

In briefing, Claimant withdrew the TTD issue as moot and the retraining issue as “unrealistic”.

CONTENTIONS OF THE PARTIES

Claimant contends she is significantly permanently disabled in the amount of 35% over PPI following a crush injury to her right foot. She has continuing symptoms in her foot. Gait changes have caused further injuries to her knees. She will need future medical care including a total knee replacement, perhaps two. Her left knee should be rated for PPI. Attorney fees should be awarded for Defendants’ refusal to pay benefits for her left knee.

Defendants contend Claimant suffered no permanent disability in excess of PPI. Defendants have paid medical benefits for surgery and other treatment of her right foot and knee, but not for her left knee. Claimant failed to show she is entitled to benefits for her left knee and, therefore, Claimant’s claim for attorney fees should be denied as well.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, supervisor Tim Denton, and ICRD expert Dan Brownell;
2. Claimant’s Exhibits 1 – 25; and
3. Defendants’ Exhibits A – N.

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 for Employer for 11 years in the mill at Athol.
2. On February 17, 2005, Claimant suffered a crush injury to her right foot in a compensable accident. Defendants paid medical and TTD benefits for treatment,

RECOMMENDATION - 2

including surgeries, of her right foot. (Some medical records inaccurately indicate “left” or “right” when they obviously mean the opposite. Reasonable inspection of the evidence makes these errors clear. The parties do not dispute that these inaccuracies occurred in the records.)

3. Claimant reported right knee pain after an injury at work on September 9, 2004. Medical bills were paid by Defendants. This accident is not a subject of the claim before the Commission at this time.

4. After the February 2005 accident, Claimant began reporting increased right knee pain. Defendants paid medical and TTD benefits for treatment of her right knee.

5. Claimant has exhibited an abnormal gait since the February 2005 accident.

6. On September 15, 2005, treating physician, Adam Olscamp, M.D., opined Claimant was stable. He identified restrictions and suggestions for helping Claimant return to work. Claimant returned to work with Employer, but at another job which could accommodate her lingering right foot symptoms.

7. Beginning November 9, 2005, Claimant reported *left* knee symptoms. Jonathan King, M.D., treated these. Claimant underwent physical therapy which did not significantly help. A December 1, 2005 MRI showed degenerative changes in the left knee, including meniscal tears. On January 9, 2006, Claimant underwent arthroscopic surgery on her left knee. The surgery revealed chondromalacia and meniscal tears.

8. A final surgery to Claimant’s right foot – to remove a bone spike – was performed on February 21, 2006. Dr. King opined this would not change the PPI rating formerly given. While, Dr. King opined, “she would likely benefit from a permanent light duty position,” he made it clear this was not offered as a restriction.

RECOMMENDATION - 3

9. Claimant's recovery was slow and frustrating for both Claimant and Employer as they tried to return Claimant to gainful employment.

10. On September 28, 2005 and May 22, 2006, J. Craig Stevens, M.D., evaluated Claimant at Defendants' request. He opined Claimant suffered PPI in her right knee and foot totaling 6% of the whole person at the first IME. He opined Claimant need no more medical treatment and could return to work with temporary restrictions which he offered to reevaluate in six months. Dr. Stevens reduced this PPI by one percent at the second IME. He appears to have based this reduction, in part, on his belief that Claimant was not giving maximal effort during the evaluation. He did not evaluate the left knee.

11. Claimant returned to work for Employer. Employer accommodated Claimant's requests for a stool to sit on and a heater to keep her foot warm.

12. During an economic downturn in the logging and mill industries, Claimant was laid off along with other workers. None has returned to work for Employer.

13. Claimant was born April 28, 1948. She lives on an acreage near Athol. She earned a high school diploma. She has taken a real estate course and an H&R Block tax course. She worked briefly as a real estate agent, but has not kept her license current. She never worked in tax. She has earned a living as a housekeeper and in the mills.

DISCUSSION AND FURTHER FINDINGS OF FACT

14. **Credibility.** Claimant's testimony was credible. Her demeanor indicated she was being forthright with normal lapses of memory. Insignificant inconsistencies between Claimant's testimony and the contemporaneously-made medical records are resolved by assigning more weight to the written records.

RECOMMENDATION - 4

15. Mr. Denton appeared wary, perhaps even paranoid, on cross-examination. Nevertheless, his demeanor and testimony were credible.

16. Mr. Brownell is an expert with which the Commission is well familiar. His record, reputation, and demeanor consistently combine to establish him as a credible witness.

17. **Left knee benefits.** Claimant bears the burden of showing her left knee condition was caused by the February 15, 2005 accident. She alleges the injury to her foot caused her abnormal gait which, in turn, affected first her right then her left knee. If established, this would be compensable. However, the requirements of establishing this link are well set forth in the case law.

18. Proof of a possible causal link is not sufficient to satisfy a claimant's burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (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, 890 P.2d 732 (1995). Magic words are not required. Jensen v. City of Pocatello, 136 Idaho 406, 18 P.3d 211 (2000).

19. The medical evidence – diagnostic imaging and surgical report – supports a finding that the left knee condition was degenerative, not the result of consequences of the compensable accident. The record lacks the requisite medical opinions to establish the causal link alleged by Claimant. The record provides insufficient indicia to establish that any physician of record believes it likely the left knee condition was caused by the accident.

20. **TTD.** Claimant is entitled to temporary disability benefits following the accident for lost work time for treatment during recovery, including recovery from surgeries to her right foot and knee. It appears from the record that these have been paid. Claimant has failed

RECOMMENDATION - 5

to establish that she is entitled to TTD benefits for work lost as a result of her left knee condition.

21. **Medical care.** Claimant is entitled to benefits for medical treatment, including surgeries, to her right foot and knee. It appears from the record that these have been paid. Claimant failed to show she is entitled to medical care benefits relating to her left knee.

22. **PPI/PPD.** Claimant suffered PPI which was credibly rated at 6% of the whole person for her right foot and knee. (The one percent reduction later is not assigned significant weight.) She failed to establish a basis for compensable PPI for her left knee.

23. Claimant's permanent disability requires evaluation. Permanent disability and its evaluation are defined by statute. Idaho Code §§ 72-423, -425, -430. Here, Claimant returned to work with Employer. She did not return to her old job, but Employer accommodated her by assigning her to a lighter one. By the time of the lay-off, she was earning more than at the time of injury. These facts, combined with consideration of the medical opinions, suggest Claimant's permanent disability is small, perhaps fully included in the 6% PPI.

24. However, considering all factors set forth in the statutes, especially noting the size, composition, and health of the local job market at the time of medical stability and afterward, Claimant's lingering difficulties with her right foot creates a greater impact upon her permanent disability. Claimant suffered compensable permanent disability rated at 10% of the whole person, inclusive of compensable PPI.

25. **Attorney fees.** Claimant failed to show Defendants acted unreasonably in denying her claim as it related to her left knee. Claimant did not allege Defendants unreasonably denied benefits pertaining to her right foot and knee. Defendants acted reasonably at all times. No attorney fees are awardable under Idaho Code § 72-804.

RECOMMENDATION - 6

CONCLUSIONS OF LAW

1. Claimant is entitled to benefits for her right foot and knee. Medical benefits and TTD for these conditions appear to have been paid;
2. Claimant is not entitled to benefits for her left knee;
3. Claimant suffered compensable PPI rated at 6% and permanent disability rated at 10% of the whole person, inclusive; and
4. Claimant is not entitled to an award of attorney fees.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 19TH day of December, 2008.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

db

4. Claimant is not entitled to an award of attorney fees.

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

DATED this 23RD day of DECEMBER, 2008.

INDUSTRIAL COMMISSION

/S/ _____
R. D. Maynard, Chairman

/S/ _____
Thomas E. Limbaugh, Commissioner

/S/ _____
James F. Kile, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

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

Thomas B. Amberson
P.O. Box 1319
Coeur d'Alene, ID 83816-1319

E. Scott Harmon
P.O. Box 6358
Boise, ID 83707

db

/S/ _____

ORDER - 2