

4. Whether and to what extent Claimant is entitled to benefits for:
 - (a) temporary total or partial disability (TTD/TPD),
 - (b) permanent partial impairment (PPI),
 - (c) permanent disability in excess of impairment,
 - (d) retraining, and
 - (e) medical care.

The parties stipulated at hearing that issues about whether a compensable accident occurred and whether Claimant was totally and permanently disabled as an odd-lot worker were waived. However, in posthearing briefing, Claimant again raised the odd-lot worker issue. Further, in posthearing briefing, Claimant “reserved” argument on the issue of retraining if Claimant were not found totally and permanently disabled by the Commission.

CONTENTIONS OF THE PARTIES

Claimant contends she suffered a low back injury in a fall which occurred on February 8, 2001. She is entitled to continuing medical care and TTDs until she reaches medical stability. If found medically stable, she is entitled to PPI and permanent disability. She is either an odd-lot worker or entitled to retraining.

Defendants contend Claimant has been medically stable since the date of the second IME in August 2002. All benefits have been paid.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, her boyfriend Greg Rice, and Employer’s HR manager Debra Balmer;
2. Claimant’s Exhibits 1 – 31;
3. Defendants’ Exhibits 1 – 5; and
4. Post-hearing depositions of family practice physician Donald A. Baker, M.D., orthopedic surgeon Stephen R. Sears, M.D., and neurosurgeon Jeffrey McDonald, M.D.

At hearing, the Referee reserved ruling on Defendants' objection to the admission of Claimant's proposed Exhibits 32, 33, and 34. In posthearing briefing, Claimant withdrew proposed Exhibits 33 and 34. Proposed Exhibit 32 contains a clinic note from Dr. Baker dated January 25, 2007, an MRI report dated January 31, 2007, and a fax transmittal cover sheet relating to these two documents. Claimant filed a list of exhibits as required by J.R.P. 10. It did not identify the disputed Exhibits 32, 33, and 34, nor is there any support in the record that Dr. Baker was timely identified as a treating physician. Defendants' objection is SUSTAINED.

All objections raised in depositions are overruled, except Defendants' objection at page 15 of Dr. McDonald's deposition which is sustained. After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant worked for Employer. She slipped on ice and hurt her back. The accident date has been alternately alleged as February 5 or 8, 2001. Surety accepted liability for the accident.

2. Claimant sought medical treatment for a lacerated finger on February 7, 2001. There is no mention of a fall or back injury in that medical record.

3. One record which dates a visit on February 12, 2001 is an obvious error as this visit occurred on March 12. The first medical record pertaining to this accident is for outpatient treatment at Kootenai Medical Center on February 15, 2001. It recites a February 5 accident date. (The February 5 date would be repeated in medical records until after the Form 1 was filled out in October 2001. Because an electronic data summary of the Form 1 was

submitted by Surety and the record does not show the actual Form 1, all inferences relevant to the Form 1 shall be construed in Claimant's favor.)

4. After the February 15, 2001 visit, Claimant was released to return immediately to work with temporary restrictions. A full-duty release was anticipated for February 20.

5. Claimant began attending physical therapy sessions on February 21, 2001. She underwent three months of physical therapy.

6. Claimant sought additional treatment on March 5 and 12, 2001. Temporary work restrictions were again imposed and an MRI was ordered.

7. An MRI dated March 20, 2001, showed degenerative disease in Claimant's lumbar spine with a herniated L5-S1 disc. An L1 compression deformity was attributed to either old trauma or a congenital anomaly.

8. Jeffrey McDonald, M.D., performed a microdiscectomy on May 30, 2001.

9. On June 7, 2001, Dr. McDonald recorded that Claimant reported complete pain relief. She also reported persistent S1 numbness which Dr. McDonald expected to resolve over time.

10. By July 20, 2001, some pain had returned.

11. On August 3, 2001, Dr. McDonald expressed uncertainty about when Claimant might be able to return to work. On August 20, 2001, he noted Claimant was now complaining of right-sided symptoms in addition to the previously noted left-sided ones. A repeat MRI showed some inflammation, but no recurrent disc herniation. Dr. McDonald opined Claimant has residual scarring at the surgical site which is likely affecting her continued symptoms.

12. On September 27, 2001, Scott Magnuson, M.D., began treating Claimant for

pain management. He tried epidural steroid injections without much result.

13. On October 3, 2001, Stephen Sears, M.D., and J. Robert Clark, M.D., evaluated Claimant at Defendants' request. They opined she suffered a low back strain and L5-S1 disc herniation in the accident and that she was not yet stable. They opined she was able to return to light-duty work with temporary restrictions. They recommended she perform an exercise regimen at home.

14. On October 10, 2001, Dr. McDonald disagreed with portions of Dr. Sears' evaluation. He opined Claimant's restrictions should allow only lighter lifting, that she should be released to return only to work of very light duty, and that she should be treated for "possibly" another six months.

15. On January 10, 2002, Dr. McDonald reported Claimant had returned to full-duty work and had improved substantially. Although she was still somewhat symptomatic, he opined her care could be turned over entirely to Dr. Magnuson for pain management.

16. On February 28, 2002, Claimant reported gradual improvement with less frequent bouts of pain. Dr. Magnuson's nurse practitioner reported an examination positive for persistent left lower extremity radiculopathy.

17. On April 10, 2002, Dr. Magnuson opined Claimant was medically stable although she would have "ongoing pain management needs."

18. On May 30, 2002, Dr. McDonald opined Claimant was medically stable as of that date.

19. On August 6, 2002, Dr. Sears performed a repeat evaluation. He opined Claimant was medically stable. She had returned to full-time work. Dr. Sears opined Claimant suffered a preexisting low back condition which had been temporarily worsened by

the accident and that, after surgery and recovery, she had returned to her pre-accident baseline. He imposed permanent restrictions, but related these to the preexisting condition. He opined she suffered a seven percent PPI as a result of the accident out of a total 12 percent rated PPI.

20. On January 24, 2003, Claimant visited Dr. McDonald and described similar symptoms with the addition of symptoms in her left ankle. On March 24, 2003, July 19, 2004, and February 15, 2005, Claimant visited Dr. Magnuson. He continued to prescribe pain relievers.

21. The record contains no mention of additional medical care until she visited Donald Baker, M.D., on January 25, 2007, less than two weeks before the hearing.

22. **Prior Medical Care.** Claimant's medical records show a history of low back symptoms in 1993, 1996, 1998, and 2000. Diagnostic imaging confirmed degenerative disease in her lumbar spine. These symptoms arose after specific incidents and resolved without loss of work time.

23. **Non Medical Factors.** At the time of injury, Claimant was 39 years old. She attended high school into her junior year but did not graduate. She has not obtained a GED. She has worked at various occupations, including managing food service and housekeeping services. At the time of the accident, she built panels for office cubicles. She was still working this job when deposed in April 2006.

DISCUSSION AND FURTHER FINDINGS OF FACT

24. **Causation.** A claimant must prove she was injured as the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995).

A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). A preexisting condition does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the preexisting condition to produce the disability for which compensation is sought. An employer takes the employee as it finds her. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

25. Claimant is a credible witness. Her testimony and the medical records show she suffered a compensable low back injury. She has suffered persistent symptoms since. She requires appropriate medication for pain management.

26. Claimant's medical records show a degenerative lumbar spine condition which preexisted the accident and has progressed over the years. What was once only sporadically symptomatic has become steadily symptomatic.

27. Claimant's subsequent ankle condition and the ankle surgery which are mentioned but not directly documented in the record do not contradict the fact that the record shows Claimant suffers from scar tissue at the site of the herniated disc. The scar tissue aggravates the S1 nerve root and causes her persistent left-sided radiculopathy.

28. ***PPI, Disability, and Apportionment.*** Opinions about impairment are advisory only. Urry v. Walker & Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989). Dr. Sears' PPI rating and apportionment appears reasonable. Dr. McDonald does not evaluate for PPI ratings.

29. Dr. Baker first visited Claimant on one occasion, two weeks before the hearing and about five years after both Drs. McDonald and Sears had declared Claimant to be medically stable. Whether Dr. McDonald's May 2002 date, Dr. Sears' August 2002 date, or

Dr. Magnuson's April 2002 date is used as the date of medical stability, each is so remote in time from Dr. Baker's examination that his opinions are entitled to little weight. To the extent they differ from medical findings in the spring and summer of 2002, any findings from Dr. Baker's examination are likely attributable to the progression of Claimant's degenerative spine condition and not to the residual effects of the disc surgery.

30. Claimant returned to full-duty, full-time work a little over one year after the accident. She continued to work at that job from 2002 through the date of her deposition in 2006.

31. The record demonstrates Claimant is entitled to PPI rated at 7% of the whole person as a result of the accident, with any additional impairment attributable to her preexisting condition.

32. Both Drs. McDonald and Sears provided reasonable bases for their opinions regarding the extent of Claimant's restrictions and whether these should be attributable to the accident or to the preexisting condition. The record shows that restrictions were not imposed before the accident. Therefore, doctors' opinions about whatever restrictions might have or should have been imposed before they began treating or evaluating Claimant are somewhat speculative. Here, the record supports a finding that some of Claimant's restrictions are attributable to the degenerative condition and some to the surgery made necessary by the accident. Although Claimant returned to her old job, some accommodations were made regarding heavy lifting. Claimant showed she suffered some disability in excess of PPI. Claimant failed to show that she suffered a significant amount of permanent disability in excess of PPI attributable to the accident.

33. Considering all factors, both medical and non-medical, Claimant is entitled to a permanent disability rated at 15% of the whole person, inclusive of PPI, as a result of the accident.

34. The issue of odd-lot analysis was waived at hearing. However, even if it had not been waived, the facts show that Claimant was not an odd-lot worker. She was working full time at her old job and continued to do so for years afterward. Performing full-time work has a persuasive effect in overcoming a claim to total and permanent disability. There is no credible indication that Employer was a sympathetic employer.

35. **TTDs.** There is no allegation that Defendants failed to pay temporary disability benefits in 2001 and 2002. Claimant's TTD claim depended upon a finding that she was not yet stable from the accident. Claimant failed to show she is entitled to additional temporary disability benefits.

36. **Retraining.** Claimant's reservation of a claim for retraining benefits is unavailing. She failed to establish any basis for an award of retraining benefits. Moreover, she was working at her old job well after she was deemed medically stable. It is the progression of her degenerative condition and not the accident which affects her employability in 2007.

37. **Medical Care.** Claimant established she suffers residual radiculopathy from the accident and disc surgery. She is entitled to appropriate medication as prescribed. She failed to show that other future medical care, if offered, is probably related to the accident.

CONCLUSIONS OF LAW

1. Claimant suffered a low back injury requiring surgery as a result of the accident. She continues to suffer some symptoms of radiculopathy as a result. She also suffers some symptoms due to unrelated degenerative disease.

2. Claimant failed to show she is entitled to additional TTD benefits.
3. Claimant is entitled to a PPI award rated at 7% of the whole person and permanent disability rated at 15% of the whole person, inclusive of PPI as a result of the accident. Any other PPI or disability is not attributable to the accident.
4. Claimant failed to show she is entitled to retraining benefits.
5. Claimant is entitled to continuing medical care in the form of pain medication for pain management related to her radiculopathy. Claimant failed to show any other medical care would be related to the accident.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 19TH day of October, 2007.

INDUSTRIAL COMMISSION

ATTEST:

/S/ _____
Douglas A. Donohue, Referee

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9TH day of NOVEMBER, 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:

Harold B. Smith
P.O. Box 2083
Coeur d'Alene, ID 83816

David P. Gardner
P.O. Box 817
Pocatello, ID 83204-0817

db

/S/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SUSAN L. MORRIS,)
)
 Claimant,) **IC 2001-500902**
 v.)
)
 FLEXCEL, fka HARPERS, INC.,) **ORDER**
)
 Employer,)
 and)
)
 LIBERTY NORTHWEST,) FILED NOV 9 2007
)
 Surety,)
 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 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 suffered a low back injury requiring surgery as a result of the accident. She continues to suffer some symptoms of radiculopathy as a result. She also suffers some symptoms due to unrelated degenerative disease.
2. Claimant failed to show she is entitled to additional TTD benefits.
3. Claimant is entitled to a PPI award rated at 7% of the whole person and permanent disability rated at 15% of the whole person, inclusive of PPI as a result of the accident. Any other PPI or disability is not attributable to the accident.

4. Claimant failed to show she is entitled to retraining benefits.

5. Claimant is entitled to continuing medical care in the form of pain medication for pain management related to her radiculopathy. Claimant failed to show any other medical care would be related to the accident.

6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 9TH day of NOVEMBER, 2007.

INDUSTRIAL COMMISSION

/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 9TH day of NOVEMBER, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Harold B. Smith
P.O. Box 2083
Coeur d'Alene, ID 83816

David P. Gardner
P.O. Box 817
Pocatello, ID 83204-0817

db

/S/ _____

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