

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SANDRA K. JACKSON,)
)
 Claimant,)
)
 v.)
)
 MERWIN'S HARDWARE,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 2004-514538

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

10/18/07

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 Sandpoint, Idaho, on June 22, 2006. Joseph Jarzabek of Sandpoint represented Claimant. Paul J. Augustine of Boise represented Defendants. The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on May 31, 2007 and is now ready for decision. By order of the Commission, this case was re-assigned to the Commissioners due to the resignation of Referee Lora Rainey Breen.

ISSUES

By agreement of the parties at hearing, the issues to be decided are whether and to what extent Claimant is entitled to:

- (a.) permanent partial impairment (PPI); and
- (b.) disability in excess of impairment.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained a compensable injury to her right shoulder on June 30, 2004, for which Claimant underwent surgical intervention on October 27, 2004. Claimant returned to work with Employer and continues to perform her pre-injury job as an office administrator.

Claimant asserts that her injury resulted in permanent physical impairment which will limit her access to the job market in the geographical area surrounding Sandpoint, in the event she loses her current job with Employer. Specifically, Claimant has lifting limitations which would preclude work in the timber industry or a retail job requiring more than nominal lifting. Claimant maintains that she has experienced a reduction of 13% to 15% of job market access.

Defendants assert that the 3% PPI assigned by the treating doctor is correct and that Claimant does not have disability in excess of impairment. Defendants maintain that Claimant was released to return to work without restrictions and that Claimant's ability to perform job duties associated with bookkeeping is unchanged from her pre-injury abilities. Defendants contend that Claimant's vocational expert based his opinions on flawed assumptions.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant¹ and Ray Yaw;
2. Claimant's Exhibits 1 through 10;
3. Defendants' Exhibits A through F;

¹ Claimant's name changed from Sandra K. Jackson to Sandra K. Shirley due to marriage. Some records refer to Claimant as "Sandi."

4. The post-hearing deposition of Robert R. Cornell, M.S., taken on February 28, 2007; and

5. The post-hearing deposition of Richard Hunter taken on February 28, 2007.

FINDINGS OF FACT

1. Claimant was born on October 22, 1954, and was 51 years old at the time of the hearing. Claimant has a high-school education and previous work experience in the retail industry. She has worked for Employer since 1981. Employer is a True Value/Ace Hardware store located in downtown Sandpoint. Claimant resides in Athol, Idaho, which is between Coeur d'Alene and Sandpoint, approximately 22 miles from either city.

2. Claimant has worked in various capacities for Employer over the past 25 years including cashier, stocker, pricer, orderer, house wares manager and floor sales. Claimant has assembled products such as wheelbarrows and shelving units. Claimant assumed bookkeeping responsibilities as part of her job duties in the early 1990s and became a full time office administrator in mid-2004. As office administrator, Claimant balances the company's books, balances the registers, takes phone calls, organizes the office, prepares time cards, issues checks, handles accounts receivable and administers a customer loyalty program. Claimant utilizes a bookkeeping software program that is designed for hardware stores.

3. On June 30, 2004, Claimant lifted a 20 to 25 pound binder over-head to place it on a shelf when she experienced pain to her right shoulder. Initial treatment was sought with Donna Ford, P.A.C., who works at the office of Steven Puffer, M.D. Claimant was referred to John Faggard, M.D., for evaluation and treatment.

4. Diagnostic studies confirmed the existence of a right shoulder rotator cuff tear which was arthroscopically repaired by Dr. Faggard on October 27, 2004. Claimant's post

operative diagnosis was synovitis of the biceps tendon in the glenohumeral joint with a tear of the subscapularis and rotator cuff. Claimant underwent a course of post-surgical physical therapy from October 29, 2004, to February 25, 2005.

5. Dr. Faggard placed Claimant in an off-work status from October 19, 2004, through December 12, 2004. He released Claimant to modified duty work as of December 13, 2004, for four hours per day, with no right upper extremity lifting. Claimant was released to full duty work on March 2, 2005. No physician has provided an opinion regarding Claimant's ability to work since March of 2005.

6. Claimant's return to work with Employer was facilitated by the Industrial Commission Rehabilitation Division (ICRD). Claimant was able to return to part-time work on December 14, 2004, with assistance from co-workers as needed. Claimant returned to her pre-injury position, without restrictions, on January 17, 2005. The ICRD closed Claimant's case on February 28, 2005, at which time Claimant demonstrated the ability to return to her customary occupation and had been at her time of injury position for more than 30 days.

7. Dr. Faggard certified that Claimant's condition was fixed and stable as of March 2, 2005. He assigned 3% PPI as a whole person impairment rating in accordance with the Guides to the Evaluation of Permanent Impairment. Claimant's rating was based on range-of-motion deficits. No physician has assigned an alternate rating or challenged the rating assigned by Dr. Faggard.

8. Ray Yaw has been Claimant's supervisor for the past 24 years. He testified that Claimant is a quick learner with strong social skills. He explained that Claimant is able to use deductive reasoning to solve various accounting mysteries and that she does a good job fielding telephone calls. Claimant has been able to learn various upgrades to the inventory software and

teach other employees how to use the software that affects their jobs. Mr. Yaw estimates that 90% of Claimant's day is spent in the office with the other 10% on the floor handling customers' phone calls, getting cash for the registers and working with the cashiers. He testified that Claimant took on the role of a full-time office administrator prior to her injury. He confirmed that Claimant is a good employee and that he plans to keep her on "as long as she lives." (Tr. p.45).

9. Claimant testified that she has decreased strength in her right shoulder and that she has difficulty lifting more than ten pounds over-head. She believes that she could perform minimal secretarial work and could work as a cashier if she was only required to lift small items. Claimant feels that she could perform accounting work if she received additional software training. Claimant acknowledges that she has not missed out on opportunities with Employer, such as overtime, because of her injury but feels that her disability exceeds 3% because of strength deficits and inability to throw or reach behind herself with her right arm. (Exh. F, pp. 43-44).

10. Claimant was earning \$14.00 per hour at the time of her injury and was earning \$14.50 per hour at the time of the hearing.

11. Robert Cornell, M.S., is a vocational rehabilitation expert who is familiar with the labor market in the Coeur d'Alene/Sandpoint area. He opines that Claimant experienced loss of access to the job market in the amount of 13% to 15%. Mr. Cornell attributes the loss of access to lifting restrictions associated with Claimant's injury. Specifically, Claimant would not be able to perform retail work for Home Depot or Wal-Mart, the two major employers in Sandpoint, because of lifting requirements. He acknowledged that Claimant's work as a bookkeeper was unaffected by the shoulder injury.

12. Richard Hunter is the field consultant with the ICRD who was assigned to Claimant's case. He facilitated Claimant's return to work with Employer in the same position Claimant held prior to her injury. Mr. Hunter agrees with Mr. Cornell that the two major employers in the area are Home Depot and Wal-Mart, but disagrees that their cashier positions require heavy lifting.

DISCUSSION AND FURTHER FINDINGS

13. "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 Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 769 P.2d 1122 (1989). Although use of the American Medical Association's Guides to the Evaluation of Permanent Impairment are not required to be utilized in calculating PPI, Idaho courts have acknowledged that the Guides are a trustworthy and reliable authority on the issue of rating a disability. Hite v. Kulhenak Bldg. Contractor, 96 Idaho 70, 524 P.2d 531 (1974).

14. The 3% PPI rating assigned by Dr. Faggard was calculated in accordance with the Guides to the Evaluation of Permanent Impairment and is supported by the medical evidence.

15. 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. The degree of permanent disability resulting from an industrial injury is a question of fact to be resolved by the Commission. 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).

16. At the time of the hearing, Claimant had been performing her pre-injury job without restriction or limitation for a year and five months and was receiving a higher hourly rate than at the time of her injury. Claimant has multiple transferable skills which enhance her employability. Claimant's concerns about future employment are speculative. Claimant failed to establish the existence of disability in excess of her 3% PPI.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is not entitled to permanent partial impairment beyond 3% as previously assigned.
2. Claimant is not entitled to disability in excess of impairment.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this ___18_ day of _October_____ 2007.

INDUSTRIAL COMMISSION

/s/
James F. Kile, Chairman

R. D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of October a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon:

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jc

_____/s/_____