BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AMANDA TORGERSON, Claimant, v. SKYWEST, INC., Employer, and EMPLOYERS INSURANCE OF WAUSAU, Surety, Defendants.	)	**IC 2005-007798** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** filed May 4, 2009

INTRODUCTION

The Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Idaho Falls on September 4, 2008. Paul T. Curtis represented Claimant. E. Scott Harmon represented Defendants. The parties presented oral and documentary evidence. They submitted post-hearing briefs. The case came under advisement on March 19, 2009. The Referee submitted his recommendation; the Commissioners having reviewed the same, have prepared modified findings and conclusions.

ISSUES

At hearing the issues to be resolved were reduced to the following:

Whether and to what extent Claimant is entitled to the following benefits:

a) Temporary partial and/or temporary total disability benefits (TPD/TTD);
b) Permanent partial impairment (PPI);
c) Disability in excess of impairment;
d) Medical care; and
e) Attorney fees.

The parties expressly waived issues of causation and apportionment at hearing.

CONTENTIONS OF THE PARTIES

Claimant contends she has suffered continual low back pain since an accident on December 19, 2000. She is entitled to benefits for injury sustained in that accident, including future chiropractic care. An award of attorney fees is appropriate because of unreasonable denial of benefits by Defendants.

Defendants contend that Claimant has not met her burden of proof. She has failed to show she is entitled to benefits beyond those already paid by Surety.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Hearing testimony of Claimant;
2. Claimant's Exhibits 1 – 10; and
3. Defendants' Exhibits A – M.

After having considered all the above evidence and the briefs of the parties, the Commissioners submit the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Claimant began working for Employer about February 1999. This job helped fund her full-time status as a college student at Idaho State University. Upon graduation she began teaching. At the time of hearing she still worked as a teacher.

2. Employer cross-trained Claimant to perform several duties on an as-needed basis. On December 19, 2000, she lifted a heavy suitcase. She has claimed she suffers constant low back pain since.

3. On the date of the accident, Claimant earned $7.75 per hour.

4. On December 22, 2000, Claimant sought treatment with Eric Walker, M.D. She reported a two to four week history of low back pain and described the accident of December 19 as causing sharp low back pain. On examination, no objective findings were noted. She demonstrated some mild voluntary movement restrictions and tenderness. Dr. Walker diagnosed a lumbosacral strain superimposed upon prior mild back discomfort. He suggested mild temporary restrictions. Claimant returned to work.

5. On her next visit on January 9, 2001, Claimant showed modest improvement. She underwent physical therapy. On January 23, she was much improved. Dr. Walker continued to attribute her symptoms to the SI joint area and found no basis for possible disc involvement.

6. By her February 13, 2001 visit, Claimant reported increased pain with any activity. She continued to work in the lighter positions Employer had available.

7. On February 20, 2001, Claimant underwent an injection of her SI joint. She claimed her pain was increasing. X-rays were negative.

8. After additional visits, an MRI was performed on March 21, 2001. It showed mild disc bulges at L3-4 and L5-SI which did not appear to have clinical significance. On March 21, an epidural steroid injection was performed. Claimant reported initial relief (Dr. Walker characterized it as “dramatic” relief) which lasted only two weeks. Nevertheless, on May 22 another epidural steroid injection was performed. It did not help much. Dr. Walker referred her to chiropractic care.

9. Claimant reported significant improvement with early chiropractic care which focused on her SI joint. At subsequent visits she began describing returning pain

and re-aggravations of her symptoms. She reduced her work load to part-time to accommodate her school studies and got married in the fall of 2001. Further therapy was interrupted by her first pregnancy.

10. At a December 19, 2001 visit, Dr. Walker recommended that she "wean" off of chiropractic care and that she more diligently perform her home exercise program. On January 30, 2002, Dr. Walker pronounced her "stable." He suggested continuation of palliative chiropractic care. At her next visit on April 8, 2002, he confirmed she was stable.

11. Claimant delivered her baby on June 15, 2002. She did not work for Employer thereafter.

12. On July 29, 2002, Dr. Walker rated Claimant's impairment at 5% whole person. He imposed long-term restrictions of no lifting over 50 pounds.

13. Claimant began working as a student or substitute teacher in September 2002.

14. On November 29, 2002, a repeat MRI confirmed the disc bulges had not changed.

15. On December 16, 2002, Claimant reported a significant exacerbation of pain.

16. Claimant first reported symptoms of a potentially radicular nature during a February 10, 2003 visit to Dr. Walker. Claimant visited Dr. Walker on April 11, 2003 and June 23, 2004.

17. On January 4, 2005, Claimant first visited Stephen R. Marano, M.D., at the request of Surety. On January 11, 2005, a myelogram and CT scan showed mild degenerative changes at L3-4, L4-5 (for the first time), and L5-S1. Dr. Marano recommended a nerve root block but this had to be postponed for a second pregnancy. On January 26, 2006, a nerve root block was performed.

18. Claimant submitted chiropractic medical and billing records for visits to Angela (Donehey) Smith Sackett, D.C., from June 30, 2001 through May 15, 2008. Treatments to Claimant's pelvis and T-spine usually were included with treatments to Claimant's lumbar spine. In October 2001, C-spine treatments were also often added. Claimant described "spa treatments" she enjoys as part of her continuing chiropractic treatment. Claimant was released from care by Dr. Sackett on December 23, 2002 "as MMI". Nevertheless, chiropractic visits continued. Claimant's areas of complaint thereafter sometimes indicated left low back pain, sometimes right, and sometimes neck pain without low back pain.

19. On three occasions – June 23, 2005, September 21, 2006, and September 24, 2007 – David C. Simon, M.D., evaluated Claimant at Surety's request. Defendant's Exhibit F. He opined she was not medically stable at the first two visits. At the June 23, 2005 evaluation, Claimant was 25 weeks pregnant and waiting until after her pregnancy to try the nerve root block as recommended by Dr. Marano. At the September 21, 2006 evaluation, Claimant reported that her back felt great right after the nerve root block and it continued to help for three to four weeks.

20. At the September 24, 2007 evaluation, Dr. Simon reviewed a procedure report from November 22, 2006 for another nerve root block. The procedure report indicated that Claimant had complete resolution of her typical pain from 7/10 to 0/10. Dr. Simon noted that Dr. Marano's records indicate that on December 18, 2006, Claimant called Dr. Marano's office and reported the injection had worked well. At the September 24, 2007 evaluation, Claimant reported that the last injection has given her some relief and it has lasted.

21. Based on his September 24, 2007 exam, and his review of records from

November and December of 2006, Dr. Simon opined that Claimant reached maximum medical improvement as of December 18, 2006. He stated Claimant suffered pain as a result of an L5-S1 disc protrusion caused by the accident. He opined she suffered a 5% whole person impairment and should not lift more than 30 pounds occasionally or 15 pounds frequently.

22. On January 1, 2008, Dr. Marano signed a letter which stated that he agreed with Dr. Simon's September 24, 2007 report regarding Claimant's MMI date of December 18, 2006 and 5% PPI rating.

DISCUSSION AND FURTHER FINDINGS

23. **Medical Benefits**. Defendants are required to provide reasonable medical care after an injury for a reasonable time. Idaho Code § 72-432. Defendants have done so. Claimant received medical treatment, medication, physical therapy, a home exercise program, chiropractic treatments, and steroid injections. When her complaints persisted after she was declared medically stable by Dr. Walker, Dr. Marano was sought for a second opinion and treatment.

24. According to all physicians' opinions, Claimant suffered a mildly bulging disc at L5-S1 as a result of the accident. However, other than Claimant's subjective reports of pain and temporary relief from pain, there is scant evidence to indicate an objective, clinical basis for those reports; Claimant only belatedly and equivocally asserted the pain radiated beyond her immediate low back; Examination reports do not regularly report positive findings which would indicate a neurological component to her condition; The MRIs and CT myelogram demonstrate that the disc bulge does not impinge the nerve roots. Surprisingly, Claimant repeatedly asserted that she experienced no additional low back pain as

a result of either of her pregnancies.

25. Claimant was declared stable by Dr. Walker on May 8, 2002, but Claimant returned to Dr. Walker complaining of continued pain on November 27, 2002. Claimant was given another MRI and referred to physical therapy and pool therapy. On January 8, 2003, Claimant reported that felt that the pool seemed to help and that she was doing somewhat better. On February 10, 2003, Dr. Walker stated he questioned whether or not there was something further which could be done to alleviate Claimant's symptoms. Claimant last saw Dr. Walker on June 23, 2004.

26. On January 4, 2005, Claimant first visited Dr. Marano at the request of Surety. Dr. Marano performed two nerve root blocks which provided Claimant with pain relief. The second nerve root block appears to have helped Claimant from November 2006 when it was administered, until September 2007 when Claimant reported to Dr. Simon that the relief had lasted. While Claimant did not improve greatly under the care of Dr. Marano, the Commission finds that the relief provided from the nerve root blocks by Dr. Marano gave Claimant enough improvement to satisfy the conditions set forth in *Sprague v. Caldwell Transportation*, 116 Idaho 720, 779 P.2d 395 (1989). Dr. Marano's treatment was a reasonable attempt at treating Claimant's injury.

27. While being treated by Dr. Marano Claimant was evaluated by Dr. Simon's at Surety's request. Dr. Simon gave an opinion on stability after evaluating Claimant on three occasions over a period of three years. Dr. Simon reviewed Claimant past medical treatment and Dr. Marano agreed with Dr. Simon's stability and impairment evaluation. The Commission finds that Claimant reached MMI on December 18, 2006, and suffered 5% whole person

impairment attributable to her December 19, 2000 injury, as opined by Dr. Simon and confirmed by Dr. Marano.

28. Without sufficient objective evidence to correlate to Claimant's complaints, without physicians' testimony opining that the bulging disc is causing the symptoms claimed while objective imaging suggests otherwise, Claimant's claim for lifetime chiropractic treatment in a spa setting fails to be established as reasonable either in nature of treatment or in time.

29. Dr. Walker provided reasonable care, including his suggestion for chiropractic care from the date of injury to the date he opined she was medically stable, January 30, 2002. His recommendation that she "wean" off of chiropractic care was confirmed by Claimant's treating chiropractor who opined she was stable regarding chiropractic care as of December 23, 2002. Claimant's treating doctor did not refer her for additional chiropractic care and Dr. Sackett opined her stable for conservative chiropractic care. Therefore, the Commission finds that Claimant is entitled to chiropractic care related to her industrial injury through December 23, 2002, when she was opined chiropractically stable by Dr. Sackett.

30. **Temporary Disability**. Idaho Code § 72-408 provides for income benefits (temporary total and temporary partial disability) for injured workers during the period of recovery. Claimant failed to show that she was entitled to temporary disability benefits beyond those previously paid by Defendants. At most, Claimant testified about what she intended to do or about what she would have done "if . . ." Such speculation does not prove it likely that she actually suffered additional total or partial temporary disability. The fact is found that Claimant worked for Employer as a means of obtaining her college education and, once she received it,

she chose to teach professionally and to raise children at home. She failed to credibly show it likely that she missed any work as a teacher due to this accident. Her vague and speculative testimony suggesting the contrary is insufficient to allow the Commission to find that she is entitled to TTD/TPD benefits.

31. **Permanent Partial Impairment**. PPI is statutorily defined and evaluated. Idaho Code §§ 72-422, -424, *et. al*. All doctors who opined on the subject agreed Claimant suffered a 5% whole person PPI as a result of the accident. The Commission finds that Claimant is entitled to 5% PPI benefits.

32. **Permanent Disability**. Permanent disability is statutorily defined and evaluated. Idaho Code §§ 72-423, -425, -430, *et. al*. A 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. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

33. The burden of proof is on the claimant to prove disability in excess of impairment. Expert testimony is not required to prove disability. The test is not whether the claimant is able to work at some employment, but whether a physical impairment, together with nonmedical factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of*

Idaho, 110 Idaho 32, 714 P.2d. 1 (1986).

34. Claimant failed to establish she suffered permanent disability in excess of PPI. She returned to work for Employer and continued to work and receive raises. She obtained her education and became a teacher. She is young and has shown that she can compete in her labor market. She has worked as continuously as she desired and has received more pay than she was earning at the time of injury.

35. **Attorney Fees**. Idaho Code § 72-804 provides, in pertinent part, that if "the employer or his surety contested a claim for compensation made by an injured employee…without reasonable grounds…, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law." Whether or not grounds exist for awarding a claimant attorney fees under the statute is a factual determination that rests with the Industrial Commission. *Gooby v. Lake Shore Mgmt. Co.*, 136 Idaho 79, 29 P.3d 390 (2001).

36. Claimant seeks attorney's fees for Defendants' failure to pay Claimant's PPI benefits as well as failure to pay for nerve blocks and chiropractic treatment. Claimant has not submitted any detailed statement of the nerve blocks and chiropractic care which Defendants failed to pay. Defendants admit that PPI benefits were not paid when assessed by Dr. Simon on September 27, 2007. The briefing informs us that PPI benefits were paid at some point between February 9, 2009 (the date on which Claimant's opening brief was filed) and February 27, 2009 (the date on which Defendants' brief was filed). Approximately 17 months lapsed between the pronouncement of Claimant's PPI rating and Defendants' payment of that rating. Where Defendants had no extant medical predicate to deny the payment or the rating, Claimant is entitled to attorney's fees as provided for by Idaho Code § 72-804 for the unreasonable delay in

the payment of Claimant's PPI benefits.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to medical care benefits from the date of injury through December 18, 2006, and for chiropractic care through December 23, 2002;

2. Claimant failed to show she is entitled to TTD/TPD benefits for any period not already paid by Defendants;

3. Claimant is entitled to PPI benefits rated at 5% of the whole person;

4. Claimant failed to show she is entitled to permanent disability in excess of PPI; and

5. Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Defendants unreasonable delay in the payment of Claimant's PPI benefits.

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 setting forth the amount and basis for attorney fees requested. Counsel shall also provide a copy of the fee agreement executed by Claimant and her attorney, and an affidavit in support of the claim for fees. 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 such documentation, Defendants may file a response to Claimant's information. If Defendants object to any representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced response, Claimant's

counsel may file a reply. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees. In determining reasonable attorney fees, the Commission will utilize the factors outlined in *Clark v. Sage*, 102 Idaho 261, 629 P.2d 657 (1981) and *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984), along with any other relevant factors.

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

DATED this __4th__ day of _____May____, 2009.

INDUSTRIAL COMMISSION

_/s/_____
R.D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _4th_ day of ____May_____, 2009, a true and correct copy of the FINDINGS, CONCLUSIONS, AND ORDER was served by regular United States Mail upon each of the following:

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sb/cjh ____/s/_____