

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MISTY MARIE LAMB,)	
)	
Claimant,)	IC 2004-519346
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
MELALEUCA, INC.,)	AND RECOMMENDATION
)	
Employer,)	
)	
and)	
)	
WAUSAU UNDERWRITERS)	Filed November 5, 2008
INSURANCE CO.)	
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on April 16, 2008. Claimant, Misty Marie Lamb, was present in person and represented by Dennis Peterson of Idaho Falls. Defendant Employer, Melaleuca, Inc., and Defendant Surety, Wausau Underwriters Insurance Co., were represented by Monte Whittier of Boise. The parties presented oral and documentary evidence. This matter was then continued for the submission of briefs and came under advisement on July 24, 2008.

ISSUES

The issues to be resolved were narrowed at hearing and are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
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 permanent partial disability benefits; and
4. Whether the Commission should retain jurisdiction beyond the statute of limitations.

ARGUMENTS OF THE PARTIES

Claimant asserts that her ongoing bilateral upper extremity symptoms are caused by her industrial accident. She further asserts entitlement to permanent disability of 35% inclusive of her 4% whole person permanent impairment. Claimant requests the Commission retain jurisdiction to address future medical benefits and any future temporary disability benefits resulting from her industrial accident.

Defendants acknowledge Claimant's industrial accident and cubital tunnel syndrome resulting from her industrial accident. They acknowledge and have paid her permanent partial impairment of 4% of the whole person. However, Defendants contest Claimant's assertion that her current upper extremity symptoms are related to her work injury. Defendants also maintain that because no physician has imposed restrictions on Claimant's activities, she has suffered no permanent disability in excess of impairment. Lastly Defendants observe that there is no medically indicated reason for the Commission to retain jurisdiction.

EVIDENCE CONSIDERED

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

The record in this matter consists of the following:

1. The testimony of Claimant taken at the April 16, 2008, hearing;
2. Joint Exhibits A through K admitted at the hearing;
3. Post-hearing deposition of Timothy Thurman, M.D., taken by Defendants on May 6, 2008; and
4. Post-hearing deposition of Douglas Crum, CDMS, taken by Claimant on May 8, 2008.

After having considered the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1975. She lived in Idaho Falls and was 33 years old at the time of the hearing. Claimant was born and raised in Idaho Falls and is right hand dominant. She worked as a veterinarian assistant and receptionist during high school. Claimant graduated from high school in 1993. After graduating from high school, she worked as a road construction flagger earning \$10.00 per hour for state jobs and \$23.00 per hour for federal jobs. Thereafter Claimant completed four semesters of college at Idaho State University but did not complete a degree. In 1995, Claimant worked at Sears and K-Mart earning approximately \$6.00 per hour. In 1997 Claimant commenced classes at the College of Southern Idaho when she earned an associate degree in equine science in 1999. Thereafter, Claimant returned to work at K-Mart.

2. In early 2000, Claimant commenced working at Starting Line Products handling accounts payable part-time. In 2001, she began working for Security Connections processing accounts payable and receivable. Thereafter she worked as a hotel maid.

3. In December 2002, Claimant began working at Melaleuca part-time in the sales department to handle the busiest sales times of each month taking sales calls and processing orders. Her duties included significant computer data entry. In August 2003, Claimant assumed full-time employment at Melaleuca in services support. Her duties continued to include extensive computer data entry. She normally spent about 85% of her work day using a computer.

4. On approximately August 25, 2004, Claimant noticed bilateral hand symptoms. She noticed pain in her ring and little fingers and deep aching pain in her left elbow. Her right hand symptoms were similar but less severe. Claimant noted that her symptoms were minimal early in the morning but increased as she maintained a typing position during her work day. She had no pain when not at work. Claimant reported her symptoms to her manager and was sent to Community Care where she was given wrist splints for both hands and anti-inflammatories. At that time Claimant was making \$7.57 per hour, participated in a 401k plan, and received health insurance as part of her compensation.

5. In September 2004, Claimant presented to Robert Thurman, M.D., who diagnosed cubital tunnel syndrome and recommended arm splints at night. Claimant underwent an EMG which was essentially unremarkable. Dr. Thurman injected Claimant's left elbow and left wrist, and prescribed therapy.

6. In November 2004, Dr. Thurman performed anterior submuscular transposition of Claimant's left ulnar nerve. During her recuperation from left ulnar nerve transposition surgery Claimant rested her left hand and used her right hand almost exclusively. Her right upper extremity symptoms increased. By April 12, 2005, Claimant was able to use her left hand like her right. She noted continuing symptoms in her left palm as well as her little and ring fingers.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

7. In June 2005, Dr. Thurman recommended that Claimant change her work to something not requiring lifting and allowing more regular position changes.

8. Employer assigned Claimant to work as a mail room specialist until August 2005. Thereafter she transferred to the cafeteria where she prepared food and washed dishes which caused her symptoms to increase. She noted deep right elbow, wrist, and hand pain. She also noted symptoms in her ring and little fingers.

9. In March 2006, Dr. Thurman performed right ulnar nerve decompression at the cubital tunnel. He later found Claimant medically stable and rated her permanent impairment at 4% of the whole person for her left ulnar nerve transposition and 0% for her right ulnar nerve decompression. Defendants accepted and have paid medical and permanent impairment benefits of 4% of the whole person. Dr. Thurman imposed no permanent restrictions on Claimant's activities.

10. Claimant ceased her employment with Melaleuca in August 2006 and started attending Idaho State University in Idaho Falls full-time. Since leaving Melaleuca, Claimant has worked only occasionally substitute teaching.

11. At the time of the hearing, Claimant was not employed but was attending college full-time. She is presently a junior in elementary education, taking 12 to 16 credits per semester and demonstrating excellent scholastic performance. She anticipates graduating in 2010. Claimant desires to teach elementary school grades one through three. She is confident that she will be able to perform the physical duties of such a teaching position. Once employed as an elementary teacher Claimant anticipates earning \$27,000 to \$30,000 annually.

12. At the time of the hearing, Claimant continued to have upper extremity symptoms including left hand dysesthesia. She can type for only 20 to 30 minutes before the onset of

significant upper extremity pain forces her to stop. After a break of 20 to 30 minutes she can resume typing. Claimant estimates she can type a total of less than four hours per day. Claimant can write but only for a short time. She cannot take class notes on a computer. Typing causes more symptoms than writing by hand.

13. Claimant testified that she experiences numerous upper extremity symptoms with many daily activities including lifting, driving, gripping, and holding items. Due to upper extremity symptoms she occasionally drops coffee cups and similar items. Although Claimant understands that Dr. Thurman believes she suffers thoracic outlet syndrome, Claimant has not sought any treatment for this condition.

14. Having closely compared Claimant's testimony with the other evidence, the Referee concludes that Claimant is a credible witness.

DISCUSSION

15. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, the Commission is not required to construe facts liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

16. **Medical causation.** The crux of the instant case is whether Claimant's current upper extremity symptoms for which she seeks benefits are caused by her industrial accident. Defendants contend that Claimant has not shown her ongoing upper extremity symptoms are caused by her industrial accident.

17. A claimant must prove not only that he or she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. See, Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

18. In the present case, Claimant's treating surgeon, Dr. Thurman, testified that Claimant's present symptoms suggest thoracic outlet syndrome, not cubital tunnel syndrome. Dr. Thurman further testified that Claimant's thoracic outlet syndrome is not related to her industrial injury. No medical evidence relates Claimant's present upper extremity symptoms to her industrial injury. Claimant has failed to prove her present symptoms are caused by her industrial accident.

19. **Permanent Disability.** "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 permanent impairment and by pertinent nonmedical 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 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.

20. 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).

21. In the present case there are no medical restrictions in the record for Claimant's bilateral upper extremity symptoms. No physician has restricted Claimant from any work activity. Claimant testified that she experiences pain with lifting more than 10 pounds, and with extended typing and gripping. Dr. Thurman has suggested that Claimant seek employment less demanding on her upper extremities, but has not imposed any lifting, typing, or other activity restrictions. As noted above, Dr. Thurman opined that Claimant's ongoing complaints appear to arise from thoracic outlet syndrome not related to her industrial accident. Furthermore, Douglas Crum, Claimant's vocational

disability expert, considered Claimant's self-reported limitations and testified as follows:

Q. Did you perform any kind of loss of a wage earning capacity evaluation?

A. I looked at that.

Q. And what, if any, did she lose, assuming the restrictions are what they are as what she's described to you and they are industrially related?

A. I believe that based on her time of injury wage, which was I believe \$7.57 an hour, that she should be able to recover that level of wage earning capacity. Even with these restrictions, I believe she could.

Q. So there is really no loss of wage earning capacity?

A. I don't believe there would be.

Crum Deposition, p. 21, L. 24 through p. 22, L. 13.

22. The Referee concludes that Claimant has not proven any permanent disability in excess of her 4% permanent impairment.

23. **Retention of jurisdiction.** The final issue is whether the Commission should retain jurisdiction of the matter to address future medical costs and any temporary disability. Claimant's entitlement to future medical care remains open pursuant to statute, but not her entitlement to future temporary disability benefits. However, there is no medically verified indication of future medical treatment which may be needed due to Claimant's August 25, 2004, industrial injury. Under these circumstances, Claimant has not established that the Commission should retain jurisdiction beyond the statute of limitations.

CONCLUSIONS OF LAW

1. Claimant has not proven that her current upper extremity symptoms are due to her industrial accident.

2. Claimant has not proven her entitlement to any permanent disability in excess of her 4% permanent impairment.

3. Claimant has not proven that the Commission should retain jurisdiction beyond the statute of limitations.

RECOMMENDATION

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

DATED This 28th day of October, 2008.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor
Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

3. Claimant has not proven that the Commission should retain jurisdiction beyond the statute of limitations.

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

DATED this 5th day of November, 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 5th day of November, 2008 a true and correct copy of **Findings, Conclusions, and Order** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
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/s/

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