

- a. Medical;
- b. Permanent partial impairment (PPI); and
- c. Permanent partial disability (PPD).

CONTENTIONS OF THE PARTIES

Claimant contends that Surety should be liable for payment of various prescription drugs prescribed by her treating physician for chronic pain associated with her industrial cervical injury. She further contends that she should be entitled to the full amount of the PPI assigned to her by her treating physician, rather than the amount apportioned by Surety's designated examiner. Finally, she contends that she is entitled to between 35-40% PPD inclusive of her PPI, as opined by her vocational expert.

Defendants contend that "enough is enough" regarding Claimant's pain medications. Her treating physician is prescribing medications for conditions that are both industrially and non-industrially related. Surety should not be liable for ongoing medical care that is not related to Claimant's industrially-related cervical injury. Also, by Claimant's own admission, her pain medications are of little benefit to her. Finally, Defendants question whether Claimant's treating physician, a family practitioner, is duly qualified to assume the role of a pain specialist regarding the prescribing of pain and related medications. Defendants further assert that Claimant has a pre-existing degenerative condition that warrants apportionment regarding her PPI. Lastly, Defendants argue that Claimant is entitled to no PPD in excess of her PPI in that, despite her restrictions, she has secured more stable and lucrative employment than she had pre-injury.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. Claimant's Exhibits 32-44 admitted at the hearing.
3. Defendants' Exhibit A.

4. The post-hearing deposition of Douglas N. Crum, CDMS, taken by Claimant on March 16, 2007.

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.

Background:

The first hearing in this matter was held on August 6, 2003, on the sole issue of whether Claimant was entitled to past and future medical benefits. On March 8, 2004, the Commission issued its order awarding Claimant medical benefits for pain medications to address her chronic pain so long as those medications could be reasonably related to her accident and cervical injury. She was not entitled to a spinal cord stimulator. *Jaclyn2004, 2004 IIC 0195.*

FINDINGS OF FACT

1. Claimant was 46 years of age and resided in Jerome at the time of the second hearing. Claimant suffered a work-related accident resulting in cervical injuries in October 2001. On October 24, 2001, she underwent a cervical discectomy and fusion at C5-6 and C6-7 with allograft bone and plating. Claimant continues to complain of cervical pain.

2. Claimant received her LPN credentials from the College of Southern Idaho in 1991. Since that time, she has been employed in the nursing profession. At the time of her cervical injury, Claimant was employed as a staff nurse where she worked wherever needed. According to the I.C. Form 1, she was earning \$12.64 an hour. At times, Claimant would work two full-time nursing jobs simultaneously and at the time of her October 2001 accident, she was also working 36 hours a week at a care facility in Twin Falls at about \$11.00 an hour.

3. After her cervical injury, Claimant returned to Employer's hospital part-time and on light duty for about a month before she was able to get full-time employment at Twin Falls Care Center ("TFCC") at around \$11.00 an hour. At the time, Claimant was no longer physically or

mentally capable of working two full-time jobs, so she quit her job at TFCC and went to work for Shoshone Rehab and Living Center as a “desk nurse.” After a year or so, Claimant also assumed the duties of a high risk skin care nurse and monitored medical records. She earned \$16.50 an hour. In December 2006, Claimant transferred to a sister facility in Gooding as a high risk skin care nurse and handled physicians’ orders. She described her duties as 75% desk nurse. At the time of the hearing, Claimant was earning \$18.50 an hour for about 86 hours every two weeks.

DISCUSSION AND FURTHER FINDINGS

Pain medication:

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

4. Claimant has developed chronic pain issues as the result of her cervical injury and fusion. Her primary treating physician is a family practitioner and Defendants question whether he is within his standard of practice when he attempts to manage Claimant’s chronic pain. Defendants further question whether they should continue to be liable for the pain medications he prescribes. In the Order of March 8, 2004, “Defendants are liable for the payment of and/or reimbursement for medication prescribed to manage Claimant’s chronic pain so long as the need for such medications can be reasonably related to her industrial accidents and injuries.” March 8, 2004, Order, p. 2, paragraph 3.

5. Richard Sandison is a board-certified family practitioner and is Claimant’s treating physician. He has been assisting her with pain management issues and, in that process, has prescribed certain medications. Dr. Sandison testified by deposition that the following medications

are related to Claimant's cervical injury: Amitriptyline/Imipramine for acute neuropathic pain; Zanaflex, a muscle relaxant; Norco with Tylenol for pain; Ambien for sleep; Neurontin for pain; Duragesic patch for pain; Relpax for migraines exacerbated by neck pain; and Celebrex for pain.

6. Dr. Sandison testified that Claimant is on a "very complex regimen" that has resulted in only moderate pain control and he is reluctant to discontinue any of her medications. While Defendants argue that Dr. Sandison may be out of his area of practice by managing Claimant's pain, he testified that most of the medications in her regimen were originally prescribed by a pain management specialist. Further, Defendants offer no evidence that Dr. Sandison has prescribed medicines that are contraindicated or are unreasonable given Claimant's "complex situation," as described by Dr. Sandison. Finally, it is not uncommon for family practitioners to monitor and manage a patient's pain and to coordinate their medications with those prescribed by other practitioners.

7. While acknowledging that chronic pain and its management often results in a seemingly endless liability for pain medications, nonetheless, this Referee is unwilling to second guess Claimant's treating physician concerning pain management without good evidence to the contrary; such is not present here. Therefore, the Referee finds that Defendants continue to be liable for the payment of and/or reimbursement for medications prescribed for Claimant's chronic pain so long as the need for such medications can be reasonably related to her industrial accident and cervical injury.

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).

8. There have been two PPI ratings assigned in this matter; one by Michael T. Phillips, M.D., and one by Michael Schabacker, M.D. On May 10, 2002, utilizing the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition (*Guides*), Dr. Phillips, an orthopedic surgeon, assigned a 26% whole person rating with 13% apportioned to Claimant's pre-existing cervical degenerative disease. On March 30, 2002, utilizing the 4th Edition of the *Guides*, Dr. Schabacker, a physiatrist, assigned a 25% whole person rating with no apportionment.

9. The Referee finds that Dr. Phillips' rating is flawed regarding apportionment. First, there is no evidence that Claimant experienced any problems with her neck before 2001. Defendants argue that it makes no difference that Claimant was asymptomatic before her accidents. The Referee disagrees. Defendants cite Idaho Code § 72-406 and related case law in support of their position. However, that section concerns apportioning disability, not impairment. The apportioning of impairment is addressed in the *Guides*, 5th Edition:

1.6b Apportionment analysis

Apportionment analysis in workers' compensation represents a distribution or allocation of causation among multiple factors that caused or significantly contributed to the injury or disease and resulting impairment. The factor could be preexisting injury, illness, or impairment. In some instances, the physician may be asked to apportion or distribute a permanent impairment rating between the impact of the current injury and the prior impairment rating. Before determining apportionment, the physician needs to verify that all of the following information is true for an individual:

1. There is documentation of a prior factor.
2. The current permanent impairment is greater as a result of the prior factor (ie, prior impairment, prior injury, or illness).

3. There is evidence indicating the prior factor caused or contributed to the impairment, based on a reasonable probability (> 50% likelihood).

AMA *Guides*, Fifth Edition, p. 11.

Dr. Phillips failed to refer to this section and failed to provide any basis for his apportionment. Under his cursory analysis, he could have just as easily apportioned 30 or 35 or 70 or any other percentage to pre-existing conditions. Degeneration is a factor of aging. All workers are “degenerating.” However, it must be remembered that an employer takes the employee as found.

Wynn v. J.R. Simplot Company, 105 Idaho 102, 666 P.2d 629 (1983).

10. The Referee finds that Claimant has incurred whole person PPI of 25% of the whole person without apportionment. Defendants are to be given credit for any amount previously paid in PPI benefits.

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).

11. The only vocational expert to give an opinion in this matter is Douglas N. Crum, CDMS. Mr. Crum utilized the permanent physical restrictions assigned by Dr. Phillips in 2002: Claimant should avoid overhead work, no lifting over 20 pounds, no assembly line work, and no desk work where her cervical spine is flexed for more than an hour at a time. Mr. Crum opined that these restrictions place Claimant in the light work category. Mr. Crum also noted restrictions from Dr. Dille, a pain management specialist: limitations on lifting, pushing, pulling, reaching, and no lifting over 10 pounds. Mr. Crum opined that these restrictions place Claimant in the sedentary-to-light work category in terms of weight lifting. Claimant was released to work by Dr. Schabacker without restrictions.

12. When considering the restrictions imposed by Dr. Phillips and Claimant’s labor market, Mr. Crum testified that she has lost about 65% of her pre-injury labor market as a whole and about the same percentage of her pre-injury LPN labor market due primarily to her lifting restrictions. He opined that Claimant had a loss of wage earning capacity of 32 to 49%. His reasoning was as follows: Claimant earned \$37,000 the year before her injuries. At the time of Mr. Crum’s report (October 27, 2006), Claimant was earning \$16.50 an hour which did not result in

any wage loss. However, because at the time, Claimant was spending most of her working time as a billing clerk who normally makes between \$9.00 and \$12.00 an hour, she was overpaid. Therefore, when comparing that wage range to \$37,000 per year, there is a 32 to 49% loss.

13. When asked in his deposition if the fact that Claimant is currently earning \$18.50 an hour would change his opinion, Mr. Crum responded that Claimant was performing regular LPN work now and her rate of pay “. . . is probably what she’s worth in the job she’s doing.” Crum Deposition, p. 16. Even so, Mr. Crum concluded that Claimant has incurred a 35 to 40% whole person disability inclusive of her PPI based primarily on what she would face in terms of obtaining similar employment in the event she should lose her present employment.

14. Claimant has many years of experience in virtually all phases of nursing, including medical coding, and she is currently able to perform the job duties required of her. She was earning about \$6.00 an hour more at the time of the hearing than she was at the time of her industrial accident. While she was at one time able to work two full-time jobs, the Referee finds that her decision to discontinue that arrangement is not related to her industrial injury but more so to stress. She has incurred no wage loss. Her restrictions may prevent her from doing certain LPN duties such as heavy lifting, etc. However, with her experience and knowledge, Claimant should be able to easily find work within her restrictions. The Referee finds that, based on the statutory factors and the opinions of Mr. Crum, Claimant has incurred whole person PPD of 30% inclusive of her 25% PPI.

CONCLUSIONS OF LAW

1. Claimant is entitled to payment of and/reimbursement for pain medications prescribed to treat her chronic pain so long as the need for such medications can be reasonably related to her cervical injury.

2. Claimant is entitled to whole person PPI of 25% without apportionment to pre-

existing conditions.

3. Claimant is entitled to whole person PPD of 30% inclusive of her PPI.

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 __5th__ day of __December____, 2007.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __18th__ day of __December____, 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:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

_____/s/_____
ge

DENNIS R PETERSEN

PO BOX 1645

IDAHO FALLS ID 83403-1645

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PO BOX 829
BOISE ID 83701-0829

3. Claimant is entitled to whole person permanent partial disability of 30% inclusive of her permanent partial impairment.

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

DATED this __18th__ day of __December__, 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 the __18th__ day of __December__, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

____/s/_____

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