

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

PATRICIA SUTTON, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 MCCAIN FOODS USA, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 TRAVELERS PROPERTY CASUALTY )  
 COMPANY OF AMERICA, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2004-001822**

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

Filed July 3, 2007

**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 Twin Falls on July 13, 2006. Claimant was present and represented by James C. Arnold of Idaho Falls. W. Scott Wigle of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of one post-hearing deposition. The parties then submitted post-hearing briefs and this matter came under advisement on May 21, 2007.

**ISSUES**

The issues to be decided are:

1. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Permanent partial impairment (PPI);

- b. Permanent partial disability (PPD): and, if so,
2. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that she is owed additional PPI benefits following a right knee injury. She further contends that she has incurred whole person PPD of 39% in excess of her PPI without apportionment.

Defendants contend that Claimant has been paid the appropriate PPI rating and is owed no more. Further, in the event PPD in excess of PPI is found, it is minimal. Finally, Claimant had severe pre-existing arthritis in her right knee and apportionment is appropriate in this case.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant and Employer's occupational nurse, Linda Jean Byce, taken at the hearing.
2. Claimant's Exhibit 1 admitted at the hearing.
3. Defendants' Exhibits A-E admitted at the hearing.
4. The post-hearing deposition of Richard T. Knoebel, M.D., taken by Defendants on September 28, 2006.

Defendants proffered Exhibit "F," a report of an independent medical evaluation prepared by Paul Collins, M.D., at Claimant's request. Claimant objected on the ground that she did not intend to call Dr. Collins as an expert witness; hence the report was not discoverable or admissible pursuant to the civil rules. The parties argued their respective positions at hearing, and submitted additional briefing following the hearing. On August 1, 2006, this Referee signed

an Order Sustaining Claimant's Objection to Defendants' Proposed Exhibit "F." In their post-hearing brief on the merits, Defendants invite the Referee to re-visit the above order. The Referee is disinclined to do so and incorporates the August 1, 2006, order herein by this reference.

### **FINDINGS OF FACT**

1. Claimant was 37 years of age and resided in the Burley/Rupert area at the time of the hearing. She began working at Employer's potato processing facility in 1994. At the time of her January 17, 2004, accident and injury, Claimant was a line operator.

2. On January 17, 2004, Claimant slipped and fell on some black ice in the "cold room" and twisted her knee. She was able to finish her shift. The following day, Claimant contacted the plant nurse, who sent Claimant to the local emergency room where she was diagnosed with a right knee strain. She was placed on modified work pending her seeing an orthopedic surgeon.

3. Claimant began treating with orthopedic surgeon Gilbert K. Crane, M.D., who performed an arthroscopy of her right knee on March 10, 2004, including a minimal partial medial meniscectomy and debridement. Dr. Crane's operative report noted a very small central meniscal tear and Grade 3 changes over the medial compartment. The report also noted, "The medial compartment unfortunately demonstrated early arthritic changes throughout with grade 3 changes globally across the medial femoral condyle and [sic] also on the tibial plateau. The medial meniscus showed a small central tear of the posterior horn. This was mostly degenerated, but there was a small tear present that was debrided. Ninety percent of the meniscus was left." Defendants' Exhibit B.

4. Claimant had an uneventful post-operative course, and Dr. Crane released her to regular work on May 6, 2004. However, he warned her to consider employment where she did not have to stand for long periods of time.

5. Employer was able to accommodate Claimant throughout her treatment with light duty work. However, Claimant voluntarily terminated her employment because she could not bid into a higher paying job within a reasonable time that would accommodate her need to refrain from long periods of standing. Claimant was fearful that, at age 34, she would eventually require a total knee replacement(s) and she was too young to start down that path.

### **DISCUSSION AND FURTHER FINDINGS**

#### **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).

6. On July 26, 2004, Dr. Crane issued a 1% whole person PPI rating for Claimant’s partial medial meniscectomy. He did not rate Claimant’s underlying pre-existing degenerative joint disease (DJD).

7. On March 9, 2006, Richard T. Knoebel, M.D., saw Claimant for an independent medical evaluation at Defendants' request. Dr. Knoebel rated Claimant at 1% whole person for her meniscal tear and 9% for her pre-existing DJD.

8. Claimant argues that she is entitled to the full 9% because her right knee was asymptomatic prior to her industrial accident. While this may be true, nonetheless in this case there is a **distinct, separate and progressive condition**, her DJD, that was **objectively observed** by Dr. Crane at surgery and Dr. Knoebel by reviewing Dr. Crane's operative report and x-rays. Dr. Knoebel testified as follows regarding the reasoning behind his apportionment:

Q. (By Mr. Wigle): Okay. Did the industrial accident cause this chondrosis<sup>1</sup> of her medial femoral condyle?

A. No.

Q. This would have been something that was preexisting and degenerative in nature?

A. Yes.

Q. Did you address an appropriate impairment rating for Ms. Sutton with regard to her right knee?

A. Yes.

Q. Would you explain for us how you derived - - first of all, what impairment was derived, and how you came to that conclusion?

A. I found the patient had a 9 percent whole person impairment of the right knee. By the operative note and the records, she had a partial medial meniscectomy that is a 1 percent whole person impairment or a 2 percent lower extremity impairment, same thing. That's based upon the AMA guides as we're instructed in regards to work comp issues in Idaho. That's using table 17-33 of the guides, partial medial or lateral meniscectomy.

The patient's degenerative changes are addressed with an additional 8 percent whole person impairment, and I did that by looking at the x-rays. And even though they were not weight-bearing x-rays, she did have evidence of about 2 millimeters of clear space loss, or narrowing of the medial compartment on that x-ray. The significant degenerative changes of the medial compartment are as noted in Dr. Crane's operative note as we just talked about.

The two of those factors were used to determine an 8 percent whole person impairment for degenerative changes, and that's based on table 17-31 of

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<sup>1</sup> Dr. Knoebel defined chondrosis as degenerative or diseased articular cartilage.

the AMA guides for arthritis changes with 2 millimeter clear space interval remaining, 2 millimeters lost. Because 4 millimeters would be normal.

Dr. Knoebel Deposition, pp. 18-19.

Dr. Knoebel further testified that with grade 3 changes of the cartilage (grade 4 is no cartilage left), Claimant would have continued progression and degenerative changes over time.

Finally, Dr. Knoebel addressed the argument that Claimant's torn medial meniscus may have accelerated her underlying DJD as follows:

Q. (By Mr. Wigle): In Ms. Sutton's case, given the extent of the degenerative change, and her situation with regard to her weight<sup>2</sup>, is the meniscal tear going to be a highly significant factor in her future degeneration? Is there a way to quantify that?

A. Yes, there is. And in her case I don't think that it makes any significant effect for a number of reasons. Number one is that it was a very small tear that Dr. Crane describes as gently debriding and leaving 90 percent of the meniscus there. So the amount of meniscal tear and the amount of meniscal resection were minimal. So the chances of there being a significant contribution of the progression of degenerative change, minimal. And number two is the extent of degenerative changes which were already present, again as noted by x-ray and by the operative note. So there was such advanced degenerative changes already present, the contribution from the small partial meniscectomy is negligible.

. . .

Her symptoms were consistent with a meniscal tear. She went on to have her arthroscopic surgery, the meniscal tear was treated. But at the same time, Dr. Crane elected to debride extensively the degenerative changes of the medial compartment, and that in and of itself is known to have a long healing time and is not always successful in alleviating the problem. Mr. Wigle asked me does that result in any improvement, and I said it can result in temporary improvement. But certainly that is not always the case, and you see, not infrequently, people that have undergone debridement of a degenerative changes with arthroscopy, having increased symptoms of the knee thereafter.

So it's a little bit of a risky procedure - - I shouldn't say risky procedure. It's a procedure that doesn't have great results associated with it. And her symptoms could be a result of that treatment elected in regards to her, again, preexisting arthritis. And I'm not just coming up with this in my theory or my

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<sup>2</sup> Dr. Knoebel found Claimant to be morbidly obese at five feet five inches tall and 254 pounds.

personal clinical experience, but I would say that that is my personal clinical experience as well.

. . .

Well, I would just kind of expand, I guess, upon what I've already said. I gave you another scenario as to a possible cause for the patient's continued pain complaints in regards to her preexisting knee arthritis. I don't think with a reasonable degree of medical probability, or from an orthopedic perspective, that the patient's significant preexisting degenerative changes were reasonably permanently aggravated by the simple twisting of her knee at the time of her industrial injury.

Just because the patient subjectively says she never had pain before, now she has pain afterwards, is not, to me, a significant indication that she had a permanent aggravation of significance at the time of the industrial incident that then caused her significant degenerative arthritis to become symptomatic.

Based upon the objective findings, the mechanism of injury, the course of the patient's treatment, she had significant preexisting arthritis changes which not surprisingly continued to be symptomatic, and to be naturally progressive over two years from the time that she started to have treatment to the time that I saw her. That reasonably represents significant aggravation at the time of the industrial injury, despite the fact that she says everything stems from the industrial injury.

It's just not scientifically based, reasonable or accurate, based on her obesity, her significant degenerative changes seen an [*sic*] x-ray and at the time of her arthroscopy.

Dr. Knoebel Deposition, pp. 22-23, 28-29, and 30-31.

9. Because Dr. Knoebel's opinions are persuasive and because he is the only physician to express an opinion regarding the apportionment issue, the Referee finds that Claimant has incurred a whole person PPI of 1% as the result of her industrial accident. Such rating also comports with that given by Claimant's treating physician, Dr. Crane.

**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).

10. Claimant's work history includes fast food, retail, and nursing care. After her voluntary termination at Employer's, Claimant worked at FedEx for a couple of hours a day and then at the Cassia County Jail in the control room. At the time of the hearing, she was working at Magic Valley Chalet, a cheese store. She works ten hours a day, four days a week and earns

\$9.00 an hour with no benefits. At times she is required to stand for long periods of time which aggravates her knee pain somewhat.

11. Claimant argues that she is entitled to PPD of 39% in excess of her PPI with no apportionment. She bases this argument on her assertion that she could no longer work for Employer out of fear of re-injuring or further wear and tear of her knee if she returned to her time of injury position of line operator. Also, she could have bid into another position, but she would have to wait about a year at a lower paying job before she could do so. Defendants argue that they made every attempt to convince her to stay, as she was a highly valued employee. They acknowledged that at the time Claimant was considering leaving, the union rules in place prevented her from bidding on the position in which she was interested for about a year after she was released from light duty. However, that rule was changed shortly after Claimant quit and she could have bid on the position earlier.<sup>3</sup> At the time of her injury, Claimant was earning \$13.43 an hour with benefits worth, according to Claimant, \$4.77 an hour.

12. There is no vocational evidence regarding Claimant's loss of access to her pre-injury labor market. She argues that she is entitled to PPD primarily on the basis of the difference between what she would have been earning had she remained with Employer and what she is earning now. This analysis fails to consider that she could have remained with Employer and retained her benefits, although she would have been earning somewhat less than her time of injury wage. Dr. Crane opined in a letter to Defendants' counsel that he does not specifically remember if he told Claimant to change her employment, but did indicate he believed it reasonable for her to lose weight and find employment that involved less walking and

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<sup>3</sup> At the time of Claimant's injury, union rules only provided for bidding once a year; Claimant's accident happened shortly after that year's bidding process. Claimant was unaware of this pending change in the bidding process although Employer knew it was imminent but, for some reason, was unable to tell Claimant. With Claimant's seniority, Claimant would have secured the position for which she would have bid.

standing. He further opined that 60% of her current need for the restrictions on walking and standing would be attributable to her pre-existing arthritis and 40% would be attributable to her industrial accident. Dr. Knoebel opined that Claimant had no physical restrictions from her meniscal tear.

13. The Referee observed Claimant to be articulate and personable at hearing. She was of value to Employer, who would have kept her on had Claimant been willing. She has a high school education and has demonstrated that she can locate employment. Her choice to leave Employer was just that; her choice. While the Referee does not fault Claimant for making that choice, no physician told her to leave. Had she remained employed, it may be reasonably inferred that she would now be at the job in the lab that she wanted and would have been making close to her time of injury salary, including benefits.

14. Considering those factors enumerated in Idaho Code § 72-430(1), as well as some wage loss, the Referee finds that Claimant is entitled to PPD of 10% of the whole person inclusive of her 1% whole person PPI.

**Apportionment:**

Idaho Code §72-406(1) provides:

In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

15. As found in the above section regarding PPI, Claimant had a rather severe preexisting arthritic condition in her knee that caused Dr. Crane to apportion 60% of his “restriction” to that condition and Dr. Knoebel to apportion 100% to that condition. Dr. Crane’s reasoning regarding his apportionment is as follows:

Her primary reason for this [need to limit standing and walking] would be the arthritic changes which were in her knee that represent wear and tear changes, not necessarily related to the industrial accident. However, with the industrial accident she did sustain a medial meniscal tear and had a partial medial meniscectomy. This is likely going to cause increased pressure in this medial compartment of her knee, which is already somewhat arthritic, and lead to a more rapid course of osteoarthritis than would have occurred on its own without the industrial injury. Therefore, while I believe most of the reason for recommending the job change would be due to the osteoarthritis, at least a portion of this is because of the industrial accident and the knowledge that having torn the meniscus and lost part of this cushion she is likely to see more rapid degeneration in this knees [sic]. If I were to attempt to apportion this I would say 60% is due to pre-existing generalized osteoarthritis and 40% would be related to the industrial injury.

Defendants' Exhibit A.

16. Claimant cites to cases in support of her contention that apportionment is never appropriate in situations where the pre-existing condition has been asymptomatic. The first cited case is *CNA v. Nursing Home*, 2002 IIC 0503, 9-02. There, unlike here, a **permanent aggravation** of a pre-existing condition was found. The second is *Ayala v. Danis Environmental Industries*, 2002 IIC 0251, 3-02. There, claimant had a back surgery 20 plus years before the accident in question that had healed, unlike here, and he was able to continue with heavy work. No separate and distinct injury was involved. The third is *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, IIC 1933, 1-02, 99 IWCD 114 p. 12413 as amended on reconsideration p. 12692. There, unlike here, medical evidence (Dr. Knoebel) was present supporting a finding of no apportionment. The fourth is *Romney [sic] v. Hewlett-Packard Co.*, 98 IWCD 10623. This case has nothing to do with apportionment.

17. The Referee finds that Dr. Crane's approach to apportionment can reasonably be applied to an apportionment analysis under Idaho Code § 72-406. Therefore, Defendants are liable for 40% of Claimant's 9% whole person PPD.

**CONCLUSIONS OF LAW**

- 1. Claimant is entitled to whole person PPI benefits of 1%.
- 2. Claimant is entitled to whole person PPD of 10% inclusive of her 1% PPI.
- 3. Defendants are liable for 40% of Claimant’s 9% PPD pursuant to Idaho Code § 72-406.

**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 \_\_8<sup>th</sup>\_\_ day of \_\_\_\_\_June\_\_\_\_\_, 2007.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_3<sup>rd</sup>\_\_ day of \_\_July\_\_\_\_\_, 2007, 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 ARNOLD  
PO BOX 1645  
IDAHO FALLS ID 83403-1645

W SCOTT WIGLE  
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\_\_\_\_\_/s/\_\_\_\_\_

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

PATRICIA SUTTON, )  
 )  
 Claimant, ) **IC 2004-001822**  
 )  
 v. )  
 ) **ORDER**  
 MCCAIN FOODS USA, INC., )  
 ) **Filed July 3, 2007**  
 Employer, )  
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 and )  
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 TRAVELERS PROPERTY CASUALTY )  
 COMPANY OF AMERICA, )  
 )  
 Surety, )  
 )  
 Defendants. )  
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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 entitled to whole person permanent partial impairment benefits of 1%.
2. Claimant is entitled to whole person permanent partial disability benefits of 10% inclusive of her 1% permanent partial impairment.
3. Defendants are liable for 40% of Claimant's 9% permanent partial disability pursuant to Idaho Code § 72-406.

