

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

PAULA DAVIS-NIEHOFF, )  
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 Claimant, )  
 )  
 v. )  
 )  
 MICRON TECHNOLOGY, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 LIBERTY NORTHWEST INSURANCE )  
 CORPORATION, )  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2003-513778**

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

10/15/07

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Lora Rainey Breen, who conducted a hearing in Boise, Idaho, on April 20, 2007. Dean A. Martin represented Claimant with Mitchell R. Barker serving as co-counsel. E. Scott Harmon of Harmon, Whittier & Day represented Defendants. The parties submitted oral and documentary evidence. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on August 20, 2007. With the consent of both parties, an alternate Referee was appointed for the issuance of this decision.

**ISSUES**

By agreement of the parties, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;
3. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care to include cervical surgery of February 21, 2005;
  - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
  - c. Permanent partial impairment (PPI); and
  - d. Disability in excess of impairment.
4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
5. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine; and
6. Whether Claimant is entitled to attorney's fees.

### **CONTENTIONS OF THE PARTIES**

It is undisputed that Claimant sustained an injury to her neck while in the scope of her employment on July 1, 2003, as the result of lifting boxes overhead. It is further undisputed that the injury resulted in the need for cervical surgery which was performed on September 17, 2003.

Claimant contends that she experienced continued problems associated with the initial surgery which necessitated a revision surgery on February 21, 2005. Claimant seeks medical and income benefits associated with the second surgery and subsequent deterioration of her medical condition. Claimant denies the existence of pre-existing cervical impairment and asserts that her current condition is causally related to her work related injury.

Defendants contend that the second surgery was performed for reasons unrelated to the injury and that Claimant's deteriorating condition is the result of a neurological syndrome of unknown etiology. Defendants assert that Claimant had pre-existing cervical impairment and that income benefits were properly apportioned. Both parties rely primarily on the documentary medical evidence.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The hearing testimony of Claimant<sup>1</sup>;
2. Claimant's Exhibits 1 through 14; and
3. Defendant's Exhibits A through X.

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**

#### Background and Injury

1. Claimant was 60 years old at the time of this hearing. Claimant completed junior high school and passed a general educational development (GED) exam. Claimant began working for Employer on November 30, 1999 and held a series of jobs with Employer from 1999 until 2005. Claimant's employment with Employer includes periods of working for Crucial Technology, a division of Employer. At the time of the injury, Claimant was working in the shipping and receiving department at Crucial Technology as an inventory clerk where her usual

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<sup>1</sup> Claimant's name was Paula Davis at the time of her injury. Claimant's name changed as the result of marriage and her current name is Paula Niehoff. Some documents identify Claimant as Paula Davis-Niehoff.

duties included unloading product, opening boxes, scanning, repackaging product, moving items by cart and placing product on shelves. Claimant performed frequent lifting up to 20 pounds and occasional lifting of 50 or more pounds.

2. On July 1, 2003, Claimant experienced a busy workday during which more than twice the amount of product was received than on an average day. Claimant was required to work faster and lift more product than usual. After prolonged lifting of boxes to a shelf above her head, Claimant experienced a “little pop” in her neck but completed her workday. Claimant initially felt that she experienced a muscle strain. (Tr. p. 29-31).

3. Claimant reported the incident to her supervisor, Dan LeDuc, the next day. A medical incident report was completed on July 7, 2003, at which time Claimant identified injuries to her neck, mid-back and right shoulder as the result of lifting boxes. Claimant denied previous injury to the affected body parts but acknowledged previous chiropractic treatment. (Exh. 1, p.1).

4. On the morning of July 7, 2003, prior to completing the incident report and requesting medical treatment through Employer, Claimant sought treatment with James Hollingsworth, D.C. The onset of symptoms was documented as occurring when Claimant was “moving a lot of product.” Dr. Hollingsworth declined to treat Claimant due to the nature of her complaints and advised her to consult Employer for a medical referral. (Exh. E, p. 39).

#### Conservative Treatment and First Surgery

5. Claimant received chiropractic treatment on an intermittent basis for at least ten years prior to the injury. Treatment included all levels of the spine. On February 12, 2003, Claimant sought treatment for a fall when she “hurt everything.” Chiropractic records do not include diagnostic studies or any indication of physical restrictions or work limitations.

Claimant sought treatment for headaches, stress, and when she felt that she was out of alignment. (Exh. D and E).

6. Treatment was initiated on July 7, 2003 with Sheri Malakhova, M.D., at Employer's clinic. Dr. Malakhova referred Claimant to Kevin Chicoine, M.D., who evaluated Claimant and ordered an MRI of the cervical spine. Dr. Chicoine described a gradual increase in discomfort without a specific injury but made reference to a large shipment of product and Claimant being fairly busy at work. He concluded that, given Claimant's history, it was not clear whether the condition would be degenerative or acute in nature. (Exh. G, pp. 110-115).

7. Cervical MRI of July 16, 2003, revealed multilevel spondylosis; C5-6 osteophyte and disc bulge with effacement of the right lateral recess; and mild stenosis at C5-6 and C6-7. (Exh. G, pp.112-113).

8. Upon review of MRI findings, Dr. Chicoine referred Claimant back to Dr. Malakhova and noted that Claimant's problems were more likely the result of degenerative changes and not work related. Claimant received prescriptions for medication and work restrictions from Dr. Malakhova. Symptoms continued and Claimant was referred to Timothy E. Doerr, M.D. (Exh. G, pp.122-125).

9. Dr. Doerr noted that Claimant had been unresponsive to conservative treatment and recommended surgical intervention. Dr. Doerr consulted with Dr. Chicoine and explained that he felt the MRI findings revealed an acute injury. He reviewed Claimant's prior medical records and maintained that Claimant's cervical disc herniation and right arm radiculopathy were causally related to the work injury. He noted that previous complaints of radicular symptoms involved the left arm. (Exh. 3, p. 23 and 51).

10. Dr. Doerr performed surgery on September 17, 2003 in the form of a decompression and fusion at C5-C7 with allograft and plating. Surgery was uneventful and Claimant was discharged from the hospital on September 19, 2003. There were no wound problems or neurologic complaints at the follow up visit of September 22, 2003. (Exh. 3, pp.57-62). Claimant participated in a course of post-surgical physical therapy from December 16, 2003 through January 29, 2004. (Exh. 7, p. 265).

#### Recovery from First Surgery

11. Claimant received services from the Industrial Commission Rehabilitation Division (ICRD) and returned to work with Employer in a modified duty capacity on November 4, 2003. She returned to her pre-injury job in early January 2004, at which time both Claimant and Employer reported that the return to work situation was “going well.” Claimant was working 40 hours per week and earning slightly more than her pre-injury wages. The ICRD closed its case on February 17, 2004, because Claimant had successfully returned to her time of injury position for at least 30 days. (Exh. I, pp. 151-155).

12. Dr. Doerr certified maximal medical improvement (MMI) and assigned an 11% whole person impairment rating (PPI) at his evaluation of January 12, 2004, at which time he released Claimant to return to work without restrictions. (Exh. 3, p. 75). He initially indicated that there was no apportionment due to pre-existing disease. However, after subsequent review of Claimant’s pre-injury medical records, he determined that 50% of the 11% PPI should be apportioned to pre-existing disease and noted chiropractic treatment within the six months prior to the injury. (Exh. 3, p.77).

13. Claimant underwent a general physical examination by primary care physician, Louis M. Schlickman, M.D., on February 10, 2004. Claimant reported hoarseness with a

sensation of throat swelling. Dr. Schlickman attributed the throat problems to postnasal drip versus post-operative complications. Neurological exam was normal and it was noted that Claimant recovered fairly well from the surgery. Multiple other health concerns were addressed including post-menopausal issues, dry eyes, bad breath, sleep disorder, tobacco use, and hyperlipidemia. (Exh. 9, pp. 276-277).

14. Claimant followed up with Dr. Doerr on March 11, 2004, at which time she was doing well. X-rays revealed good placement of the hardware. Dr. Doerr explained that the grafts were consolidating despite Claimant's continued smoking. Claimant was instructed to continue with the cervical exercise program and discontinue smoking. (Exh. 3, p. 79).

#### Onset and Development of Neurological Symptoms

15. Claimant followed up with Dr. Schlickman on April 15, 2004, with complaints of face tingling and concerns about a possible stroke. Dr. Schlickman suspected cervical nerve impingement rather than a stroke, but recommended that Claimant stop smoking to lower her risk of having a stroke. On May 13, 2004, Dr. Schlickman noted that Claimant's neck pains resolved after two days of taking Celebrex and that the Claimant was going to Ireland to get married. Claimant returned on October 6, 2004, at which time Claimant reported increased numbness and tingling to bilateral upper and lower extremities as well as drooping of the right side of her face. Neurological exam did not reveal significant deficits and Dr. Schlickman ordered lab work to rule out thyroid dysfunction. (Exh. 9, pp. 287-289).

16. In September of 2004, Claimant returned to Dr. Doerr with complaints of radiating pain to the upper extremities. Diagnostic studies were ordered to determine the source of the complaints. The studies ruled out neurologic impingement and Dr. Doerr opined that the complaints were not related to the neck injury. He recommended that Claimant be treated for her

shoulder and upper extremity complaints through her personal insurance. Right sided facial drooping was noted at a follow up appointment on October 7, 2004. Dr. Doerr reiterated that he did not feel that the problems were associated with the cervical spine and recommended that Dr. Schlickman refer Claimant for a formal neurological evaluation. (Exh. 3, pp. 82-94).

17. Neurologist, Martha Cline, M.D., evaluated Claimant on November 4, 2004. She documented cervical pain with patchy paresthesias. She felt that the symptoms were not typical of an ischemic disorder and suspected possible cerebral dysfunction. An MRI of the brain was ordered and performed on November 10, 2004. The MRI was normal and Dr. Cline ruled out brain abnormality as a cause for Claimant's symptoms of facial paresthesias, right facial drooping, and left hand paresthesias. Dr. Cline documented Claimant's concerns that the problems could be related to the cervical hardware. She recommended a second opinion with Dr. Timothy Floyd to address questions about the prior surgery. She also recommended follow up with Dr. Todd Rustard as she felt that she could not help Claimant further. (Exh. 6, pp. 204-215).

18. C. Timothy Floyd, M.D., evaluated Claimant on December 9, 2004. He provided an assessment of a "[b]izarre central neurological syndrome, no relation to cervical pathology or her cervical surgery." (Exh. 9, p.293). Dr. Floyd reviewed the diagnostic studies performed following the initial surgery and concluded that the x-rays revealed a solid arthrodesis with the plate in good position and no evidence of loosening or fracture; that the CT myelogram showed incorporation of the bone graft with no evidence of spinal cord or nerve root compression; and that Claimant had significant relief from her arm pain as well as increased strength following the surgery of September 2003. Id. Past medical history reflects that Claimant was doing well until May of 2004, when she woke up with insidious onset of buzzing, tingling and numbness of the

face. (Exh. 9, p.291). Dr. Floyd detailed an “exhaustive evaluation” by Dr. Cline which confirmed that diagnostic studies of the brain and nerves revealed no abnormalities. Id.

20. Todd Rustad, M.D., evaluated Claimant on December 16, 2004, to address the complaint of facial weakness. He described a “puzzling constellation of facial symptoms that have come and gone after cervical fusion.” He concluded that the symptoms were atypical of Bell’s palsy and recommended additional studies to rule out Lyme disease, viral neuritis or rheumatologic disease. (Exh. 8, p. 269).

21. Claimant returned to Dr. Cline after completion of additional diagnostic work-up. The studies revealed elevated liver function but were non-conclusive with regard to Claimant’s neurologic complaints. Dr. Cline concluded that her work-up was negative to determine the etiology of Claimant’s problems. She encouraged Claimant to follow up with Dr. Perla Thulin from Salt Lake City who suspected a possible partial spasm of cranial nerve VII. (Exh. 6, pp. 230-247).

22. Claimant was referred by Dr. Cline to the Mayo Clinic in Rochester, Minnesota in January of 2007 where Claimant was seen by multiple physicians in the clinic’s neurology department. Additional diagnostic studies and lab work were performed. Claimant was diagnosed with multiple cranial neuropathies, somatic complaints of right sided symptoms and anxiety disorder. Orhun H. Kantarci, M.D., confirmed palsy of the sixth and seventh nerve but felt that the additional right sided complaints were possibly related to somatoform disorder. He concluded that there was no connection between Claimant’s history of neck surgery and the eye symptoms. (Exh. 14).

## Contemplation and Performance of Second Surgery

23. Claimant requested to change treating doctors from Dr. Doerr to Paul Montalbano, M.D., as she felt that she was not receiving adequate treatment from Dr. Doerr and that he was not listening to her. Claimant learned of Dr. Montalbano from her sister-in-law. The request was denied by Defendants and the denial was upheld by the Idaho Industrial Commission (IIC). Claimant opted to treat with Dr. Montalbano at her own expense, with the assistance of her private health insurance. (Tr. pp. 46, 69-70).

24. Paul J. Montalbano, M.D., performed a neurosurgical evaluation of Claimant on December 21, 2004. Dr. Montalbano noted that Claimant presented with a “multitude of symptoms” including pain and/or weakness to various body parts. However, he instructed Claimant that he would only address her neck pain. Dr. Montalbano reviewed the CT scan of the cervical spine taken September 22, 2004, and indicated that there appeared to be an incomplete incorporation of Claimant’s bony graft at C6-7. A bone scan was recommended to rule out pseudoarthrosis at that level. (Exh. 10, p. 307).

25. A bone scan was performed on December 22, 2004, which revealed:

...moderate activity in the lower cervical spine corresponding to the known C5 to C7 anterior fusion. Findings would be expected from prior fusion. There is no other abnormal tracer activity within the neck or remainder of the body. No abnormal soft tissue accumulation is seen.

(Exh. 10, p. 308).

Multiple other diagnostic studies were performed following the initial surgery to evaluate the outcome of the surgery and hardware placement. A post-myelogram CT scan of the cervical spine was performed on September 9, 2004, which revealed a normal post fusion appearance. (Exh. 9, p. 305). An upper extremity electrophysiological study was performed on September

29, 2004, which was normal. (Exh. O, p.244). Cervical spine X-rays were taken on February 16, 2005, which revealed that the hardware was intact and that bone plugs at C5-6 and C6-7 appeared to be incorporated into the adjoining cervical centra. (Exh. 10, p. 314).

26. Dr. Montalbano reviewed the diagnostic studies and stated that the CT scan demonstrated pseudoarthrosis at C6-C7 and that the bone scan reflected increased uptake at that level. He confirmed that conservative treatment in the form of medications and steroid injections failed to provide relief. He recommended a repeat surgery to address the pseudoarthrosis and neck pain. He attributed the pseudoarthrosis to the prior surgery. He documented that he reviewed the CT scan with radiologist, Vicken Garabedian, M.D., who agreed that there was evidence of pseudoarthrosis at C6-7. (Exh. 10, p.309). He noted that the proposed surgery would address Claimant's neck pain and not her facial weakness or other neurological problems. (Exh. 10, p.307).

27. Dr. Doerr reviewed the consultations performed by Dr. Floyd and Dr. Montalbano, as well as the diagnostic studies. He was "somewhat at a loss" to explain Dr. Montalbano's recommendation for surgery. (Exh. 3, p.95). Dr. Doerr concurred with Dr. Floyd's evaluation that Claimant's symptoms were in no way related to her industrial injury nor to the initial cervical spine surgery. Id. Dr. Doerr confirmed that the CT myelogram from September 22, 2004, revealed that the allograft was 100% incorporated at the C5-6 level and that C6-7 showed a bridging bone that was continuing to incorporate. Dr. Doerr also reports consultation with Dr. Garabedian and indicates that he personally reviewed the diagnostic films with Dr. Garabedian who agreed that there was a maturing fusion rather than a non-union. Id. Dr. Doerr concluded that he would not recommend a revision surgery and that the surgery was unwarranted. Id.

28. Defendants obtained a peer review opinion of David J. Giles, M.D., who reviewed the CT myelogram of September 22, 2004 and the bone scan of December 22, 2004. Dr. Giles opined that the tests revealed a solid interbody fusion and fixation at C5, C6 and C7 with no direct evidence of pseudoarthrosis. (Exh. 1, pp. 39-40).

29. Dr. Montalbano performed surgery on February 21, 2005, to address Claimant's neck pain related to pseudoarthrosis at C6-C7. The procedure included removal of plates, re-do of microscopic C6-7 anterior decompression, C6-7 anterior cervical arthrodesis and instrumentation with bone graft. Pseudoarthrosis at the inferior portion of the allograft at C6-7 was identified. Lower screws from the previous hardware were found to be loose. No surgical complications were noted and Claimant was discharged on February 22, 2005. (Exh. 9, pp. 295-296).

#### Claimant's Condition Following Second Surgery

30. Claimant returned to modified duty work with Employer for four hours per day in April of 2005. Claimant experienced increased problems upon return to work, including right hand and right foot numbness, headaches, neck pain and upper extremity pain. Claimant discontinued modified duty work in June of 2005 and has not returned to work in any capacity since that time. (Tr. pp. 53-59).

31. Claimant was seen by James Moreland, M.D., in August of 2006, for a disability evaluation. Dr. Moreland referenced both neck surgeries and indicated that they had "healed completely." He diagnosed right rotator cuff impingement, facial dystonia and right lower extremity problems of unknown etiology. He concluded that Claimant could perform light to moderate work with various restrictions. Re-evaluations were performed in September and October of 2006. Dr. Moreland clarified in his report of October 13, 2006, that Claimant's most

disabling condition is her undiagnosed neurologic disorder which precludes driving, reading, computer use, standing and ambulating. He indicated that the cervical fusion was the “least of her problems.” (Exh. 12).

32. Claimant applied for Social Security Disability Insurance (SSDI) benefits and a decision was issued on November 13, 2006, finding that Claimant has been disabled, as defined by the Social Security Act, since February 21, 2005. The SSDI decision adopted the opinions of Dr. Moreland. (Exh. 13).

33. Michael O’Brien, M.D., reviewed medical records and provided an opinion in January of 2006 regarding the 11% PPI and apportionment assigned by Dr. Doerr. (See above paragraph 12 for Dr. Doerr’s findings). Dr. O’Brien asserted that the correct PPI is likely 25% and that apportionment would not be appropriate. He placed Claimant in diagnosis-related estimate (DRE) category IV and gave consideration to Claimant’s limitations following the second surgery. (Exh. 11, pp. 325-327). Dr. O’Brien acknowledged that Claimant had pre-existing arthritic changes, but felt that they were asymptomatic and not the basis for impairment. (Exh. 11, p. 333).

#### Benefits Paid

34. Medical benefits paid by Defendants include treatment at the direction of Dr. Doerr, including the initial surgery. Income benefits include temporary partial and temporary total disability for periods of time immediately following the injury (July 7, 2003 through July 10, 2003) and near the time of the first surgery (September 9, 2003 through November 3, 2003). Permanent partial impairment benefits were paid pursuant to the 11% PPI, less 50% for apportionment which resulted in a 5.5% PPI. (Exh. X).

## DISCUSSION AND FURTHER FINDINGS

### Causation

35. Claimant has the burden of proof to establish, by medical probability, all elements necessary to show that the injuries complained of arose from an accident occurring in the course of employment. Hart v. Kaman Bearing & Supply, 130 Idaho 269, 939 P.2d 1375 (1997). Medical probability requires a showing of “more evidence for than against.” Soto v. Simplot, 126 Idaho 536, 540, 887 P. 2d 1043, 1047 (1994). A mere showing of a possible connection between an accident and the complained of injury is not sufficient. Callentine v. Blue Ribbon Linen Supply, 103 Idaho 734, 653 P.2d 455 (1982).

36. The medical evidence establishes that Claimant had an uneventful and successful period of recovery during the six months following her surgery of September 17, 2003. Claimant has failed to meet her burden of proof to establish that the neurological symptoms and other maladies which began to appear in April of 2004 are causally related to her work injury. These symptoms include weakness and numbness to the upper extremities and lower extremities; facial drooping; right sided weakness; vision abnormalities; cervical radiculopathy and right shoulder limitations. Claimant has been evaluated by several medical specialists and undergone multiple series of diagnostic studies to determine the etiology of her symptoms. There is no credible evidence that relates Claimant’s multiple symptoms to the work related injury or initial surgery.

### Second Surgery

37. There is conflicting medical evidence in the record regarding the basis for the second cervical surgery. Accordingly, the issue of Claimant’s entitlement to medical benefits

relating to the cervical surgery of February 21, 2005, requires an analysis involving both questions of law and fact. Generally, an employee is entitled to reasonable medical treatment for a compensable injury. Idaho Code § 72-432(1). The determination as to whether or not a specific treatment is reasonable and required is determined by the employee's physician. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 722, 779 P. 2d 395 (1989). However, the Claimant bears the burden of proving that the condition for which treatment is sought is causally related to the compensable injury. Sweeney v. Great W. Transp., 110 Idaho 67, 71, 714 P.2d 36 (1986). In the event that medical treatment is determined to constitute reasonable medical care which is causally related to a compensable injury, liability of an employer/surety for the treatment may be negated if the treatment is not performed at the direction or referral of the employee's treating physician and requirements of Idaho Code § 72-432(4) relating to change of physician are not otherwise satisfied. Quintero v. Pillsbury Co., 119 Idaho 918, 811 P.2d 843 (1991).

38. Dr. Montalbano maintained that the second surgery was attributable to pseudoarthrosis and related neck pain which followed the initial surgery. Dr. Montalbano based his opinions on the results of diagnostic studies (described in preceding paragraph 25). The same studies relied upon by Dr. Montalbano were also reviewed by Dr. Doerr, Dr. Floyd and Dr. Giles, none of whom concurred with Dr. Montalbano that the studies revealed pseudoarthrosis.

39. The opinions of Dr. Montalbano and Dr. Doerr are directly conflicting regarding the basis for a second surgery, if any. Dr. Cline referred Claimant to Dr. Floyd for a second opinion to address the issue. Dr. Floyd's report of December 9, 2004, reflects a thorough physical exam, review of diagnostic studies and consultation with Claimant. Dr. Floyd unequivocally concluded that there was no anatomical basis in the cervical spine for Claimant's

symptoms. He noted that the x-rays demonstrated a solid arthrodesis; that the plate from the first surgery was in good position; there was no evidence of loosening or fracture and that there was no evidence of compression of the nerve roots or of the spinal cord. He diagnosed a “bizarre central neurological syndrome” with no relation to cervical pathology or the initial surgery.

40. Claimant has failed to meet her burden of proof to establish that the condition for which the second surgery was performed was causally related to the compensable injury. Accordingly, the issue of entitlement to additional disability benefits is moot.

#### Impairment Rating and Apportionment

41. “Permanent Impairment” is an anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant’s position is considered medically stable. Idaho Code § 72-422. When determining impairment, the opinions of physicians are advisory only and the IIC is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 769 P.2d 1122 (1989).

42. Upon a finding of pre-existing permanent impairment, benefits may be apportioned so that an employer/surety is only liable for the amount of impairment attributable to the occupational injury. Idaho Code § 72-406. In cases involving 100% disability with liability of the Industrial Special Indemnity Fund (ISIF), a pre-existing impairment must be a hindrance or obstacle to obtaining or retaining employment in order for the impairment to be apportioned. In cases involving less than 100% disability, the pre-existing impairment is not required to have caused a hindrance or obstacle to maintaining employment. Campbell v. Key Millwork and Cabinet Co., 116 Idaho 609, 614, 778 P.2d 731, 736 (1989).

43. Dr. Doerr and Dr. O’Brien utilized alternate methodologies identified in the 5<sup>th</sup> Edition of the Guides to the Evaluation of Permanent Impairment to calculate Claimant’s PPI.

Dr. Doerr assigned an 11% PPI using the range-of-motion (ROM) model. He combined PPI for restricted neck extension with specific disorders relating to surgical intervention.<sup>2</sup> Dr. O'Brien assigned a 25% PPI using the diagnosis-related (DRE) model. Dr. O'Brien applied Claimant's fact scenario to a sample application in the Guides and determined that Claimant met the criteria for DRE cervical category IV. Dr. O'Brien noted that the sample patient in the Guides had verifiable alteration of motion segment integrity. Neither Dr. O'Brien nor the other medical records demonstrate that Claimant had alteration of motion segment integrity as defined by the Guides. Dr. O'Brien based his opinion on the medical records as opposed to an evaluation of the Claimant. He considered Claimant's condition following the second surgery and Claimant's symptomology that is not causally related to the injury. The medical evidence is consistent with an 11% PPI and Claimant has failed to meet her burden of proof to establish a PPI in excess of 11%.

44. Dr. Doerr indicated that 50% of Claimant's PPI would be properly apportioned to pre-existing disease. Dr. O'Brien opined that Claimant's pre-existing degenerative changes would not justify apportionment. Other medical evidence establishes that Claimant received chiropractic treatment to her cervical spine over the course of several years but that she did not have diagnostic studies and/or recommendations for additional neck treatment until the work injury. The fact that Claimant had a fall which prompted chiropractic treatment to the cervical spine within six months of the work injury is sufficient to support a determination that 20% of Claimant's 11% PPI should be apportioned to pre-existing impairment.

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<sup>2</sup> It is clear from the text of Dr. Doerr's report that there is a typographical error in which he identified 5% PPI from Table 15-7 but that he actually assigned 10% from Table 15-7 to arrive at a whole person PPI of 11%.

## Permanent Disability

45. Factors to be considered when calculating a percentage of permanent disability include the nature of the physical disablement, disfigurement, cumulative effect of multiple injuries, claimant's age and ability of the claimant to compete in an open labor market within a reasonable geographical area. Idaho Code § 72-430. When determining permanent disability, any permanent impairment existing at the time of the disability evaluation, including pre-existing impairment, should be included in the evaluation and subject to apportionment relating to the pre-existing impairment. Horton v. Garrett Freightlines, 115 Idaho 912, 772 P.2d 119 (1989). The degree of permanent disability resulting from an industrial injury is a question of fact to be resolved by the IIC. Zapata v. J.R. Simplot Co., 132 Idaho 513, 516, 975 P.2d 1178, 1181 (1999). A claimant's return to his or her pre-injury occupation may support a determination that there is no disability in excess of impairment. Rivas v. K.C. Logging, 134 Idaho 603, 7 P. 3d 212 (2000).

46. At the time Claimant was assigned an 11% PPI, Claimant had returned to her pre-injury job for at least thirty days, without restrictions, and was earning a higher wage than she earned at the time of injury. Claimant's subsequent deterioration in condition and inability to work did not result from impairment that was present at the time Claimant reached maximum medical improvement from her industrial accident. Claimant failed to establish disability in excess of her 11% PPI.

## Attorney's Fees

47. Claimant seeks an award of attorney's fees pursuant to Idaho Code § 72-804 and asserts that Defendants had no reasonable basis to delay initial approval of benefits and/or to deny payment of benefits following Claimant's second surgery. Attorney's fees are not granted

to a claimant as a matter of right under worker's compensation law and may only be affirmatively awarded under circumstances set out in Idaho Code § 72-804 which describes the denial or delay of payment of benefits without a reasonable basis. Wutherich v. Terteling Co., 135 Idaho 593, 21 P.3d 915 (2001). The question of whether grounds exist for awarding a claimant attorney's fees is a question of fact for the IIC. Id.

48. Defendants' initial denial of benefits, pending an opinion from Dr. Doerr regarding causation, was reasonable based on the medical opinion of Dr. Chicoine. Defendants' subsequent denial of benefits following the second surgery was reasonable based on the multiple medical opinions that Claimant's need for surgery and subsequent deterioration in health was not causally related to the compensable injury. Claimant is not entitled to an award of attorney's fees.

#### Additional Issues Moot

49. Additional issues are moot based on the above findings of fact.

### **CONCLUSIONS OF LAW**

1. Claimant's neurological condition and need for cervical surgery of February 21, 2005, were not caused by the industrial accident;
2. Claimant's Impairment Rating is 11%;
3. Apportionment in the amount of 20% of Claimant's 11% Impairment Rating due to pre-existing condition is appropriate;
4. Claimant is entitled to unpaid permanent partial impairment benefits consistent with 20% apportionment;
5. Claimant is not entitled to additional medical benefits;
6. Claimant is not entitled to additional disability benefits; and

7. Claimant is not entitled to attorney's fees.

**RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this \_\_\_2\_\_\_ day of \_October\_\_\_\_\_ 2007.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_15 day of \_October\_ a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DEAN A MARTIN  
1471 SHORELINE DR STE 100  
BOISE ID 83702

MITCHELL R BARKER  
812 12<sup>th</sup> AVE SOUTH STE E  
NAMPA ID 83651

E SCOTT HARMON  
LAW OFFICES OF HARMON, WHITTIER & DAY  
P O BOX 6358  
BOISE ID 83707-6358

jc

\_\_\_\_\_/s/\_\_\_\_\_

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

PAULA DAVIS-NIEHOFF,	)	
	)	
Claimant,	)	<b>IC 2003-513778</b>
	)	
v.	)	
	)	
MICRON TECHNOLOGY, INC.,	)	
	)	
Employer,	)	<b>ORDER</b>
	)	
LIBERTY NORTHWEST INSURANCE	)	
CORPORATION,	)	
	)	
Surety,	)	10/15/07
	)	
Defendants.	)	
_____	)	

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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 recommendations of the Referee. The Commission concurs with these recommendations. 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's neurological condition and need for cervical surgery of February 21, 2005, were not caused by the industrial accident;
2. Claimant's Impairment Rating is 11%;
3. Apportionment in the amount of 20% of Claimant's 11% Impairment Rating due to pre-existing condition is appropriate;



**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_15\_ day of \_\_October\_\_\_\_\_, 2007, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

DEAN A MARTIN  
1471 SHORELINE DR STE 100  
BOISE ID 83702

MITCHELL R BARKER  
812 12<sup>th</sup> AVE SOUTH STE E  
NAMPA ID 83651

E SCOTT HARMON  
LAW OFFICES OF HARMON, WHITTIER & DAY  
P O BOX 6358  
BOISE ID 83707-6358

jkc

\_\_\_\_\_/s/\_\_\_\_\_