

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LELIA M. SOLOM,)
)
 Claimant,) **IC 2003-522322**
 v.)
)
 PEET SHOE DRYER, INC.,) **FINDINGS OF FACT,**
) **CONCLUSIONS OF LAW,**
 Employer,) **AND RECOMMENDATION**
 and)
)
 IDAHO STATE INSURANCE FUND,) **FILED MAY 23 2008**
)
 Surety,)
 Defendants.)
 _____)

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Lewiston on January 24, 2008. Charles Graham represented Claimant. Wynn Mosman represented Defendants. The parties presented oral and documentary evidence. They took a posthearing deposition and submitted briefs. The case came under advisement on April 19, 2007. It is now ready for decision.

ISSUES

As stated in the Notice of Hearing, the issues to be resolved are as follows:

1. Whether and to what extent Claimant is entitled to the following benefits:
 - a) Disability (PPD) in excess of impairment (PPI); and
 - b) Attorney fees; and
2. Whether and to what extent Claimant is entitled to medical care for a pain management program.

RECOMMENDATION - 1

CONTENTIONS OF THE PARTIES

Claimant contends she injured her shoulder at work. She is now significantly disabled. She needs a pain management program for her residual chronic pain. Surety unreasonably denied this claim, then unreasonably delayed payments after accepting it.

Defendants contend Claimant's permanent disability related to the accident, based upon objective factors, is small. There is no objective basis for the ten-pound lifting restriction imposed by one doctor. Other doctors have not imposed such a restriction. Defendants have acted reasonably based upon medical opinions at all times.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant;
2. Claimant's Exhibits A – R;
3. Defendants' Exhibits 1 – 14; and
4. Posthearing deposition of vocational expert Debra Uhlenkott.

All objections raised in the deposition are overruled. 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 at various stations of Employer's assembly line, rotating throughout each day from one station to another. She began experiencing wrist and hand pain. She notified Employer and sought medical treatment. On October 27, 2003, she was diagnosed with probable carpal tunnel syndrome by Dr. Luther. Subsequent electrodiagnostic testing for carpal tunnel syndrome was negative. However, her pain persisted.

RECOMMENDATION - 2

2. On February 11, 2004, Claimant visited rheumatologist Linda Sakai, M.D. Dr. Sakai diagnosed epicondylitis, shoulder tendonitis, overuse syndrome and possible rotator cuff tendinitis. On April 7, 2004, Dr. Sakai requested authorization for an MRI. On July 1, 2004, she noted Claimant was more symptomatic and renewed the request for an MRI.

3. At some point, Defendants requested that Dr. Shenkar perform an evaluation. On June 17, 2004, Dr. Shenkar wrote an addendum to his IME. This report and note are referred to by Michael Gillespie M.D. Dr. Gillespie evaluated Claimant at Defendants' request on March 7, 2007. He characterized Dr. Shenkar's report as being in "an unusual format . . . likely a computer fill-in-the-blanks format," and "quite thorough." He quotes the report or note at length. Dr. Shenkar's actual report and note are not included as a part of this record.

4. On July 2, 2004, Surety denied the claim.

5. On July 13, 2004, an X-ray of Claimant's right shoulder was negative. On July 14, 2004, an MRI showed mild bursitis with either mild degeneration or a small partial thickness tear of the rotator cuff.

6. On August 20, 2004, Dr. Sakai opined Claimant's condition was causally related to her work. She restricted Claimant's arm movements to no more than 15 minutes every hour.

7. On August 31, 2004, Claimant's attorney wrote Surety for approval of the claim.

8. Claimant visited Douglas McInnis, M.D. On September 20, 2004, he opined Claimant's condition was "clearly temporarily related to the increase in her work load." He opined this onset of symptoms was related to her work.

9. Claimant visited Roger Dunteman, M.D., on November 5, 2004. His examination noted a small decrease in range of motion with positive impingement signs. He diagnosed impingement and acromioclavicular (AC) joint inflammation.

RECOMMENDATION - 3

10. On December 9, 2004, Claimant underwent surgery. Dr. Dunteman found mild inflammation (bursitis), mild fraying of the coracoacromial ligament, and a bone spur in an otherwise normal shoulder when he operated.

11. On December 17, 2004, Surety reversed its denial and approved the claim.

12. By March 14, 2005, Dr. Dunteman allowed Claimant to return to work, increasing at weekly increments, starting at four then six then eight hours per day. Claimant's pain returned.

13. In October 2005, Claimant underwent a two-day functional capacity evaluation (FCE). The FCE was considered valid. Claimant gave good effort.

14. On February 1, 2006, Claimant underwent a second surgery. Dr. Dunteman found some bursitis had returned. Other than that and the evidence of the first surgery, Claimant's shoulder appeared normal.

15. On May 11, 2006, Dr. Dunteman pronounced permanent restrictions: lifting up to 10 pounds only on an occasional basis and no work requiring arm motions overhead.

16. On June 9, 2006, Dr. Dunteman rated Claimant's PPI at 11% of the upper extremity.

17. On June 13, 2006, Dr. Dunteman approved a job site evaluation (JSE) for Claimant's return to work for Employer, subject to his modifications.

18. On August 2, 2006, Dr. Dunteman's physician assistant noted Claimant was suffering significant constant pain. He recommended retraining.

19. On October 6, 2006, vocational expert Debra Uhlenkott evaluated Claimant's employability. She relied upon the reduced arm movements and ten-pound lifting restrictions and opined Claimant suffered a 70% loss of access to her labor market.

RECOMMENDATION - 4

20. On March 7, 2007, Defendants requested an evaluation by Michael Gillespie, M.D. He found Claimant's shoulder normal. He noted she reported chronic pain with no objective findings and that she "lacks any insight" about her pain. He approved Dr. Dunteman's PPI rating based upon the surgeries but found the restrictions "arbitrary" in the absence of objective findings.

21. Claimant underwent retraining to become a hospital biller and coder. On August 2, 2007, she was hired by Benewah Community Hospital as a receptionist and admitting clerk. At hearing, Claimant was hopeful of being promoted to the open billing and coding position there.

22. On August 21, 2007, Ms. Uhlenkott issued an addendum to her report. She considered the impact of Claimant's retraining. She recalculated Claimant's wage loss at 18% but maintained Claimant's loss of access was still 70%.

Non-Medical Factors

23. Claimant was 41 years old on the date of hearing. She has a high school diploma. Her billing and coding course constitutes her only other formal education. Before her 10 years with Employer, Claimant worked as a retail clerk and in food service. After the accident, she worked the summer of 2006 for NAPA Auto Parts as a parts clerk. At the time of the accident, she earned \$8.90 per hour on a full-time basis with a monthly attendance bonus of \$50.00 and monthly incentive bonuses of \$100.00 to \$500.00. At the time of hearing, she earned \$9.45 per hour on a 32-hour week. Her pending application for the promotion to billing and coding remained speculative. Other non-medical factors were considered. However, except for those generally common to her local labor market, none impact her PPD.

RECOMMENDATION - 5

DISCUSSION AND FURTHER FINDINGS OF FACT

24. **Disability.** Permanent disability is defined and evaluated according to statute. Idaho Code §§ 72-423, 424, 425, 430(1). Some factors are expressly defined by statute and other unexpressed factors may be considered. Idaho Code § 72-430(1). Wage earning capacity may be considered. Baldner v. Bennet's, 103 Idaho 458, 649 P.2d 1214 (1982). Wage earning capacity may not be the sole factor considered in determining permanent disability. Loya v. J.R. Simplot Co., 120 Idaho 62, 813 P.2d 873 (1991).

25. Permanent disability is a question of fact, and the Commission is the ultimate decision maker regarding questions of fact. Urry v. Walker & Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989); Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975).

26. Here, Ms. Uhlenkott's analysis is generally well received. She identified specific employment factors of the area which might impact Claimant's access. Ms. Uhlenkott's analysis of the number of available jobs was based upon unproven assumptions and an unexplained computer evaluation. Moreover, Ms. Uhlenkott's refusal to reduce her 70% figure in light of Claimant's additional training undercuts the weight of her opinion. Her opinion that Claimant suffered an 18% wage loss is reasonable depending upon the estimated impact of bonuses and fringe benefits. It is un rebutted by any evidence.

27. Claimant established her PPD, inclusive of PPI, is greater than 18% and less than 70%. Considering all medical and non-medical factors, Claimant's PPD is rated at 30% of the whole person attributable to her work for Employer.

28. **Medical Care.** Dr. Gillespie's evaluation appears reasonable. Claimant failed to show further medical care or a pain clinic are reasonable or related to her work.

RECOMMENDATION - 6

29. **Attorney Fees.** Idaho Code §72-804 provides for attorney fees where a defendant unreasonably denies a claim or delays the payment of benefits. The Industrial Commission rules allow the admission into the evidentiary record of medical records despite the hearsay rule. This, in part, provides the “summary and simple” adjudication required by Idaho Code § 72-708. However, each party must present evidence to satisfy the “preponderance of the evidence” standard by which the Commission analyzes matters before it. Here, Claimant alleged Defendants unreasonably denied this claim. The evidence shows that Employer was on notice of the claim as of the manifestation date, October 27, 2003. Defendants formally denied the claim on July 2, 2004.

30. Other medical records in evidence show reasons why a surety might question the relationship of Claimant’s complaints to her work: The pain began in her wrist and hand, the early objective findings were minimal, the MRI did not unequivocally demonstrate an injury versus degeneration, etc. No employee of Surety testified as to when, why, or how the denial was made. Regardless, it is not for an adjuster to make the medical determination of causation. Only the opinion of a physician is sufficient to determine causation. *See, Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

31. The reference to Dr. Shenkar’s report in Surety’s July 2, 2004 denial letter does not substitute at hearing for evidence of Dr. Shenkar’s actual opinions. Although Defendants asserted they reasonably based their denial upon opinions in the report of Dr. Shenkar, that report is not in evidence. Dr. Shenkar’s testimony was not taken. Whether by his own records or by his deposition testimony, Dr. Shenkar’s opinions must be in evidence before the Commission may determine what they are, as well as whether these opinions constitute a reasonable basis for Surety’s denial of the claim.

RECOMMENDATION - 7

32. The quotes and references to Dr. Shenkar's opinions in Dr. Gillespie's evaluation do not constitute evidence of the truth of Dr. Shenkar's opinions under statute or Commission rules. These references and quotes show a multiple-layered hearsay that cannot substitute for the actual opinions of Dr. Shenkar. Dr. Gillespie refers to and quotes only portions of the report. Moreover, Dr. Gillespie appears to be criticizing rather than vouching for those opinions. The lapse of time before Surety's denial and the absence of a basis for that denial appear unreasonable. The record provides no basis upon which it can be concluded that Defendants acted reasonably.

33. Claimant signed her Complaint on August 16, 2004. Claimant is entitled to attorney fees from that date forward.

34. Further, Claimant alleges Defendants unreasonably delayed payment of benefits to Claimant until February 15, 2007. Claimant provided billings and evidence to support this claim. A two-year delay without explanation or justification is too long to be considered reasonable.

CONCLUSIONS OF LAW

1. Claimant is entitled to PPD rated at 30% of the whole person, inclusive of PPI rated at 11% of the upper extremity;

2. Claimant failed to show she is entitled to future medical benefits or a pain clinic as a result of this claim;

3. Pursuant to Idaho Code § 72-804, Claimant is entitled to attorney fees for all benefits received.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 20th day of May, 2008.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LELIA M. SOLOM,)
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 Claimant,) **IC 2003-522322**
 v.)
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 PEET SHOE DRYER, INC.,) **ORDER**
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 Employer,)
 and)
) **FILED MAY 23 2008**
 IDAHO STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended 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 is entitled to PPD rated at 30% of the whole person, inclusive of PPI rated at 11% of the upper extremity.
2. Claimant failed to show she is entitled to future medical benefits or a pain clinic as a result of this claim.
3. Pursuant to Idaho Code § 72-804, Claimant is entitled to attorney fees for for all benefits received. Claimant is entitled to attorney fees as provided for by Idaho Code § 72-804. Unless the parties can agree on an amount for reasonable attorney fees, Claimant’s counsel shall,

within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel filed the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney's fees.

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

DATED this 23rd day of MAY, 2008.

INDUSTRIAL COMMISSION

/S/ _____
James F. Kile, Chairman

/S/ _____
R. D. Maynard, Commissioner

/S/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

ORDER - 2

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of MAY, 2008 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Charles L. Graham
P.O. Box 9344
Moscow, ID 83843

Wynn Mosman
P.O. Box 8456
Moscow, ID 83843

db

/S/ _____