

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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| JUDY BROWNING, |) | |
| |) | |
| Claimant, |) | IC 2003-002216 |
| |) | |
| v. |) | |
| |) | |
| COEUR D'ALENE PRESS, |) | |
| |) | |
| Employer, |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, |
| and |) | AND ORDER |
| |) | |
| ROYAL INDEMNITY COMPANY, |) | |
| |) | |
| Surety, |) | filed May 28, 2008 |
| |) | |
| and |) | |
| |) | |
| STATE OF IDAHO, INDUSTRIAL |) | |
| SPECIAL INDEMNITY FUND, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan R. Taylor. The matter was then reassigned to the Commissioners who conducted a hearing in Coeur d'Alene, Idaho on August 21, 2007. Claimant was present and represented by Bradley J. Stoddard of Coeur d'Alene. Eric S. Bailey, of Boise, represented Employer/Surety. Thomas W. Callery, of Lewiston, represented the State of Idaho, Industrial Special Indemnity Fund (ISIF). Oral and documentary evidence was presented. The record remained open for post-hearing depositions. The parties submitted post-hearing briefs and this matter came under advisement on January 29, 2008.

ISSUES

The issues to be decided, as modified and agreed upon at hearing, are:

1. Whether, and to what extent, Claimant is entitled to permanent partial impairment (PPI);
2. Whether, and to what extent, Claimant has incurred whole person permanent partial disability (PPD) in excess of PPI;
3. Whether Claimant is totally and permanently disabled;
4. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine;
5. Whether apportionment under Idaho Code § 72-406 is appropriate;
6. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332; and,
7. Apportionment under the Carey formula.

CONTENTIONS OF THE PARTIES

The parties do not dispute that Claimant was employed by Coeur d'Alene Press on December 5, 2002, when she suffered an industrial accident and injury lifting a 50 pound box of copy paper.

Claimant contends that she attempted to return to work after her 2002 industrial accident but her neck pain progressed until Dr. Dirks took her off work completely. Claimant alleges that the evidence supports a finding that she is 100% disabled or totally and permanently disabled pursuant to the odd-lot doctrine. Claimant states that due to her pre-existing impairment Employer/Surety is liable for 35% of Claimant's total and permanent disability benefits and ISIF

is liable for the remaining 65%. Claimant further contends that she should be determined to be totally and permanently disabled as of September 16, 2004, when Dr. Dirks took her off work.

Defendants Employer/Surety contend that if Claimant is not totally and permanently disabled, they are responsible for no additional disability beyond the PPI benefits they have already paid. If Claimant is found to be totally and permanently disabled, Employer/Surety counter that because of Claimant's pre-existing impairment they are responsible for 35% of her total and permanent disability benefits and ISIF is reasonable for the remaining 65%. Employer/Surety also counter that Claimant should be deemed totally and permanently disabled as of December 21, 2005, when Dr. Dunteman found Claimant's right shoulder stable.

Defendant ISIF argues that Claimant is not totally and permanently disabled because Nancy Collins, a vocational consultant, testified that Claimant could remain at her time of injury job per the recommendations of Mark Bengston's functional capacity evaluation. Alternatively, if Claimant is found to be totally and permanently disabled, because of Claimant's pre-existing impairment Employer/Surety is responsible for 57% of her total and permanent disability benefits and ISIF is reasonable for the remaining 43%. ISIF agrees with Employer/Surety that Claimant should be deemed totally and permanently disabled as of December 21, 2005.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and vocational consultant Nancy J. Collins taken at the hearing.
2. Claimant's Exhibits A-AA admitted at the hearing.
3. Defendants' Joint Exhibits 1-33 admitted at the hearing.

4. The post-hearing depositions of Douglas Crum taken by Employer/Surety on October 3, 2007, and Mark Bengston taken by ISIF on October 3, 2007.

The objection made on page 49 of Douglas Crum's deposition is sustained. All objections made during the deposition of Mark Bengston are overruled.

After having considered all the above evidence and the arguments of the parties, the Commission hereby issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Claimant's Employment History

1. Claimant was 68 years of age and resided in Hayden, Idaho at the time of the hearing. She graduated from high school in Wenatchee, Washington. Claimant worked as a bookkeeper/receptionist at the Rocky Reach Dam and Wells Dam on the Columbia River for approximately eight years. She also worked for an apple packing shed, and she and her husband ran a lunch time restaurant for about five years.

2. In the mid 1970's Claimant began working for Employer as a single copy manager, delivering newspapers to racks and store accounts in Hayden. Claimant suffered several industrial accidents through the years but continued her employment with the Coeur d'Alene Press in various capacities. In 1991, after a lifting accident, Claimant continued working as a single copy manager but required assistance when she was needed to lift newspaper racks. In 1994, after being involved in an accident with a logging truck, Claimant could not lift with her right shoulder and moved to an office job.

3. In December 2002, Claimant worked as an office manager for Employer. Claimant no longer lifted newspaper racks but did occasionally lift bundles of newspapers and other items. Claimant supervised seven other office workers. Claimant's job was computer

based and consisted of monitoring other office workers, logging subscriber phone calls, and a variety of other general office tasks.

4. Claimant was injured on December 5, 2002 lifting a 50 pound box of copy paper, the medical details of which are discussed below. When allowed by her treating doctor, Claimant returned to work as an office manager for four hours per day. Later Claimant worked two hours per day for three or four months, then not at all. Tr., p. 60. Claimant ended her employment with Employer on September 16, 2004, and has not worked since that date.

Prior Injuries

Lifting a newspaper rack - 1991

5. On August 29, 1991, Claimant twisted her back when lifting a newspaper rack into the back of her car. Tr, p. 76. She experienced back pain which traveled down into her right leg. Claimant's Ex. O. An MRI showed minor changes at L4-5 and a large right paramedian disc protrusion at L5-S1. Ernest C. Fokes, Jr., M.D., performed a laminectomy and discectomy at L5-S1 on January 8, 1992. Dr. Fokes released Claimant to full duty work with no restrictions. Claimant was given a 10% PPI rating by James Y. Lea, M.D., based upon the surgically treated disc and persisting symptoms. Since then she has had pain down her right leg and right foot numbness. Claimant continued working with additional help when she needed to lift a newspaper rack. Tr., p. 77.

Logging truck – 1994

6. On July 11, 1994, Claimant was involved in a motor vehicle accident when a logging truck shifted into reverse gear and backed into Claimant's stopped vehicle. Claimant suffered injury to her right shoulder and cervical spine.

7. An MRI was performed on August 4, 1994, and showed degenerative disc space narrowing at C5-6 and C6-7. In September 1994, Dr. Dirks released Claimant to work but restricted her to lifting no more than 25 pounds due to her cervical strain. Dr. Lea diagnosed Claimant with cervical strain and a flare-up of her radicular symptoms in the right leg. Claimant's Ex. O.

8. Claimant continued to have right shoulder pain. Dr. Pike performed surgery, finding an incomplete tear of the rotator cuff with impingement on Claimant's right shoulder, on November 22, 1996. Claimant's Ex. V. Claimant attended physical therapy. Claimant was given a 9% upper extremity PPI rating, equaling 5% whole person PPI for the right shoulder.

9. Claimant testified that she could not reach up and lift supplies out of the supply room, and she could not help move bundles of newspapers. Claimant no longer vacuumed or carried laundry up and down the stairs. Tr., p. 79.

10. The 1994 accident was settled by a lump sum settlement agreement. The agreement did not give an impairment rating for Claimant's cervical spine problems, but it did note that Claimant was restricted to lifting 25 pounds. Joint Ex. 28.

1995 - Carpal tunnel

11. Claimant has undergone carpal tunnel surgery and a trigger thumb release procedure. Claimant testified that she returned to work after both procedures and has had no additional work related problems from those conditions. Tr., pp. 71-2.

2002 Accident and Injury

12. On December 5, 2002, Claimant suffered an industrial accident and injury when she lifted a 50 pound box of copy paper. Claimant reported the accident and sought medical treatment at North Idaho Immediate Care Center for pain in her neck and left shoulder.

13. Claimant received some physical therapy for her left shoulder but ultimately an MRI on March 12, 2003 revealed a rotator cuff tear. Claimant was referred to orthopedic surgeon, Roger C. Dunteman, M.D., who performed surgery on Claimant's left shoulder on April 17, 2003. The surgery consisted of arthroscopic assisted rotator cuff tendon repair, subacromial decompression, debridement, diagnostic bursoscopy, and diagnostic arthroscopy.

14. In November 2003, Claimant was referred to Bret A. Dirks, M.D., to further assess her significant pathology at C3-4, C4-5, C5-6, and C6-7, revealed on a November 17, 2003 MRI. Claimant's Ex. X. Dr. Dirks examined Claimant on December 4, 2003 and found cervical spondylosis with left neck pain and carpal tunnel syndrome. Additionally, Dr. Dirks ordered EMG/nerve conduction studies to rule out carpal tunnel syndrome of her left hand and a CT myelogram to determine if there is any further compression onto the neural elements. Claimant's Ex. R.

15. On February 5, 2004, Dr. Dirks noted the CT myelogram revealed nerve root cutoff particularly at C3-4 on the left and at C6-7 on the left. After a discussion with Claimant, Dr. Dirks ordered physical therapy in an attempt to avoid surgery. Dr. Dirks kept Claimant off work, as it seemed to aggravate her neck.

16. Claimant returned to work as an office manager for 4 hours per day. The work caused increased pain. On February 9, 2004, Dr. Dirks released Claimant to work 2 hours per day only answering phones. On April 27, 2004, Dr. Dirks released Claimant to light duty work for 2 hours per day. At the end of a 2 hour work day, Claimant testified she had pain in her neck which radiated into her left shoulder. Tr., p. 67.

17. On September 16, 2004, Dr. Dirks took Claimant off work entirely with no return date. He stated that Claimant is causing herself more harm than good by continuing to work.

Dr. Dirks recommended that Claimant discontinue work so she can avoid cervical surgery. Claimant's Ex. R.

18. On December 21, 2005, Dr. Dunteman opined an 8% upper extremity PPI rating (5% whole person PPI) for the left shoulder. Dr. Dunteman assessed permanent restrictions of no repetitive activity at or above shoulder level and no lifting more than 5-10 pounds on a repetitive basis. Claimant's Ex. X.

Functional Capacity Evaluation

Mark Bengston

19. Mr. Bengston was deposed on October 3, 2007, on behalf of ISIF. Mr. Bengston is a licensed physical therapist who holds a master's degree in physical therapy. He has been practicing since 1998 and has been performing functional capacity evaluations (FCE) for six or seven years. Mark Bengston's Depo., p. 6.

20. Mr. Bengston performed a two day FCE on Claimant in October 2004. Mr. Bengston did not review Claimant's medical records, but he did have the approval of Claimant's treating doctor, Dr. Dirks, before performing the FCE. The FCE consisted of a subjective discussion where Claimant identified her medical history and symptomatic issues, a physical examination, and a final assessment of the physical abilities and limitations that Claimant possesses.

21. In his report, Mr. Bengston ultimately found that Claimant qualified for full time work in the sedentary work level with the following recommendations: 1) eight weeks of rehabilitation focused on scapular stabilization; 2) education in work behavior modifications; 3) ergonomic work station modification; and, 4) a change of activity from computer work at least every 30 minutes. Mr. Bengston also noted that Claimant gave maximal effort on all test items.

22. Dr. Dirks, Claimant's treating doctor for her cervical condition, opined that the rehabilitation program would not allow Claimant to get back to a sedentary position and that it would put additional stress on Claimant's neck requiring surgery. At Dr. Dirks recommendation, Claimant did not participate in the program.

Independent Medical Evaluations

Drs. Powell and Bozarth

23. Bruce D. Powell, M.D., and William R. Bozarth, M.D., performed an IME on December 12, 1995, following Claimant's accident with the logging truck. They opined that Claimant's industrially related conditions of cervical strain, low back strain, excision of the disc, and the right carpal tunnel syndrome are all related. They agreed with the 10% PPI rating related to the 1991 lumbar injury but found no impairment for her cervical condition related to the logging truck accident. Drs. Powell and Bozarth restricted Claimant from lifting over 50 pounds, repetitive bending, stooping, and twisting motions. A 5% upper extremity PPI rating was also given due to Claimant's right carpal tunnel syndrome and release. Claimant's Ex. T.

Dr. Gerber

24. On May 13, 2004, Henry W. Gerber, M.D., an orthopedic surgeon, performed an IME at Surety's request. Dr. Gerber found that Claimant was not stable and opined that it was reasonable to continue to limit her to 2 hours of work per day while she received further physical therapy.

25. Claimant was seen again by Dr. Gerber on September 13, 2004. Dr. Gerber deferred to Dr. Dirks regarding whether Claimant was a surgical candidate, but found that if Claimant was not a surgical candidate then she was MMI. With that scenario, Dr. Gerber rated Claimant at 15% whole person PPI for cervical injuries sustained in the December 5, 2002

industrial accident. Dr. Gerber further stated that he was not in a position to say if Claimant can work a full 8 hour day. Claimant's Ex. Y.

26. In a letter drafted on November 17, 2004, Dr. Gerber stated that he has reviewed the FCE as well as Dr. Dirks' note recommending Claimant not follow the FCE. Dr. Gerber stated that he has no reason to disagree with the FCE, specifically that if Claimant completes a course of physical therapy she would be able to perform sedentary work 40 hours per week. Joint Ex. 19.

27. On August 25, 2005, Dr. Gerber again reviewed his IME report with additional records and modified the report to find that 50% of Claimant's previously rated 15% cervical PPI should be apportioned to pre-existing conditions and 50% to Claimant's December 5, 2002 industrial accident. Thus, Dr. Gerber's final cervical impairment rating is 7.5% pre-existing and 7.5% to the 2002 industrial accident.

Dr. Phillips

28. Michael T. Phillips, M.D., performed an IME which generated a report on May 8, 2005, at the request of Employer/Surety. Joint Ex. 15. Dr. Phillips examined Claimant and stated somewhat conflicting conclusions. He agreed with the FCE (which stated that Claimant could return to full time sedentary work with rehabilitation and accommodations) and further found that Claimant could not return to her pre-injury employment as office manager. Dr. Phillips stated that Claimant would have difficulty with prolonged sitting at a desk and manipulating office equipment for more than 15 minutes at a time. He noted that Claimant was not successful in attempting part time employment and found that her limitations would preclude most sedentary work activity.

29. On May 17, 2005, after receiving additional medical records, Dr. Phillips revised his previous report and opined that Claimant's neck pain was not related to 2002 industrial accident. Dr. Phillips now stated that Claimant could perform sedentary work on a full time basis, but she would have difficulty with operating office equipment for extended periods of time.

30. On July 5, 2005, Dr. Phillips opined 5-8% whole person PPI rating for Claimant's cervical spine, pre-existing the December 5, 2002 industrial accident. He stated that Claimant could return to the level of work activity she was performing prior to December 2002.

31. On March 7, 2006, Dr. Phillips agreed with Dr. Dunteman's 8% upper extremity PPI rating for Claimant's left shoulder.

Vocational Evidence

Nancy Collins

32. Nancy Collins, Ph.D., testified in her capacity as a vocational rehabilitation counselor at the hearing on August 21, 2007, on behalf of ISIF. Dr. Collins holds a bachelor's degree in psychology, a master's degree in counseling, and a Ph.D. in adult education with a cognate in vocational rehabilitation. Dr. Collins has been involved with vocational issues in Idaho for close to 20 years and has worked on many workers' compensation cases.

33. Dr. Collins prepared a report on June 13, 2007. Joint Ex. 29. Before preparing the report, Dr. Collins interviewed Claimant, reviewed Claimant's medical records, Claimant's deposition transcript, and other records as set forth in the report. Dr. Collins found that if she followed the physical restrictions and the FCE, then Claimant could return to time of injury job and sustain no loss of earning capacity. Dr. Collins alternatively stated that if she followed Claimant's subjective complaints and Dr. Dirks' recommendations, then "there are likely not

jobs available that would be more physically consistent or available for someone at her age.”

Claimant’s Ex. I.

Douglas Crum

34. Douglas Crum was deposed on October 3, 2007, on behalf of Employer/Surety. Mr. Crum holds a bachelor’s of Science in Business and is a Certified Disability Management Specialist. He worked for the Industrial Commission as a vocational rehabilitation consultant for seven years.

35. Mr. Crum prepared a report on August 6, 2007. He did not interview Claimant but he sat in on Claimant’s deposition. Mr. Crum reviewed Claimant’s medical records, her FCE, Dr. Collins’ assessment, and other records as set forth in his report. Claimant’s Ex. J. Mr. Crum stated that prior to the 2002 injury, Claimant was at best a sedentary worker and could perform that work only with accommodation. Mr. Crum concluded that Claimant is totally disabled as a result of her pre-existing conditions and the 2002 injury. During his deposition Mr. Crum stated that, if he followed the FCE performed by Mr. Bengston and if Claimant successfully completed an eight week rehabilitation program, she could have returned to her time of injury position with a temporary reduction in wage earning capacity. Douglas Crum’s Depo., p. 22.

DISCUSSION AND FURTHER FINDINGS

PPI Benefits

36. “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).

37. There is no disagreement that Claimant has suffered pre-existing PPI as well as PPI associated with the 2002 industrial accident. In fact, the parties are in agreement as to the bulk of PPI ratings. They agree that Claimant incurred pre-existing whole person impairment of 10% for the lumbar spine and 5% for the right shoulder. The parties further agree that Claimant incurred 5% whole person impairment for the left shoulder relating to the December 5, 2002 industrial accident.

38. The only significant impairment rating in question is for the cervical spine. Claimant and Employer/Surety assert that 50% of the cervical PPI rating (7.5%) should be apportioned to the 2002 accident and the other 50% (7.5%) is pre-existing. ISIF argues that the entire 15% PPI rating given to the cervical spine should be allocated to the 2002 accident. The specific issue is whether Claimant had cervical impairment before her 2002 industrial accident.

39. In 1995, Drs. Powell and Bozarth found no impairment for her cervical condition related to the logging truck accident, which is the preexisting injury in question with regard to the cervical impairment. Claimant then entered into a lump sum settlement agreement which did not give an impairment rating for the cervical spine but does discuss her cervical spine treatment and 25 pound lifting restriction given by Dr. Dirks.

40. In 2004, Dr. Gerber first rated Claimant at 15% whole person PPI for cervical injuries sustained in the December 5, 2002 industrial accident. On August 25, 2005, Dr. Gerber reviewed his IME report and modified it to find that 50% of Claimant's previously rated 15% cervical PPI should be apportioned to pre-existing conditions and 50% to Claimant's December 5, 2002 industrial accident. Thus, Dr. Gerber's final cervical impairment rating is 7.5% pre-existing and 7.5% to the 2002 industrial accident.

41. On July 5, 2005, Dr. Phillips opined 5-8% whole person PPI rating for Claimant's cervical spine, pre-existing the December 5, 2002 industrial accident.

42. While Dr. Gerber's change in impairment ratings is questionable, the Commission finds that his final rating is further supported by Dr. Phillips' rating, Claimant's 25 pound lifting restriction given by her treating doctor in 1994, and the fact that Claimant continued to have problems with her cervical spine after the 1995 IME finding of no cervical impairment. Claimant saw Dr. Dirks in January 1996 for pain down the base of her neck and into her right shoulder, after Drs. Powell and Bozarth found no cervical impairment. Claimant's Ex. R.

43. The Commission finds the final rating, given by Dr. Gerber and supported by Dr. Phillips, persuasive evidence that Claimant suffered cervical impairment which pre-existed her December 5, 2002 industrial accident. Claimant incurred a 7.5% whole person PPI rating for her cervical spine prior to the 2002 accident.

PPD Benefits

44. "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.

45. 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).

46. Claimant was 68 years of age at the time of the hearing. She is a high school graduate who has some computer training. She has worked as a bookkeeper and receptionist, as well as a single copy manager and then office manager for Employer.

47. As stated by all parties in briefing, this case rests upon the choice between the full work restriction given by Dr. Dirks and the FCE performed by Mr. Bengston finding that Claimant could return to her time of injury job.

48. Mr. Bengston, a physical therapist, performed a two day examination of Claimant. He questioned Claimant about her medical history but did not review her medical records. He ultimately found that with additional rehabilitation and work site modifications, Claimant could return to sedentary work. But it is important to note that in his capacity as a physical therapist, Mr. Bengston stated that he would defer any recommendations in treating Claimant's cervical spine to Dr. Dirks, including any treatment recommended by Mr. Bengston. Mark Bengston's Depo., pp. 47-8.

49. Dr. Gerber's November 17, 2004 letter states that he concurs with the FCE, specifically that Claimant would be able to perform sedentary work 40 hours per week if she completes a course of physical therapy. Yet when Dr. Gerber first assessed Claimant's cervical PPI, he stated that he was not in a position to say if Claimant can work a full 8 hour day. Dr. Phillips examined Claimant and stated somewhat conflicting conclusions. He agreed with the FCE but further found that Claimant could not return to her pre-injury employment as office manager. Dr. Phillips stated that Claimant would have difficulty with prolonged sitting at a desk and manipulating office equipment for more than 15 minutes at a time. He noted that Claimant was not successful in attempting part time employment and found that her limitations would preclude most sedentary work activity.

50. The opinions of Drs. Gerber and Phillips do not lend great support to the FCE completed by Mr. Bengston. They are mildly supportive, but with additional conflicting statements that work against the conclusions in the FCE.

51. Dr. Dirks has been treating Claimant since 1994. He is well aware of her condition and shows a great deal of understanding for Claimant's overall situation. Given her condition, he has recommended that she stop work entirely so she will not be pushed into cervical surgery. This is a serious restriction, but it was given only after attempts at working 4 hours per day and then 2 hours per day in a modified sedentary position. Claimant has given her full effort in physical therapy and yet was still unable to return to work at a sedentary job with an employer who was willing to make accommodations for her.

52. Both vocational rehabilitation experts found that if Claimant followed her physical restrictions and the recommendation of Dr. Dirks, she would be unemployable. The Commission is persuaded by Dr. Dirks' recommendation as well as the fact that Claimant attempted to return to her time of injury job without success. Claimant's time of injury job was sedentary, allowed her to change positions as needed, yet Claimant was unable to return even when she attempted a work schedule of two hours per day.

53. At hearing Claimant presented herself with great composure and confidence. The medical providers, IME doctors and vocational experts agree that Claimant put forth her full effort in her medical recovery as well as her attempt to return to work. Yet even with an accommodating employer and 27 years of experience in the business, Claimant was unable to successfully work for two hours per day in her time of injury position. These facts support the fact that Claimant cannot return to work.

54. The Commission finds that when considering Claimant's labor market, age, work history, physical restrictions, work restriction given by Dr. Dirks, and unsuccessful attempt at returning to work for an accommodating employer, she has incurred whole person PPD of 100%.

Date of Total and Permanent Disability

55. The parties also dispute the date Claimant became totally and permanently disabled. Claimant argues that she became totally disabled on September 16, 2004 when Dr. Dirks restricted her from any work. Employer/Surety and ISIF allege that Claimant became totally disabled on December 21, 2005 when Dr. Dunteman, the treating doctor for Claimant's left shoulder, opined that Claimant was stable and assessed an impairment rating.

56. Claimant injured both her cervical spine and left shoulder in the December 5, 2002 industrial accident. Her final stability date came from Dr. Dunteman on December 21, 2005. Claimant did receive additional physical therapy and medical care in 2005 for her left shoulder. The Commission finds Claimant became totally and permanently disabled as of December 21, 2005, when Dr. Dunteman found her stable.

Apportionment and Odd-Lot Status

57. Because Claimant is found to be 100% disabled, the issues of apportionment pursuant to Idaho Code § 72-406 and odd-lot status are moot.

ISIF Liability

58. Idaho Code § 72-332(1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his or her employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his or her income benefits out of the ISIF account.

59. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the

Idaho Supreme Court listed four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332:

- (1) Whether there was indeed a pre-existing impairment;
- (2) Whether that impairment was manifest;
- (3) Whether the alleged impairment was a subjective hindrance to employment; and,
- (4) Whether the alleged impairment in any way combines with the subsequent injury to cause total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

60. In the present case, ISIF concedes the first three prongs of the Dumaw test.

61. To satisfy the “combines” element, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. This test “encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment.” Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

62. ISIF relies on the basic argument that Claimant can return to her pre-injury position and thus the 2002 injury did not change Claimant’s work status. As previously stated, the Commission finds the opinion of Dr. Dirks, finding that Claimant could not work, persuasive. Claimant was employed in a full time sedentary position prior to the 2002 accident. After treatment and recovery from the 2002 injuries, Claimant was unable to return to even the sedentary position with an accommodating employer. Claimant’s previous lumbar spine, cervical spine, and right shoulder impairment combined with her additional cervical and left shoulder impairments cause total disability.

63. There is persuasive evidence that Claimant's 2002 accident combined with her pre-existing impairment to result in total permanent disability. The final prong of the Dumaw test has been satisfied. The Commission concludes that Claimant has proven ISIF's liability under Idaho Code § 72-332.

Carey Apportionment

64. The Idaho Supreme Court has adopted a formula dividing liability between ISIF and the employer/surety at the time of the industrial accident in question. The formula provides for the apportionment of non-medical factors by determining the proportion of the non-medical portion of disability between ISIF and the employer/surety by the proportion which the pre-existing physical impairment bears to the additional impairment resulting from the industrial accident. Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984). Conditions arising after the injury, but prior to a disability determination, which are not work-related, are not the obligation of ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

65. As stated in the impairment discussion, the applicable impairment ratings are as follows.

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|-------------------------|-----------------------|-----------|
| Pre-existing impairment | Cervical spine | 7.5% |
| | Lumbar spine | 10% |
| | <u>Right shoulder</u> | <u>5%</u> |
| | Total pre-existing | 22.5% |
| 2002 impairments | Cervical spine | 7.5% |
| | <u>Left shoulder</u> | <u>5%</u> |
| | Total 2002 | 12.5% |

66. In this case, Claimant's total disability due to medical factors is 35%. Of that amount, 22.5% was pre-existing and 12.5% was due to her 2002 accident. Claimant is 100% disabled, so an additional 65% of nonmedical factors must be apportioned between

Employer/Surety and ISIF. ISIF is liable for 22.5/35 or 64% of the nonmedical disability and Employer/Surety is liable for 12.5/35 or 36% of the nonmedical disability.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven she suffers permanent partial impairment of 35% of the whole person, including 22.5% due to her 2002 industrial accident and 12.5% due to her pre-existing impairment.

2. Claimant has proven she is 100% disabled. Claimant became totally and permanently disabled as of December 21, 2005.

3. Apportionment pursuant to Idaho Code § 72-406 and the issue of odd-lot status are not appropriate.

4. Defendant ISIF is liable to Claimant under Idaho Code § 72-332.

5. Apportionment under the formula set forth in Carey, is appropriate as follows: ISIF is liable for 64% of the nonmedical disability and Employer/Surety is liable for 36% of the nonmedical disability. ISIF is responsible for payment of full statutory benefits commencing 180 weeks after December 21, 2005, the date Claimant was medically stable.

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

DATED this 28th day of May, 2008.

INDUSTRIAL COMMISSION

Dissent without comment
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 _28th day of ____May____, 2008, a true and correct copy of the **FINDINGS, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon each of the following:

BRADLEY J. STODDARD
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sb/cjh

_____/s/_____