

CONTENTIONS OF THE PARTIES

Claimant contends she is an odd-lot worker who qualifies for ISIF benefits. She suffered industrial accidents in 2002 and 2003 working for Community Support Center, Inc. (Employer). Injuries from these accidents combined with previous injuries and a preexisting condition to render her totally and permanently disabled. ISIF is liable for benefits under the apportionment required by the Carey formula.

ISIF contends Claimant is not totally and permanently disabled. Alternatively, if she is so disabled, other prerequisites to ISIF liability are not present. Claimant lacks credibility. Her testimony and presentations to doctors are replete with inconsistencies.

EVIDENCE CONSIDERED

The record in the instant case consists of:

1. Oral testimony at hearing of Claimant and vocational expert William Jordan;
2. Claimant's Exhibits 1 – 36 (except that the lower half of Bates #000024 of Exhibit 32 appears to be a record of an unknown patient, not Claimant);
3. Defendants' Exhibits 1 – 32; and
4. The depositions, with exhibits, of vocational expert Nancy J. Collins, Ph.D., psychiatrist Nancy E. Greenwald, M.D., nurse practitioner Janet King, N.P., and ICRD consultant Irene Sanchez.

Posthearing, Claimant moved for the admission of an additional exhibit. Claimant's motion is deemed moot after the deposition of Ms. King, as the requested exhibit is admitted as part of that deposition. All objections raised in the depositions are overruled. 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, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

FINDINGS OF FACT

Introduction and Accidents

1. Claimant began working for Employer in July 1997. She assisted clients at a day treatment center for adults with mental illnesses. She talked to clients, cooked and served lunches, helped clients shop and drove them to appointments.

2. On January 4, 2002, Claimant slipped descending a flight of stairs. She injured her right ankle and left pinky. She wore an air cast and attended physical therapy. She missed no work from this accident.

3. On September 2, 2003, Claimant tripped over a curb and fell. She injured her right ankle and other parts of her body. The ankle required surgery. She continues to suffer residual symptoms.

4. At the date of hearing, Claimant continued to work for Employer – one hour or so every weekday evening – at a lighter job and at another location.

Medical Care

5. Gilbert Crane, M.D., had treated Claimant before. He diagnosed the January 2002 accident as an ankle sprain. After treatment, he found no permanent impairment.

6. Claimant sought medical treatment immediately after the September 2003 accident. The immediate care doctor diagnosed contusions and abrasions to her left elbow, right hand, below left knee, and right foot. All initial reports describe the injury to the dorsum of her right foot. However, within a few days, the ankle complaints arose.

7. Dr. Crane first saw Claimant for the September 2003 accident on December 9, 2003. She complained about her left index finger and right ankle. On February 11, 2004, Dr. Crane checked a box stating she was “fully functional.” At her next visit, he hypothesized

her complaints and examination findings were related to a build up of scar tissue around the ankle ligaments. Dr. Crane performed surgery on Claimant's right ankle on April 19, 2004, to resolve lateral entrapment syndrome and chronic instability. On July 3, 2004, he performed surgery to irrigate and debride the ankle and to remove hardware.

8. Orthopedist Ronald Kristensen, M.D., treated Claimant. In August 2004, he found some objective signs of injury, which did not account for Claimant's hypersensitivity and complaints. An MRI showed edema and mild tenosynovitis. Dr. Kristensen's assessment was reflex sympathetic dystrophy (RSD) or complex regional pain syndrome (CRPS). He released her to light or sedentary work and referred her to Nancy Greenwald, M.D. At Dr. Kristensen's final examination on January 20, 2005, he opined Claimant was stable and did not need orthopedic intervention. He suggested a pain clinic or a rheumatologist might help.

9. Claimant also underwent substantial physical therapy which emphasized desensitization of her ankle. X-rays suggested the presence of osteoporosis but not osteomyelitis.

10. Physiatrist Nancy Greenwald, M.D., treated Claimant. She first examined Claimant on September 24, 2004. Edema was present in the right ankle and foot. She considered a diagnosis of CRPS but found insufficient indicators. In November 2004, she diagnosed diabetes and considered the possibility of the presence of an autoimmune disorder. She recommended Claimant undergo the LifeFit program. When Claimant declined the program, Dr. Greenwald opined Claimant was medically stable as of December 30, 2004. On January 20, 2005, Dr. Greenwald recommended permanent restrictions "[d]ue to the ankle sprain and surgery." She recommended permanent restrictions, including a requirement of

ad lib position changes and avoidance of prolonged walking, “[d]ue to her pain syndrome.” No specific lifting or stair climbing restrictions were mentioned. She rated Claimant’s PPI at 7% of the whole person. No restrictions were discussed for Claimant’s preexisting or non-industrial conditions.

11. On September 20, 2006, Ms. King opined Claimant was unable to work a full day at any occupation. She opined that Claimant’s inability to work was related to the September 2003 ankle injury because “[n]one of the [prior] incidents that we have reviewed today had kept her from working.” She could not opine whether Claimant would be able to work consistently if the ankle injury had not occurred.

Non-medical Factors and Prior Injuries

12. Claimant was born September 20, 1955. She attended school through ninth grade and has not received a GED.

13. She has worked as a motel maid, café dishwasher, cook and waitress, school lunch lady, and babysitter. Claimant’s time of injury wage was \$8.25 per hour, full time.

14. Claimant was injured in an automobile accident in 1989. She injured her low back. E. J. Cutler, M.D., and nurse practitioner Janet King treated her. Claimant’s primary physician, Ms. King, began treating her in 1988. She has examined Claimant on a number of occasions for a variety of illnesses and injuries. After the 1989 accident, they found small disc bulges and stenosis. Claimant’s low back pain persisted.

15. Claimant was injured in a work accident for a prior employer in December 1992. She injured her right leg and hip. Orthopedist Joseph Petersen, M.D., treated her. He diagnosed a contusion. The hip improved very slowly. His records do not show any treatment between February 18, 1993, and March 7, 1994, when she returned for treatment of her right hip.

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

16. On March 8, 1993, Claimant was evaluated by Richard Knoebel, M.D. He noted some histrionic behavior inconsistent with objective findings. He diagnosed a resolved low back strain and trochanteric bursitis. He opined she was not yet stable but stated he anticipated no permanent impairment. On November 15, 1993, he rated her PPI at 5% of the lower extremity and opined she could return to work without restrictions. (Other documents refer to this PPI rating as 5% of the whole person.)

17. Dr. Cutler treated her from March 16, 1993 through March 4, 1994. After Dr. Petersen resumed treating her on March 7, 1994, an MRI showed a small disc bulge but an EMG showed normal nerve function. A bone scan in May suggested a possible small fracture of the hip, but X-rays could not find it. Claimant testified her hip never became permanently asymptomatic.

18. Claimant suffered complications after she donated a kidney in June 1994. Surgery was performed at LDS Hospital in Salt Lake City. A 10-pound lifting restriction was given. The record does not say whether this restriction is temporary, and there is no indication that it was ever removed. A nerve was excised and scar tissue and internal stitches were removed in a subsequent surgery in December 1995.

19. Claimant suffered lower left rib pain after an automobile accident in August 1994.

20. Her hip complaints continued. By December 27, 1994, Dr. Petersen rated her PPI at 10% of the whole person.

21. Michael T. Phillips, M.D., evaluated Claimant's right hip on September 19, 1994. He recommended conservative treatment.

22. Lynn Webster, M.D., began treating Claimant at his pain clinic in May 1999 for continuing symptoms associated with the 1994 kidney donation. He noted he expected

“probable prolonged functional impairment.” She visited irregularly. In January 2001, he offered a spinal cord stimulator which Claimant declined. Dr. Webster’s last record is dated April 20, 2001.

23. In 2001, Gilbert K. Crane, M.D., treated Claimant for bilateral carpal tunnel syndrome. Dr. Petersen also treated her for it in July 2002. He performed surgery on her right carpal tunnel on October 11, 2002.

Vocational Evaluators

24. On April 2, 2005, Sharik Peck performed a functional capacities evaluation (FCE). He noted Claimant’s hypersensitivity but reported she gave a good effort. He opined, “Client would not be likely capable of safely performing in a normal work environment with her combined limitations and in her present condition.” Claimant’s treating physician, Ms. King, opined the FCE accurately represented Claimant’s permanent abilities and limitations, despite Mr. Peck’s cautions that he considered the FCE accurate for only the next six months.

25. William Jordan opined Claimant was not totally and permanently disabled. He relied upon Dr. Greenwald’s restrictions and not upon Mr. Peck’s FCE.

26. Dr. Collins opined Claimant was totally and permanently disabled. She relied upon Dr. Greenwald’s restrictions, but differed with Dr. Greenwald’s approval of certain named jobs. Dr. Collins also assumed a 20-pound lifting restriction had been imposed as a result of Claimant’s kidney donation. Dr. Collins opined these jobs would require Claimant to work in excess of Dr. Greenwald’s restrictions.

27. ICRD consultant Irene Sanchez identified jobs that Dr. Greenwald’s restrictions would allow Claimant to do, but admitted Claimant was unlikely to be hired at any of them.

Subsequent Illness and Injury

28. Claimant injured her left elbow in a March 19, 2006, automobile accident. Cassia Regional Medical Center emergency department noted her primary complaints in her chest and left shoulder and diagnosed muscle strains. Examination of her right ankle found “very minimal tenderness on palpation.”

29. Claimant was diagnosed with diabetes by Dr. Greenwald in November 2005.

30. Although no physician has diagnosed Claimant as suffering from RSD or rheumatoid arthritis, Dr. Greenwald opined Claimant does have some autoimmune disorder which has not been more specifically identified.

Discussion and Further Findings

31. **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. Thus, the impact of Claimant’s age and other factors are relevant as of the date of medical stability, December 30, 2004.

32. 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 a claimant has met this burden, then total and permanent disability has been established. If, however, a 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).

33. A claimant may satisfy her burden of proof and establish odd-lot disability by showing that she has attempted other types of employment without success, by showing

that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. Id.

34. Claimant is, at best, an average historian. She has suffered a number of illnesses and injuries, not all of which are relevant to these findings and conclusions. ISIF's contention is that inconsistencies in her memory or medical records support a finding that Claimant is not credible. Indeed, where there exists a relevant discrepancy between Claimant's testimony and a medical record, the Referee assigned greater weight to the medical record. Moreover, Claimant demonstrated a tendency to exaggerate whatever pain was under consideration by a physician on any given visit and to discount pain from other conditions which were not salient in her mind at the moment. However, neither Claimant's normal and reasonable memory lapses nor her imbalance of focus indicate that she has attempted to deceive any physician or the Commission. To the contrary, subject to the reservations expressed in this paragraph, Claimant is a credible witness. ISIF's recitation of perceived inconsistencies are based upon double hearsay or otherwise fail to support an inference that Claimant is lying, faking, or malingering.

35. Claimant's work history shows that despite lingering painful conditions, she returned to work as soon as possible. For example, she returned to full-time work wearing an air cast after the January 2002 accident. Claimant demonstrated an above-average work ethic, a positive quality which is particularly impressive given her myriad of illnesses and injuries.

36. Claimant is working one to one and one-half hours per day at a sedentary job to which Employer transferred her because of her physical condition. Claimant requires *ad lib* position changes. She is unable to work full-time. She is unable to work even a

half-time job. Her limitations and restrictions are disabling. Her work history involving primarily unskilled labor, her age, and her education further limit her prospects to seek or obtain competitive employment. Her time of injury job was in the light or sedentary classifications. She obtained it because she was no longer able to fulfill the physical demands of the other types of employment with which she was familiar.

37. Dr. Greenwald's restrictions and opinions are entitled to great weight. Dr. Greenwald explained well in deposition her reasoning and basis for her opinions. Dr. Greenwald was also a treating physician. However, Dr. Greenwald did not have the vantage point of examining Claimant over the years. The light regard she showed for the FCE represents a reasonable disagreement among medical professionals. In Ms. King's role as nurse practitioner, her long-term treatment of Claimant and careful attention to the detailed FCE compared to her familiarity with Claimant's physical condition received greater weight in this instance.

38. Claimant was 100% disabled as of the date of medical stability. The conclusions of the FCE were affirmed and supported by her long-time treating physician. There is no indication Claimant's condition changed between the date of medical stability and the date of the FCE. The limitations and restrictions arising from the FCE are permanent.

39. Claimant being 100% disabled, there is no cause to consider the factors for determining odd-lot disability.

40. **ISIF liability.** Idaho Code § 72-332 (1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his or her employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent

injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his or her income benefits out of the ISIF account.

41. Idaho Code § 72-332 (2) further provides that “permanent physical impairment” is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

42. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court set forth four requirements a claimant must meet in order to establish ISIF liability under Idaho Code § 72-332:

- (1) Whether there was indeed a pre-existing impairment;
- (2) Whether that impairment was manifest;
- (3) Whether the alleged impairment was a subjective hindrance; and
- (4) Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317. The analysis of the “combined effects” criterion can be assessed using a “but for” test. The test is whether, but for the work-related accident,

the worker would not have been totally and permanently disabled immediately following the occurrence of that injury. Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

43. Here, Claimant had a preexisting impairment. Her right hip and low back condition was rated at 5% PPI by Dr. Knoebel and at 10% by Dr. Petersen.

44. Claimant's other preexisting conditions, despite the substantial volume of medical records in evidence, were never rated for impairment under Idaho Workers' Compensation Law. Ms. King was unable to opine to the requisite standard regarding whether these other preexisting conditions resulted in permanent impairment. Claimant testified to lingering symptoms of nerve damage resulting from her 1994 kidney donation and subsequent surgery.

45. Claimant testified her right hip never completely healed. Claimant changed occupations from the restaurant work she had previously performed to the less physically demanding work with Employer. Thus, this impairment was manifest and constituted a subjective hindrance to her ability to work.

46. Claimant's ankle condition resulted in a 7% PPI and required multiple surgeries. She has residual pain and gait problems as a result. Her restrictions are mild from this injury and the pain syndrome or autoimmune disorder which became symptomatic as a result. These are represented by Dr. Greenwald's restrictions. This injury, by itself, would not render her totally and permanently disabled. It does not explain the much greater restrictions defined by Ms. King as a result of careful testing during the FCE. But for the preexisting conditions, Claimant would not have been totally and permanently disabled by the ankle injury.

47. Claimant was working full-time when the September 2003 accident occurred. But for the ankle injury, Claimant would not have been totally and permanently disabled by the preexisting conditions.

48. It is anticipated that an objection might arise over the hip condition together with other preexisting conditions for which no impairment has been rated. Such an objection is not well taken. Hypertechnical analysis has been disapproved in other areas by the Idaho Supreme Court in the past. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1966). These preexisting conditions are considered merely a part of Claimant's disability in the same manner as non-medical factors such as age or lack of education contribute to her total and permanent disability. Neither the statute nor case law preclude consideration of all relevant disability factors when determining ISIF liability.

49. Claimant qualifies for and is entitled to benefits from ISIF.

50. **Carey formula.** Determination of the amount of ISIF liability is a matter of calculation set forth by the Idaho Supreme Court. Carey v. Clearwater County Road Dept., 107 Idaho 109, 686 P.2d 54 (1984). Drs. Knoebel and Petersen rated Claimant's PPI after her prior injury in 1992. Using the same analysis as would be used for a current injury, Dr. Petersen's rating carries more weight. He was Claimant's treating physician and examined her multiple times over a longer period of her recovery. Thus, for purposes of applying the Carey formula, Claimant's preexisting PPI was 10% and her PPI related to

the current injury is 7%. Of 17% PPI, ISIF's liability is 10/17ths or 59% of her total and permanent disability.

CONCLUSIONS OF LAW

1. Claimant is 100% disabled without resort to the odd-lot doctrine; and
2. ISIF is liable for 59% of her total and permanent disability with its commencement based upon her December 30, 2004 date of medical stability.

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 13TH day of July, 2007.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26TH day of JULY, 2007, 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:

Dennis R. Petersen
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db

/S/ _____

James F. Kile, Chairman

/S/_____
R. D. Maynard, Commissioner

/S/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 26TH day of JULY , 2007, 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/_____

ORDER - 2