

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

PAULA DAVIS-NIEHOFF, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 MICRON TECHNOLOGY, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 LIBERTY NORTHWEST INSURANCE )  
 CORPORATION, )  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2003-513778**

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

September 29, 2008

**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 Boise, Idaho, on April 20, 2007. Dean A. Martin represented Claimant with Mitchell R. Barker serving as co-counsel. E. Scott Harmon of Harmon, Whittier & Day represented Defendants. The parties submitted oral and documentary evidence. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter first came under advisement on August 20, 2007. Because Referee Breen retired, an alternate referee, Douglas Donohue, was appointed for the issuance of a recommendation. After reviewing the record and the briefs of the parties, Referee Donohue issued his findings of fact, conclusions of law, and recommendation, which the Commission adopted in an order dated October 15, 2007.

On October 29, 2007, Claimant filed a motion for rehearing, asserting that Claimant had never consented to the appointment of an alternate referee. Defendants objected to the motion. On December 28, 2007, the Commission issued an order vacating the October 15, 2007 order entered in this case and granted Claimant's motion for rehearing.

The Commission conducted a new hearing on March 18, 2008, also held in Boise. The parties, represented by the same counsel, submitted oral and documentary evidence. Once again, no post-hearing depositions were taken. The parties submitted post-hearing briefs, and the matter came under advisement on July 8, 2008.

### **ISSUES**

By agreement of the parties, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits, prompting surgery on February 21, 2005, was caused by Claimant's industrial accident on July 1, 2003;
2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;
3. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care to include cervical surgery of February 21, 2005;
  - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
  - c. Permanent partial impairment (PPI); and
  - d. Disability in excess of impairment.
4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
5. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine; and

6. Whether Claimant is entitled to attorney fees.

### **CONTENTIONS OF THE PARTIES**

It is undisputed that Claimant sustained an injury to her neck while in the scope of her employment on July 1, 2003. It is further undisputed that the injury resulted in the need for cervical surgery, which was performed on September 17, 2003.

Claimant contends that she experienced continued problems associated with the initial surgery, which necessitated a revision surgery on February 21, 2005. Claimant seeks medical and income benefits associated with the second surgery. Claimant denies the existence of pre-existing cervical impairment.

Defendants contend that the second surgery was performed for reasons unrelated to the work injury and that Claimant's deteriorating condition was the result of a neurological syndrome. Defendants assert that Claimant had pre-existing cervical impairment and ask that the Commission reaffirm the findings and conclusions in Referee Donohue's recommendation. Both parties rely primarily on the documentary medical evidence.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant<sup>1</sup> at the April 20, 2007 hearing;
2. The testimony of Claimant and Claimant's husband, Thomas Niehoff, at the March 18, 2008 hearing;
3. Claimant's Exhibits 1 through 15;
4. Defendants' Exhibits A through X; and

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<sup>1</sup> Claimant's name was Paula Davis at the time of her injury. Claimant's name changed as the result of marriage and her current name is Paula Niehoff. Some documents identify Claimant as Paula Davis-Niehoff.

5. The Industrial Commission legal file pertaining to this claim.

In Claimant's Reply Brief, Claimant objects to the Commission's consideration of Defendants' Responsive Brief filed after the first hearing in this case. Following the second hearing, Defendants incorporated their first Responsive Brief into their second Responsive Brief, as Defendants believe the issues have remained largely the same. Claimant believes Defendants were obliged to file a wholly new brief. Claimant cites no law or rule to support her objection, and her objection is overruled. The Commission is entitled to consider the contents of its own legal file.

After having considered all the above evidence and the briefs of the parties, the Commission adopts the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

#### **Background and Injury**

1. Claimant, born in 1947, was 61 years old at the time of the second hearing. Though Claimant never completed high school, she did obtain a GED. Prior to her accident, she had worked steadily in various jobs in Idaho, California, and Nevada. Her prior jobs required bending, twisting, and reaching, and for at least a decade prior to her accident, Claimant sought chiropractic care for various aches and pains, including in her neck. However, prior to her accident, Claimant had no neck or shoulder injuries and was apparently in good health; chiropractic records do not indicate physical restrictions or work limitations, and Claimant's occasional aches and pains did not preclude her from performing her work duties.

2. Claimant began working for Employer in late 1999 and held a series of jobs with Employer from 1999 until 2005. At the time of her accident, Claimant worked as an inventory clerk in the shipping and receiving department at Crucial Technology, a subsidiary of Employer.

Claimant's duties included lifting and sorting boxes full of computer parts; the boxes could weigh up to 65 pounds. Claimant also had to bend and crouch frequently.

3. On July 1, 2003, Claimant experienced an unusually busy work day, which required a great deal of physical effort. Claimant was required to work faster and lift more than she did under normal circumstances. As Claimant was lifting boxes onto a shelf above her head, she felt a "pop" in her neck, followed by pain in her neck and right shoulder. Despite the pain, she completed her work day. Claimant initially believed that she had strained a muscle.

4. Claimant reported the incident to her supervisor, Dan LeDuc, the next day. Over the next several days, her pain intensified, and her symptoms increased. Her right hand was numb, and she was having problems with her grip that resulted in her dropping items. On July 7, 2003, she went to see her chiropractor, James Hollingsworth, D.C. After she informed Dr. Hollingsworth of her symptoms, Dr. Hollingsworth refused to treat Claimant, believing that Claimant's condition could be serious. He advised Claimant to consult Employer for a medical referral.

5. Claimant notified Mr. LeDuc of her problem, and Mr. LeDuc had her complete a medical incident report, at which time Claimant identified pain in her neck, mid-back and right shoulder as the result of lifting boxes. Claimant denied previous injury to the affected body parts but acknowledged receiving previous chiropractic treatment.

#### Conservative Treatment and First Surgery

6. On July 7, 2003, Claimant, after completing the medical incident report, was sent to Employer's health clinic, where Claimant consulted with Sheri Malakhova, M.D. Dr. Malakhova examined Claimant and prescribed pain medication. When Claimant's symptoms did not improve over the next few days, Dr. Malakhova referred Claimant to Kevin Chicoine, M.D.,

who evaluated Claimant on July 16, 2003. Dr. Chicoine ordered an MRI of the cervical spine. The cervical MRI revealed multilevel spondylosis, C5-6 osteophyte and disc bulge with effacement of the right lateral recess, and mild stenosis at C5-6 and C6-7.

7. Upon review of the MRI findings, Dr. Chicoine referred Claimant back to Dr. Malakhova and noted that Claimant's problems were more likely the result of degenerative changes than of the work-related accident. Claimant received prescriptions for medication from Dr. Malakhova and was put on restricted work duties. But Claimant's symptoms continued, worsening with time, and Claimant was referred to Timothy E. Doerr, M.D.

8. Dr. Doerr examined Claimant on July 24, 2003. He noted that Claimant had been unresponsive to conservative treatment and recommended surgical intervention. He also notified Dr. Chicoine that Claimant's condition had an "acute nature" and was more likely the result of her accident than of degenerative changes. Dr. Doerr also notified Surety of his conclusions, and Claimant's workers' compensation claim, after initially being denied, was approved.

9. Dr. Doerr performed surgery on September 17, 2003 in the form of a decompression and fusion at C5-C7 with allograft and plating. Surgery was uneventful and Claimant was discharged from the hospital on September 19, 2003. There were no wound problems or neurologic complaints at the follow-up visit of September 22, 2003. Claimant participated in a course of post-surgical physical therapy from December 16, 2003 through January 29, 2004.

#### Recovery from First Surgery

10. Claimant's recovery from the first surgery appeared to go well. Four months after surgery, on January 12, 2004, Dr. Doerr opined that Claimant had reached maximum medical improvement. He released Claimant to work without restrictions and assigned an 11% whole

person impairment rating (PPI). Initially, he did not attribute any of the impairment to a pre-existing condition or disease. However, after he reviewed Claimant's pre-injury chiropractic records, he determined that 50% of the 11% PPI should be apportioned to a pre-existing condition.

11. Claimant received services from the Industrial Commission Rehabilitation Division (ICRD) and returned to work with Employer in a modified duty capacity on November 4, 2003. She returned to her pre-injury job in early January 2004, at which time both Claimant and Employer reported that the return-to-work situation was "going well." Claimant was working 40 hours per week and earning slightly more than her pre-injury wage. The ICRD closed its case file on February 17, 2004, because Claimant had successfully returned to her time-of-injury position for at least 30 days.

12. Claimant underwent a general physical examination by her primary care physician, Louis M. Schlickman, M.D., on February 10, 2004. Claimant reported hoarseness with a sensation of throat swelling. Dr. Schlickman attributed the throat problems to postnasal drip versus post-operative complications. Claimant's neurological exam was normal, and Dr. Schlickman noted that Claimant recovered fairly well from the surgery. Multiple other health concerns were addressed including post-menopausal issues, dry eyes, bad breath, sleep disorder, tobacco use, and hyperlipidemia.

13. Claimant followed up with Dr. Doerr on March 11, 2004, at which time she was doing well. X-rays were taken and revealed good placement of the surgical hardware. Dr. Doerr explained that the bone grafts were consolidating despite Claimant's continued smoking. Claimant was instructed to continue with the cervical exercise program and discontinue smoking.

Onset and Development of Neurological Symptoms

14. Claimant consulted with Dr. Schlickman on April 15, 2004, complaining of face tingling; she was concerned about a possible stroke. Dr. Schlickman suspected cervical nerve impingement rather than a stroke, but he recommended that Claimant stop smoking to lower her risk of having a stroke. On May 13, 2004, Dr. Schlickman noted that Claimant's neck pains resolved after two days of taking Celebrex and that the Claimant was going to Ireland to get married. Claimant returned on October 6, 2004, at which time Claimant reported increased numbness and tingling to both her left and right upper and lower extremities as well as drooping of the right side of her face. A neurological exam did not reveal significant deficits, and Dr. Schlickman ordered lab work to rule out thyroid dysfunction.

15. In September of 2004, Claimant returned to Dr. Doerr with complaints of radiating pain to the upper extremities. Dr. Doerr ordered diagnostic studies to determine the source of the complaints. The studies ruled out neurologic impingement, and Dr. Doerr opined that the complaints were not related to Claimant's work injury. He recommended that Claimant be treated for her shoulder and upper extremity complaints through her personal insurance. Right-sided facial drooping was noted at a follow-up appointment on October 7, 2004. Dr. Doerr reiterated that he did not believe the problems were associated with the cervical spine and recommended that Dr. Schlickman refer Claimant for a formal neurological evaluation.

16. On November 4, 2004, neurologist Martha Cline, M.D., evaluated Claimant. Dr. Cline noted that Dr. Doerr's surgery had resulted in good pain relief for Claimant. Dr. Cline documented Claimant's symptoms, including cervical pain with patchy paresthesias. Dr. Cline suspected Claimant's symptoms were related to a cerebral dysfunction. She ordered an MRI of the brain. The MRI was normal and Dr. Cline ruled out brain abnormality as a cause for Claimant's symptoms of facial paresthesias, right facial drooping, and left hand paresthesias. Dr.

Cline documented Claimant's concerns that the problems could be related to the cervical hardware. Dr. Cline recommended a second opinion with Dr. Timothy Floyd to address questions about the prior surgery. She also recommended follow-up with Dr. Todd Rustad as Dr. Cline believed that she could not help Claimant any further.

17. C. Timothy Floyd, M.D., evaluated Claimant on December 9, 2004. He concluded that Claimant's symptoms were the result of a "[b]izarre central neurological syndrome, no relation to cervical pathology or her cervical surgery." Dr. Floyd reviewed the diagnostic studies performed following the initial surgery and concluded that the x-rays revealed a solid arthrodesis with the plate in good position and no evidence of loosening or fracture, that the CT myelogram showed incorporation of the bone graft with no evidence of spinal cord or nerve root compression, and that Claimant had significant relief from her arm pain as well as increased strength following the surgery of September 2003. According to Dr. Floyd's notes, Claimant reported doing well until May of 2004, when she woke up with insidious onset of buzzing, tingling and numbness of the face. Dr. Floyd detailed an "exhaustive evaluation" by Dr. Cline, which confirmed that diagnostic studies of the brain and nerves revealed no abnormalities. Dr. Floyd's notes indicate that during the appointment, both Claimant and her husband were angry and frustrated at the inability of medical personnel to accurately diagnose the cause of her symptoms, and they apparently refused to accept Dr. Floyd's explanation that there was "no anatomical basis in the cervical spine" for Claimant's symptoms.

18. Todd Rustad, M.D., evaluated Claimant on December 16, 2004 to address the complaint of facial weakness. He described a "puzzling constellation of facial symptoms that have come and gone after cervical fusion." He concluded that the symptoms were atypical of

Bell's palsy and recommended additional studies to rule out Lyme disease, viral neuritis or rheumatologic disease.

19. Claimant returned to Dr. Cline after completion of additional diagnostic work-up. The studies revealed elevated liver function but were non-conclusive with regard to Claimant's neurologic complaints. Dr. Cline concluded that her work-up was negative to determine the etiology of Claimant's problems. She encouraged Claimant to follow up with Dr. Perla Thulin from Salt Lake City, who suspected a possible partial spasm of cranial nerve VII.

20. Claimant was referred by Dr. Cline to the Mayo Clinic in Rochester, Minnesota in January of 2007, where Claimant was seen by multiple physicians in the clinic's neurology department. Additional diagnostic studies and lab work were performed. Claimant was diagnosed with multiple cranial neuropathies, somatic complaints of right-sided symptoms and anxiety disorder. Orhun H. Kantarci, M.D., confirmed palsy of the sixth and seventh nerve but felt that the additional right-sided complaints were possibly related to somatoform disorder. He concluded that there was no connection between Claimant's history of neck surgery and the eye symptoms.

#### Contemplation and Performance of Second Surgery

21. On December 1, 2004, Paul J. Montalbano, M.D., performed a neurosurgical evaluation of Claimant. Dr. Montalbano noted that Claimant presented with a "multitude of symptoms" including pain and/or weakness to various body parts. However, he instructed Claimant that he would only address her neck pain. Dr. Montalbano reviewed the CT scan of the cervical spine taken September 22, 2004, and indicated that there appeared to be an incomplete incorporation of Claimant's bone graft at C6-7. A bone scan was recommended to rule out pseudoarthrosis at that level.

22. The bone scan was performed on December 22, 2004. It revealed:

...moderate activity in the lower cervical spine corresponding to the known C5 to C7 anterior fusion. Findings would be expected from prior fusion. There is no other abnormal tracer activity within the neck or remainder of the body. No abnormal soft tissue accumulation is seen.

Multiple other diagnostic studies were performed following the initial surgery to evaluate the outcome of the surgery and hardware placement. A post-myelogram CT scan of the cervical spine was performed on September 9, 2004, which revealed a normal post-fusion appearance. An upper extremity electrophysiological study was performed on September 29, 2004, which was normal. Cervical spine x-rays were taken on February 16, 2005, which revealed that the hardware was intact and that bone plugs at C5-6 and C6-7 appeared to be incorporated into the adjoining cervical centra.

23. Dr. Montalbano reviewed the diagnostic studies and stated that the CT scan demonstrated pseudoarthrosis at C6-7 and that the bone scan reflected increased uptake at that level. He confirmed that conservative treatment in the form of medications and steroid injections failed to provide relief of Claimant's symptoms. He recommended a repeat surgery to address the pseudoarthrosis and neck pain. He attributed the pseudoarthrosis to the prior surgery. He documented that he reviewed the CT scan with radiologist Vicken Garabedian, M.D., who agreed that there was evidence of pseudoarthrosis at C6-7. Dr. Montalbano noted that the proposed surgery would address Claimant's neck pain and not her facial weakness or other neurological problems.

24. Dr. Doerr reviewed the consultations performed by Dr. Floyd and Dr. Montalbano, as well as the diagnostic studies. He was "somewhat at a loss" to explain Dr. Montalbano's recommendation for surgery. Dr. Doerr concurred with Dr. Floyd's evaluation that Claimant's ongoing symptoms were not related to her industrial injury or to the initial

cervical spine surgery. Dr. Doerr confirmed that the CT myelogram from September 22, 2004 revealed that the allograft was 100% incorporated at the C5-6 level and that C6-7 showed a bridging bone that was continuing to incorporate. Dr. Doerr also reported a consultation with Dr. Garabedian, indicating that he personally reviewed the diagnostic films with Dr. Garabedian, who agreed that there was a maturing fusion rather than a non-union. Dr. Doerr concluded that he would not recommend a revision surgery and that the surgery was unwarranted.

25. Defendants obtained a peer review opinion of David J. Giles, M.D., who reviewed the CT myelogram of September 22, 2004 and the bone scan of December 22, 2004. Dr. Giles opined that the tests revealed a solid interbody fusion and fixation at C5, C6 and C7 with no direct evidence of pseudoarthrosis.

26. Dr. Montalbano performed surgery on February 21, 2005, to address Claimant's neck pain related to pseudoarthrosis at C6-7. The procedure included removal of plates, re-do of microscopic C6-7 anterior decompression, C6-7 anterior cervical arthrodesis and instrumentation with bone graft. He noted pseudoarthrosis at the inferior portion of the allograft at C6-7; he also noted that lower screws from the previous hardware were found to be loose.<sup>2</sup> No surgical complications were noted and Claimant was discharged on February 22, 2005.

#### Claimant's Condition Following Second Surgery

27. Claimant returned to modified duty work with Employer for four hours per day in April of 2005. Claimant experienced increased problems upon return to work, including right hand and right foot numbness, headaches, neck pain and upper extremity pain. Claimant discontinued modified duty work in June of 2005 and has been unable to work in any capacity since that time.

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<sup>2</sup> The Commission agrees with Defendants that there is nothing in the medical records to support Claimant's testimony that the graft bone from the first surgery had "shattered."

28. Claimant applied for Social Security Disability Insurance (SSDI) benefits. In August 2006, during the application process, James Moreland, M.D., evaluated Claimant. Dr. Moreland referenced both neck surgeries and indicated that they had “healed completely.” He diagnosed right rotator cuff impingement, facial dystonia and right lower extremity problems of unknown etiology. He concluded that Claimant could perform light to moderate work with various restrictions. Re-evaluations were performed in September and October of 2006. Dr. Moreland clarified in his report of October 13, 2006 that Claimant’s most disabling condition is her neurological disorder, which precludes driving, reading, computer use, standing and ambulating. He indicated that the cervical fusion was the “least of her problems” and that cervical fusions typically do not prevent someone from working.

29. Claimant’s SSDI application was approved in a November 13, 2006 decision, which found that Claimant has been disabled, as defined by the Social Security Act, since February 21, 2005. The SSDI decision adopted the opinions of Dr. Moreland.

30. Michael O’Brien, M.D., reviewed medical records and provided an opinion in January of 2006 regarding the 11% PPI and apportionment assigned by Dr. Doerr. (See above paragraph 10 for Dr. Doerr’s findings). Dr. O’Brien asserted that the correct PPI is likely 25% and that apportionment would not be appropriate. He placed Claimant in diagnosis-related estimate (DRE) category IV and gave consideration to Claimant’s limitations following the second surgery. Dr. O’Brien acknowledged that Claimant had pre-existing arthritic changes, but believed that they were asymptomatic and not the basis for impairment.

#### Benefits Paid

31. Medical benefits paid by Defendants include treatment at the direction of Dr. Doerr, including the initial surgery. Income benefits include temporary partial and temporary

total disability for periods of time immediately following the injury (July 7, 2003 through July 10, 2003) and near the time of the first surgery (September 9, 2003 through November 3, 2003). Permanent partial impairment benefits were paid pursuant to the 11% PPI, less 50% for apportionment which resulted in a 5.5% PPI.

## **DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW**

### Causation and Second Surgery

32. Claimant has the burden of proof to establish, by medical probability, all elements necessary to show that the injuries complained of arose from an accident occurring in the course of employment. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 939 P.2d 1375 (1997). Medical probability requires a showing of “more evidence for than against.” *Soto v. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994). A mere showing of a possible connection between an accident and the complained of injury is not sufficient. *Callentine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 653 P.2d 455 (1982).

33. The medical evidence establishes that Claimant had an uneventful and successful period of recovery during the six months following her surgery of September 17, 2003. Claimant has acknowledged that there is not sufficient medical evidence to connect most of the neurological symptoms that began to appear in April of 2004 with her work injury. These symptoms include weakness and numbness to the upper extremities and lower extremities, facial drooping, right-sided weakness, vision abnormalities, cervical radiculopathy and right shoulder limitations. Claimant has been evaluated by several medical specialists and undergone multiple series of diagnostic studies to determine the etiology of her symptoms.

34. There is conflicting medical evidence in the record regarding the basis for the second cervical surgery. Accordingly, the issues relating to the cervical surgery of February 21,

2005 require an analysis involving questions of both law and fact. Generally, an employee is entitled to reasonable medical treatment for a compensable injury. Idaho Code § 72-432(1). The determination as to whether or not a specific treatment is reasonable and required is determined by the employee's physician. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). The Claimant bears the burden of proving that the condition for which treatment is sought is causally related to the compensable injury. *Sweeney v. Great W. Transp.*, 110 Idaho 67, 714 P.2d 36 (1986).

35. Dr. Montalbano believes that the second surgery was necessary, and that the need for the second surgery was attributable to pseudoarthrosis and related neck pain that followed the initial surgery. Dr. Montalbano based his opinions on the results of diagnostic studies (described in preceding paragraph 23). The same studies relied upon by Dr. Montalbano were also reviewed by Dr. Doerr, Dr. Floyd and Dr. Giles, none of whom concurred with Dr. Montalbano that the studies revealed pseudoarthrosis.

36. The opinions of Dr. Montalbano and Dr. Doerr are directly conflicting regarding the need for a second surgery. Dr. Cline referred Claimant to Dr. Floyd for a second opinion to address the issue. Though Claimant testified that Dr. Floyd's evaluation of her was not extensive, Dr. Floyd's report of December 9, 2004 reflects a thorough physical exam, review of diagnostic studies and consultation with Claimant. Dr. Floyd unequivocally concluded that there was no anatomical basis in the cervical spine for Claimant's symptoms. He noted that the x-rays demonstrated a solid arthrodesis, that the plate from the first surgery was in good position, that there was no evidence of loosening or fracture, and that there was no evidence of compression of the nerve roots or of the spinal cord. He diagnosed a "bizarre central neurological syndrome" with no relation to cervical pathology or the initial surgery.

37. Claimant has failed to meet her burden of proof to establish that the condition for which the second surgery was performed was causally related to the compensable injury. Accordingly, the issue of entitlement to additional disability benefits is moot.

#### Impairment Rating and Apportionment

38. “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 IIC is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

39. Upon a finding of pre-existing permanent impairment, benefits may be apportioned so that an employer/surety is only liable for the amount of impairment attributable to the occupational injury. Idaho Code § 72-406. In cases involving 100% disability with liability of the Industrial Special Indemnity Fund (ISIF), a pre-existing impairment must be a hindrance or obstacle to obtaining or retaining employment in order for the impairment to be apportioned. In cases involving less than 100% disability, the pre-existing impairment is not required to have caused a hindrance or obstacle to maintaining employment. *Campbell v. Key Millwork and Cabinet Co.*, 116 Idaho 609, 778 P.2d 731 (1989).

40. Dr. Doerr and Dr. O’Brien used differing methodologies identified in the 5<sup>th</sup> Edition of the *Guides to the Evaluation of Permanent Impairment* to calculate Claimant’s PPI. Dr. Doerr assigned an 11% PPI using the range-of-motion (ROM) model. He combined PPI for restricted neck extension with specific disorders relating to surgical intervention.<sup>3</sup> Dr. O’Brien

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<sup>3</sup> It is clear from the text of Dr. Doerr’s report that there is a typographical error in which he identified 5% PPI from Table 15-7 but that he actually assigned 10% from Table 15-7 to arrive at a whole person PPI of 11%.

assigned a 25% PPI using the diagnosis-related (DRE) model. Dr. O'Brien applied Claimant's fact scenario to a sample application in the *Guides* and determined that Claimant met the criteria for DRE cervical category IV. Dr. O'Brien noted that the sample patient in the *Guides* had verifiable alteration of motion segment integrity. But Dr. O'Brien failed to demonstrate that Claimant had alteration of motion segment integrity as defined by the *Guides*. Dr. O'Brien also considered Claimant's condition following the second surgery, and he considered Claimant's symptomology that was not causally related to the injury. The Commission finds Dr. Doerr's 11% PPI rating more persuasive and consistent with the medical evidence. Claimant has failed to meet her burden of proof to establish a PPI in excess of 11%.<sup>4</sup>

41. Dr. Doerr indicated that 50% of Claimant's PPI would be properly apportioned to pre-existing disease. Dr. O'Brien opined that Claimant's pre-existing degenerative changes would not justify apportionment. Other medical evidence establishes that Claimant received chiropractic treatment over the course of several years, including cervical treatment, but that she did not have diagnostic studies and/or recommendations for additional neck treatment until the work injury. Those studies revealed some degenerative changes as well as the acute condition caused by the accident. But the degenerative changes did not impact Claimant; they did not affect her ability to work, and they did not disable her in any way. The evidence in the record — that Claimant had occasional chiropractic treatment, and that she had some degenerative changes in her cervical spine — is not enough to show that Claimant had a "preexisting physical impairment" that increased or prolonged the degree or duration of disability resulting from the

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<sup>4</sup> Claimant argues that Dr. Doerr's PPI rating should not be adopted by the Commission, because the rating was based on the "obsolete" 5<sup>th</sup> Edition of the *Guides*, instead of the more recently released 6<sup>th</sup> Edition. The Commission notes that it is the Commission's role to decide whether a doctor's PPI rating is persuasive. The Commission is not precluded from considering an impairment rating merely because it is based on one version of the *Guides* and not another.

industrial injury, as contemplated by Idaho Code § 72-406(1). For that reason, the Commission finds that apportionment in this case is not appropriate.

#### Permanent Disability

42. 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. When determining permanent disability, any permanent impairment existing at the time of the disability evaluation, including pre-existing impairment, should be included in the evaluation and subject to apportionment relating to the pre-existing impairment. *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989). The degree of permanent disability resulting from an industrial injury is a question of fact to be resolved by the IIC. *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 975 P.2d 1178 (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).

43. Around the time Claimant was assigned an 11% PPI rating, Claimant had returned to her pre-injury job without restrictions and was earning a higher wage than she earned at the time of injury. Claimant's subsequent deterioration in condition and inability to work did not result from impairment that was present at the time Claimant reached maximum medical improvement from her industrial accident. Though it is not disputed that Claimant is, at present, disabled, that disability is based on her neurological disorder, not on a condition caused by the industrial accident. Claimant failed to establish disability in excess of her 11% PPI.

#### Attorney Fees

44. Claimant seeks an award of attorney fees pursuant to Idaho Code § 72-804 and asserts that Defendants had no reasonable basis to delay initial approval of benefits and/or to deny payment of benefits following Claimant's second surgery. Attorney fees are not granted to a claimant as a matter of right under workers' compensation law and may only be affirmatively awarded under circumstances set out in Idaho Code § 72-804: attorney fees are appropriate where payment of benefits was denied or delayed without a reasonable basis. *Wutherich v. Terteling Co.*, 135 Idaho 593, 21 P.3d 915 (2001). The question of whether grounds exist for awarding a claimant attorney fees is a question of fact for the IIC. *Id.*

45. Defendants' initial denial of benefits, pending an opinion from Dr. Doerr regarding causation, was reasonable based on the medical opinion of Dr. Chicoine. Defendants' subsequent denial of benefits following the second surgery was reasonable based on the multiple medical opinions that Claimant's symptoms following the first surgery were not causally related to the compensable injury and that the second surgery was unnecessary. Claimant is not entitled to an award of attorney fees.

#### Additional Issues Moot

46. Additional issues are moot based on the above findings of fact and conclusions of law.

### **ORDER**

Based upon the foregoing analysis, IT IS HEREBY ORDERED that:

1. Claimant's condition that prompted cervical surgery on February 21, 2005 was not caused by the industrial accident;
2. Claimant's impairment rating is 11%;
3. Apportionment under Idaho Code § 72-406 is not appropriate;

4. Claimant is entitled to unpaid permanent partial impairment benefits consistent with her 11% impairment rating;

5. Claimant is not entitled to additional medical benefits;

6. Claimant is not entitled to additional disability benefits; and

7. Claimant is not entitled to attorney fees.

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

DATED this 29th day of September, 2008.

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 \_29th\_ day of September, 2008, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following persons:

DEAN A MARTIN  
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\_\_\_\_/s/\_\_\_\_\_