimant objected to Defendants' counsel referring to a "generally accepted" pain scale copied onto page 5 of Defendants' brief. Because there was considerable testimony regarding Claimant's subjective complaints of pain and her reference to the 10-point pain scale and because this Referee's experience and understanding regarding the use of such a scale is consistent with the scale reproduced by Defendants, Claimant's objection is overruled.

that she was in constant pain, she did not exhibit it with pain indicators such as fidgeting, guarding, etc. Further, even though Claimant admitted to having been at times a 10/10² on the pain scale, she continued to use her right hand as more than a mere helper hand. Dr. Holt also observed that Claimant's husband appeared to be very enabling of Claimant in that he wanted her to have more surgery, even though not indicated, and he would ask her how she was doing and if she needed a break. The Referee noted similar behavior at the hearing. In sum, Dr. Holt opined that Claimant does not need any more narcotic medications, opiates, injections, or a SCS.

5. Dr. Wilson testified in his deposition that Claimant was using her SCS at the time of the panel's second evaluation on June 15, 2005, but was also still on narcotic pain medication. He questioned Claimant's use of her right hand as a helper hand in light of her claim of typing up to 40 words per minute. Claimant indicated that she was 70% improved with the SCS but there was no way to tell whether that improvement was from the SCS, the narcotic medication, or the over-magnification of what her pain level was. Dr. Wilson does not believe continued narcotic use or a SCS is appropriate for Claimant:

Q. (By Mr. Hall): Okay. And just generally explain why you make that statement.

A. Well, first of all, it did not appear to the panel that she was in a great deal of pain, number one. And secondly, the chronic use of narcotic medications is not appropriate for a person such as Ms. Raymond. Those are appropriate drugs to use acutely, maybe following surgery. But they are not an appropriate long-term treatment. And that the panel does not have a high regard for the use of spinal cord stimulators in situations such as hers.

And the subsequent history and problems have indicated that it has not worked consistently well for her and has required readjustment. And that the potential risk for long-term use of this device, as well as the narcotics, is not justified on the basis of the objective evidence that we have with respect to the condition of her right wrist.

Dr. Wilson Deposition, pp. 21-22.

² A 10 on the universal pain scale is "Unconscious. Pain makes you pass out." Defendants' Brief, p. 5.

6. Dr. Wilson further testified that if the SCS resolved Claimant's pain completely, then it could be said that the unit was helpful, otherwise not. Another issue is that whether the SCS has been beneficial to Claimant depends totally on her subjective reports in that regard. Even though the results have generally been medically "disappointing," Dr. Wilson has prescribed the SCS to his patients "on rare occasions only." *Id.*, p. 28. Dr. Wilson testified as follows regarding the type of patients who might appropriately be prescribed a SCS:

I think it may be appropriate for individuals with severe pain related to documented nerve damage. Usually spinal nerve damage, multi-spinal nerve damage from trauma in which it's clear from all diagnostic studies that there is major nerve injury. In an individual such as Ms. Raymond, where the pain is very localized, and the only neurologic deficit is minor and related to a comparatively inconsequential sensory nerve in the back of the hand; and that the patient is functioning on a day-to-day basis at their profession, it is my opinion that the use of a spinal cord stimulator is not justified by virtue of the probability that it is not, number one, necessary. And number two, that the risk of such a device, which is a foreign body injected in a position [*sic* – close?]to the central nervous system, putting the patient at unnecessary risk. And that the risk benefit assessment does not favor using the device.

Dr. Wilson Deposition, pp. 28-29.

7. Dr. Linderman's hearing testimony in support of the use of the SCS is not credible. She spent a good deal of time criticizing anyone who was not, as she was, totally convinced that the SCS was the "cure-all" of our time. She even went so far as to refer to Drs. Holt and Wilson as "medical whores" for questioning the efficacy of the SCS and who will say whatever insurance companies want them to. Of note is that on November 24, 2004, after Claimant's 7th stellate ganglion block and a self-reported 2/10 pain level and a 40% improvement, Dr. Linderman requested Surety authorization for either more injections or a SCS trial. Further, even though one of the reasons Dr. Linderman wanted the SCS was to wean Claimant from her narcotic pain medication, Methadone, as of the time of the hearing such had not been the case.

8. Dr. Linderman testified as follows regarding her recommendation for the SCS:

Q. (By Mr. Green): Now, what were the considerations that compelled you or induced you to recommend the spinal cord stimulator as the appropriate therapy?

A. Well, as we have seen, we started with very conservative therapy,³ starting out with Neurontin which is really the first drug you reach for when you see a pain problem that's caused, caused from a nerve type of pain. Opiates help that, but the real helpful agent for those are the nerve-stabilizing agents.

We started there. We worked up. With her not being able to tolerate the Neurontin, we tried Cymbalta, which is another nerve-stabilizing agent; and that didn't work well for her. So it was a trial-and-error type of, of pathway that we took. We tried different things; and if they worked, wonderful.⁴ But if they didn't work, then we had to look for something else.

So as we went up, we went from more conservative to more invasive, to the stellate ganglion blocks; and those are blocks that are done to help people with nerve type of pain. We got some benefit from that, but it wasn't a long-lasting benefit.

So the next option really is either to go in and cut the sympathetic nerve outflow into the arm or to place a spinal cord stimulator; and cutting nerves is a very severe and very unrefined procedure because very often people are left with crippling problems from those things. So you want to do as little harm as possible.

And a spinal cord stimulator is very reversible. Plus you can test the stimulator before you ever place it, and you never want to put a stimulator in anyone who hasn't already been tested to see if it is going to work, work for them.

Hearing Transcript, pp. 268-269.

9. Dr. Linderman revealed her misunderstanding of the 0-10 pain scale scoring system by testifying that people who are untreated for pain walk around with 10/10 all the time and she never hospitalizes such patients. She testified as follows regarding pain as a subjective phenomenon:

Q. (By Mr. Hall): A person that has pain at, let's say, five over ten might have very - - might have a very difficult time functioning in the workforce day after day being a consistent employee; isn't that true?

A. I can't answer that, Mr. - - what's your name again?

Q. Hall.

³ Even though Dr. Linderman testified that 99% of the people she sees are on opiates when she first sees them, she admitted that Claimant was not, yet the first thing Dr. Linderman did was place Claimant on the narcotic Neurontin.

⁴ A curious comment because nothing seemed to work, or, ostensibly, she would have gone no further.

A. - - Hall. I can't answer that because pain is such an object - - or subjective thing for the patient that's undergoing the pain. Five over ten for me may be completely different than five over ten for you.

So at some - - a pain score is a score - - is a way to [*sic* – for] patients [*sic* – to] relate to me their pain problems and how significant it is impacting their lives. And many people can sit there with ten over ten pain, and you'll never know that they're hurting. But when they tell you how it's affecting their lives, you realize it is causing them significant dysfunction in their home and their, their, their lives.

So it's a, it's a subjective opinion on their part where their pain is. It's up to me to help decrease that pain score when they come to see me. I can't make a decision or any judgment on what people should be doing if their pain was an eight over ten, a five over ten, or a three over ten. We all deal with it differently. You would deal with it differently. Mr. Raymond would deal with it differently.⁵

Hearing Transcript, pp. 288-289.

10. Claimant self-referred to William Wilson, M.D., an orthopedic hand surgeon. She first saw him on January 8, 2002. His records demonstrate the danger in relying on subjective pain complaints as is evident in the following passage dated February 27, 2003: “Plan: At this point, I have expressed to the patient that I am extremely perplexed by this increasing pain syndrome even though we have not had her back to work and have had only mild resumption of activities. The fact that is the most perplexing is the magnitude of the pain she exhibits. The clinical syndrome does not reflect the pain that I can appreciate on either her facial expression or in her voiced complaints.” Defendants’ Exhibit 7, p. 2046. Dr. Wilson was also perplexed that Claimant continued to complain of pain in her wrist in an area that had undergone two prior nerve de-innervations. Dr. Wilson then referred Claimant to Dr. Linderman.

11. While the panel did not believe Claimant was a suitable candidate for the SCS for reasons above-stated, Claimant argues that she has been cleared psychologically for the unit by Howard Harper, Ph.D., a psychologist to whom Dr. Linderman referred Claimant for an opinion in that regard. According to Dr. Harper’s records, he found no symptom magnification and

⁵ The Referee notes that Claimant has been all over the board regarding her pain scale levels without any discernable consistency.

found Claimant to be “. . . currently psychologically and emotionally healthy and well adjusted.” Claimant’s Exhibit E. The Referee places greater weight on the opinions of Dr. Holt than those of Dr. Harper. Dr. Holt is a psychiatrist with medical training. Dr. Harper is a psychologist with no medical training and a reasonable inference can be made that Dr. Linderman utilizes his services each time she prescribes a SCS.

12. An employer is required to provide reasonable and necessary medical care, not the “. . . absolute Cadillac of treatments for someone who has nerve pain associated with an extremity” as testified to by Dr. Linderman. Hearing Transcript, p. 267. The panel opined that the SCS was neither reasonable nor necessary. Dr. Linderman never indicated whether the SCS was required, necessary, or reasonable although she certainly advocated for its use during her testimony and in her medical records. Dr. Linderman saw no signs of malingering or symptom magnification during the entire time she treated Claimant and saw no contraindications in implanting the SCS. However, Dr. Linderman’s patient advocacy and bias towards the attributes of the SCS has seriously undermined her testimony. Further, Dr. Linderman did not refer to any protocols or other criteria developed to assist a physician in determining those patients that may benefit from a SCS and those that would not. The panel and Dr. William Wilson, on the other hand, were much more objective than Dr. Linderman in expressing their opinions and the Referee gives those opinions more weight. Of significance is that at the time of the hearing when the SCS was apparently working properly, Claimant still had pain (2/10) and was still on narcotic pain medication, hardly an endorsement for the “Cadillac” of pain management. While the Commission has in the past ordered a surety to pay for a SCS, *see, Sligar v. Sun Healthcare dba Sunbridge Rehabilitation Center*, 2006 IIC 0438 (6/30/06), this Referee is not so inclined based on the record presented herein.

13. The Referee finds that Claimant has failed to prove her entitlement to reimbursement for and upkeep and maintenance of a spinal cord stimulator is reasonable.

PPI:

“Permanent impairment” is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. 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).

14. On October 14, 1999, Stan R. Griffiths, M.D., Claimant’s then treating physician, assigned Claimant a 7% whole person PPI rating. After Claimant’s infection resolved, hand surgeon William Lenzi, M.D., assigned Claimant a 6% whole person PPI rating inclusive of Dr. Griffith’s rating. The first panel on January 12, 2004, concurred with Dr. Lenzi’s rating. The second panel on June 15, 2005, requested a functional capacity evaluation (FCE) before assigning a PPI rating. Dr. William Wilson agreed with the first panel’s report except for the PPI rating; he would assign 13% rather than 6%. Dr. William Wilson then subtracted out Dr. Griffith’s 7% leaving an additional 6%. The second panel, after receiving the results of the FCE assigned an 8% whole person rating with 0% for any psychological impairment. The

Referee finds that the 8% whole person PPI rating is reasonable as it more closely comports with the ratings of Drs. Griffith and Lenzi.

PPD:

“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 impairment and by pertinent non-medical 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 the 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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).

15. Claimant was raised and attended schools in Greybull, Wyoming, graduating from high school there in 1972. She then attended Ricks College in Rexburg for a year taking secretarial courses.

16. Claimant's work history began in the mid-1970's with a short stint as a ward clerk in an Idaho Falls hospital. She then left the work force to get married and raise a family. She then returned to the work force in 1988 to work as a part-time librarian for about a year. In August 1989, Claimant began working as a secretary to the principal at Snake River Junior High School. Claimant remained in that position until Dr. William Wilson recommended she should not return to work as a secretary. In August 2003, the school district offered Claimant employment as a Title I Aide at the 5th and 6th grade middle school; she accepted and was so employed at the time of the hearing and was earning \$10.46 an hour for 183 days a year. At the time of her injury, Claimant was working 8 hours a day for 203 days a year at \$8.70 an hour. At the time of her injury, Claimant was also working for the school district as a drill team advisor earning \$1,023 a year and as a scorekeeper earning between \$800 and \$1,200 a year.

17. Claimant retained Kathy Gammon, CRC, MPT, to assist her with vocational issues. Ms. Gammon obtained her master's degree in vocational rehabilitation counseling in 1998. She also received a master's degree in physical therapy in 1975 and practiced in that field until 1991 when an injury made it impossible for her to continue.

18. Ms. Gammon met with Claimant on December 15, 2005, for a four and one-half hour interview. Ms. Gammon performed a physical therapy evaluation and concluded

Claimant's right upper extremity limitations placed her in the sedentary work category. Claimant has undergone two FCE's. One, to which the panel agreed, placed Claimant in the medium work category. The other placed Claimant in the light-to-medium level. Defendants made objections at hearing to Ms. Gammon testifying as a physical therapy expert and as a vocational expert on the ground that she had been called as a vocational expert, not as a physical therapy expert. Those objections were sustained to the extent that the two areas of expertise could be separated. In any event, Ms. Gammon's criticisms regarding the methodology used by and the qualifications of the examiners in the two FCE's are given no weight by the Referee. Further, Ms. Gammon's conclusion that Claimant is an odd-lot worker in light of her full-time employment and the light-to-medium work level is given no weight, as is her criticism of Dr. Holt's MMPI test interpretations.

19. Defendants retained William Jordan, MA, CRC, CDMS, to assist them with vocational issues. Mr. Jordan is well known to the Commission and his credentials will not be repeated here. Mr. Jordan interviewed Claimant as well as a number of school district employees and supervisors. He also reviewed all of Claimant's medical records (his summary of the same totaled six pages in his report) and the two FCE's. He personally discussed various jobs with Dr. Richard Wilson to get his input regarding whether Claimant could reasonably perform them. He reviewed a number of job openings in Blackfoot only (Claimant's labor market includes Idaho Falls and Pocatello) in January 2006 that were within Claimant's restrictions and for which her transferable skills could be applied.

20. Mr. Jordan's report and deposition testimony were reasoned, thorough, and persuasive as compared to Ms. Gammon's and are, thus, entitled to more weight. He opined that

Claimant's wage loss was minimal but that she did lose some portion of her pre-injury labor market. He concluded that Claimant has suffered PPD of 15-20% inclusive of her PPI.

21. Claimant asserts that her present job with the school district is as an at-will employee and she has little job security. However, school district officials testified that due to her seniority, highly satisfactory job performance, and dependability, she will likely keep her job regardless of the vagaries involved in school funding and the Referee so finds. Besides, Claimant was an at-will employee at the time of her accident as well. Claimant also asserts that she has a significant loss of income because she is working less hours, albeit for more money per hour than she was before her injury. However, should Claimant choose to apply for the summer session and be hired, she would be within four hours of her pre-injury hourly work year. Claimant further asserts that she has suffered a wage loss stemming from her no longer working as a scorekeeper and drill team coach. However, school officials testified that the drill team coach is no longer a paid position and that she could again apply for the scorekeeper job that now pays \$10.00 an hour. Finally, Claimant acknowledged that Dr. William Wilson would release her back to her secretarial position if she could be provided with a left-handed keyboard and a telephone headset. Claimant testified that she would try it if such accommodations were made.

22. The Referee is not convinced Claimant is as disabled as she believes she is. There is no doubt that she had an injury that was difficult to treat and resolve. However, during the majority of that time she continued to work with minimal absences. Further, her co-workers who testified did not notice her to be in pain or needing undue assistance. Claimant has the transferable skills, social skills, work experience and ethic, education, and personality to be able to obtain employment in her labor market and within her rather minimal objective physical restrictions to only her right upper extremity to more than restore her time-of-injury wage should

she choose to explore them. However, Claimant testified that she loves her present job and plans on retiring from the school district. Based primarily on the reasoning of Mr. Jordan, the Referee finds that Claimant has incurred PPD of 20% of the whole person inclusive of her 8% whole person PPI.

Attorney fees:

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denied a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

23. Based on the record and the ultimate outcome in this matter, the Referee finds that Claimant has failed to prove her entitlement to attorney fees.

Offset:

Idaho Code § 72-1023 is a Crime Victims Compensation Act provision that allows for subrogation in the event of a recovery under that Act.

24. Here, there is no evidence or testimony that Claimant recovered any monies from the Crime Victims Compensation Program (CVCP). Defendants' Exhibit 2 is a standard Release of All Claims showing that Claimant settled with an insurance company for the errant boy's conduct in slamming Claimant's hand in the door. Generally, CVCP will not award benefits if there is a collateral source; i.e., workers' compensation. Therefore, the Referee is reluctant to award Defendants a subrogation interest under that section.

25. If, on the other hand, Claimant obtained a settlement with a third party under Idaho Code § 72-223, Defendants have a statutory right to subrogation under subsection 3 with or without an order of the Commission.

CONCLUSIONS OF LAW

1. Claimant is not entitled to future medical care including the reimbursement for and maintenance of a spinal cord stimulator.
2. Claimant is entitled to PPI of 8% of the whole person.
3. Claimant is entitled to PPD of 20% of the whole person **inclusive** of her PPI.
4. Claimant is not entitled to an award of attorney fees.
5. Defendants have a right to subrogation for any third party recovery pursuant to Idaho Code § 72-223 (3).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __11th__ day of __December__, 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, 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 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JAMES B GREEN
611 WILSON STE 3C
POCATELLO ID 83201

SCOTT HALL
PO BOX 51630
IDAHO FALLS ID 83405-1630

_____/s/_____

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KATHY J. RAYMOND,)	
)	
Claimant,)	IC 1998-033326
)	
v.)	
)	ORDER
SNAKE RIVER SCHOOL DISTRICT)	
NO. 52,)	
)	Filed December 21, 2006
Employer,)	
)	
and)	
)	
STATE INSURANCE FUND,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his 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 not entitled to future medical care including the reimbursement for and maintenance of a spinal cord stimulator.
2. Claimant is entitled to permanent partial impairment of 8% of the whole person.
3. Claimant is entitled to permanent partial disability of 20% of the whole person **inclusive** of her permanent partial impairment.

4. Claimant is not entitled to an award of attorney fees.

5. Defendants have a right to subrogation for any third party recovery pursuant to Idaho Code § 72-223 (3).

6. 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 the __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 persons:

JAMES B GREEN
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