

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

DEBBIE BAIR,	)	
	)	<b>IC 2009-023498</b>
Claimant,	)	
	)	<b>FINDINGS OF FACT,</b>
v.	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND RECOMMENDATION</b>
AMALGAMATED SUGAR CO., LLC,	)	
	)	
Self-Insured	)	Filed: February 23, 2012
Employer,	)	
Defendant.	)	
	)	
	)	
	)	
_____	)	

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on March 4, 2011. Patrick D. Brown of Twin Falls represented Claimant. Susan R. Veltman of Boise represented Defendant. The parties submitted oral and documentary evidence and took post-hearing depositions. Claimant did not file a brief. Defendant submitted its brief and the matter came under advisement on October 19, 2011 and is now ready for decision.

**ISSUES**

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

1. Whether Claimant suffered an injury from an accident arising out of and in the course of her employment;
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
3. Whether Claimant's condition is due in whole or in part to a pre-existing or

subsequent injury or condition;

4. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care;
  - b. Temporary partial and or temporary total disability benefits (TPD/TTD);
  - c. Permanent partial impairment (PPI);
  - d. Permanent partial disability in excess of impairment, including total permanent disability pursuant to the odd-lot doctrine; and
  - e. Attorney fees.

### **CONTENTIONS OF THE PARTIES**

Claimant did not file an opening brief, so the Referee is left to surmise Claimant's positions based on the hearing transcript and exhibits admitted into the record. It is undisputed that on or about August 26, 2009, Claimant dropped a metal filter frame on her right foot, causing an injury to her right big toe. Defendant accepted and paid medical benefits for treatment of the injured toe. Claimant also asserts that the accident permanently aggravated a pre-existing low back condition. Her pre-existing back condition had not interfered with her work, but following the August 26, 2009 accident, her back condition worsened until she could no longer work. Claimant may also be asserting that the August 26 accident caused a new injury to her right foot and ankle or aggravated her pre-existing right lower extremity injury. Claimant seeks benefits including medical care for her back, time loss benefits, permanent partial impairment, disability in excess of impairment (including total permanent disability as an odd-lot worker), and attorney fees.

Defendant asserts that the only industrial injury Claimant suffered on August 26, 2009 was to her right big toe, for which Defendant paid appropriate benefits. Defendant disputes that

Claimant injured her back in the August 26 industrial injury, and avers that she has failed to establish any new back injury or aggravation of her pre-existing back conditions or any new injury or aggravation to her right lower extremity that entitles her to additional benefits. Finally, Defendant denies that Claimant has established any grounds for an award of attorney fees.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, Wanda Roberson, Kevin Burns, and Delbert Bair, taken at the hearing;
2. Defendant's exhibits 1 through 29, admitted at hearing without objection;
3. Claimant's exhibits 30 through 39, admitted at hearing without objection;
4. The post-hearing depositions of Lynn D. Hansen, D.C., taken by Claimant on June 23, 2011, and Lawrence V. Hicks, D.O., taken by Defendant on July 20, 2011;<sup>1</sup> and
5. The Industrial Commission legal file.

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

### **FINDINGS OF FACT**

#### ***BACKGROUND***

1. Claimant was sixty years old at the time of the hearing, and resided in Rupert with her husband, Delbert.
2. Claimant graduated from high school in Utah.
3. Claimant and her husband moved to Idaho and Claimant went to work for

---

<sup>1</sup> Claimant did not lodge the deposition of Dr. Hansen with the Commission. Defendant submitted a copy of the deposition when it became apparent that Claimant did not intend to do so.

Defendant in 1984. Defendant processes sugar beets into refined sugar at its plant in Paul, Idaho, a seasonal enterprise that begins with the beet harvest in the fall and continues until it has processed the entire crop by early spring. Claimant worked for more than a dozen years in various seasonal positions. In the late 1990s, Defendant promoted her to a full-time position as a lab assistant. During the fall, winter, and early spring, Claimant worked in the lab. When the season's refining was complete and Defendant laid off its seasonal workers, Claimant continued to work, performing maintenance and repair (M & R) at the plant.

4. Personnel records show that Claimant worked hard, did her job well, and worked well with her colleagues, but had attendance issues. It was not unusual for Claimant to maintain negligible vacation and sick leave balances.

5. Apart from her attendance issues, Claimant had two notable work-related problems. In 1989, while she was still a seasonal employee, Claimant was convicted of insurance fraud relating to misrepresentations made to obtain unemployment insurance benefits, in part payable by Defendant. Claimant completed her criminal sentence and faced no separate disciplinary action by Defendant. In 2002, Claimant alleged disability and gender discrimination against Defendant for its handling of her return to work following a non-industrial accident. Defendant refuted the allegations, and the matter was ultimately resolved without the EEOC making any findings on the allegations.

### ***PRIOR MEDICAL HISTORY***

#### ***Right Lower Extremity***

6. In July 1998, Claimant was involved in a non-industrial motor vehicle accident (MVA), and sustained severe injuries to her right foot, ankle, and heel. Claimant had multiple surgeries on her foot, including a fusion, and suffered chronic right foot and ankle problems

thereafter. Claimant's right lower extremity injuries made her susceptible to further injury, and the medical records show she suffered multiple subsequent injuries to her right foot and ankle, necessitating time off work.

### ***Low Back***

7. Claimant has a long history of medical treatment for her low back:

- From 1990 through 2009, she received intermittent lumbar treatment from Kenneth Turner, D.C.;
- In 2001, Claimant's primary care physician (PCP) diagnosed sciatica caused by a misalignment of her pelvis due to a shortening of her right leg caused by her ankle surgeries. She also received treatment for back pain related to a urinary tract infection (UTI) and a fall;
- Also in 2001, Claimant began treating with Lynn A. Hansen, D.C., for multiple complaints including her lumbar spine, and received treatment for her lumbar spine on six of eleven visits;
- In 2002, Claimant's PCP notes she reported a long-standing history of low back pain with a recent injury that occurred when moving furniture. Claimant's PCP opined that sacral imbalance resulting from leg length discrepancy was a contributing factor;
- Claimant continued to see Dr. Hansen in 2002, with three of four visits including treatment for lumbar pain;
- In 2003, Claimant sought treatment from Dr. Hansen for her low back on two occasions;
- Claimant continued to report back pain to her PCP through 2004. He prescribed Norco, which Claimant took for pain in both her lower right extremity and her low back;
- Claimant saw Dr. Hansen for lumbar treatment eight times in 2004. Initially, he attributed her complaints to mal-alignment, but his records also reflect that she suffered a back injury while working in her yard in July and additional back pain from lifting at work in August;
- In 2005, Claimant's PCP treated her for low back pain associated with UTIs.
- In 2005, Claimant also sought treatment at West Chiropractic for neck and back pain after falling down stairs. Her low back pain radiated to her right foot and bilaterally into the gluteal fold, and the chiropractor diagnosed low back pain with lumbar facet syndrome;

- Claimant also saw Dr. Hansen three times for lumbar treatment in 2005. She reported a back injury from pulling shrubs as well as injuries to her knees and low back from the fall down the stairs.
- Claimant continued to take Norco as prescribed by her PCP for her foot and back during 2006;
- In 2007, Claimant's PCP attributed her back pain to chronic UTI issues, but Claimant's back symptoms increased in April 2007 and her PCP prescribed anti-inflammatories in addition to Norco. Claimant re-injured her back in June 2007 while working cattle, and her prescriptions were refilled in September and November 2007;
- Claimant also saw Dr. Hansen three times for lumbar complaints in 2007, primarily related to her injury while working cows;
- In 2008, Claimant started seeing Greg Boettcher, D.O., for primary care. Initially, he diagnosed chronic low back pain and refilled her prescription for Norco;
- Claimant continued to treat with Dr. Hansen for lumbar pain in 2008, seeing him on five occasions. She reported multiple re-injuries to her back—a fall on ice in February, another cattle-related injury in June, and a lifting injury and UTI in July that required she be taken off work, and a further aggravation in September when she slipped.
- In February 2009, Dr. Boettcher noted Claimant “has a lot of back pain which is related to arthritis” and diagnosed osteoarthritis of her spine. D's ex. 13, p. 190.
- Claimant saw Dr. Hansen three times in 2009 for low back treatment before the accident at issue in this proceeding: In January, she slipped on ice and Dr. Hansen took her off work. In February, she experienced lumbar pain and radiating pain down her left leg. In April, she described an injury that occurred while gardening with a sudden onset of pain. Claimant told Dr. Hansen that her symptoms were “constant” and that she had difficulty sitting, performing household chores, ADLs, bending over to do yard work and rotational movements. D's ex. 7, p. 150.
- Claimant also began treating with Laurence V. Hicks, D.O., in June 2009, with complaints of pain in her back, both knees and her right foot. Dr. Hicks diagnosed severe degenerative disc disease at L5-S1, discopathy with moderate osteophytic changes at L4-5 and L3-4, and spondylosis of the lumbar spine. She opted to proceed with prolotherapy, receiving injections on three occasions in June and July 2009.

### ***AUGUST 2009 WORK EVENTS***

8. In August 2009, Claimant was working M & R from 7:00 a.m. until 4:30 p.m., Monday through Friday. On Monday, August 17, Claimant called in to say that she had injured

her right foot and ankle over the weekend, when a puppy knocked her over, and she wished to take sick leave. Claimant went to see Dr. Boettcher, who diagnosed her with an acute sprain and chronic pain in her right ankle. Dr. Boettcher took Claimant off work for “the next couple of days,” advising that she could return to work when she could get her boot back on. D’s ex. 13, p. 194. Dr. Boettcher gave Claimant an off-work slip for August 17 and August 18. Claimant failed to report for work on August 19 and failed to call in before her shift. She did call in sick the remainder of the week (August 20 through August 21). Defendant charged Claimant with an unexcused absence for August 19.

9. Claimant returned to work on Monday, August 24, 2009. On August 26, at a meeting with her supervisor and her union representative, Claimant received an Employee Improvement Action Report regarding the August 19 unexcused absence. Claimant signed the report, which stated that Claimant should obtain a doctor’s note when off work due to illness.

10. Claimant provided her supervisor with Dr. Boettcher’s note excusing her from work on August 17 and August 18, with a hand-written notation at the bottom stating: “ongoing 19-20-21 also.” D’s ex. 25, pp. 313-314. Dr. Boettcher later confirmed that he did not write the notation extending the off-work slip.

### ***THE ACCIDENT***

11. On August 27, 2009, Claimant reported to her supervisor that she had injured her right foot the previous morning at 9:45 a.m. She told him she was moving standard liquor filter frames from a tall stack and she dropped one on her right foot.<sup>2</sup> The filter frames that Claimant

---

<sup>2</sup> “Liquor” is the product of the refining process after reducing the beets to a pulpy liquid. The liquor passes through filters held in large frames (about four feet in diameter) containing a fine metal mesh and covered with a cloth to filter out beet solids.

was moving that day were clean filters that had not yet been “dressed” with the filter cloth. They weighed approximately thirty pounds each. Claimant declined an offer of medical treatment.

12. On August 30, 2009, Claimant presented at the Cassia emergency room seeking treatment after having dropped a heavy metal object on her right foot and experiencing pain near her first metatarsal. X-rays were normal, and Claimant was diagnosed with blunt trauma to the right big toe.

13. Claimant filed a first report of injury on Monday, August 31, 2009, in which she identified her injury as “blunt trauma, 1<sup>st</sup> metatarsal right foot.” D’s ex. 26, p. 320. She stated the injury occurred while moving a filter frame that slipped from her hands and hit her right big toe.

#### ***SEPTEMBER 2009 EVENTS***

14. On September 3, 2009, the union president, facility manager, and plant manager met with Claimant to discuss her alteration of Dr. Boettcher’s note. Claimant initially denied she altered the note, but later admitted that she had done so. Defendant suspended Claimant without pay pending further investigation.

15. Claimant returned to see Dr. Boettcher on September 4, 2009. She complained of lower back pain and suspected a UTI. Dr. Boettcher confirmed the UTI, and otherwise diagnosed chronic myalgia and arthralgia. The chart note also discusses Claimant’s right ankle complaints and her most recent ankle injury on August 17, 2009, but does not mention her August 26 accident and injury.

16. Claimant returned to Dr. Boettcher on September 8 for follow-up on her low back pain and possible kidney stones. There is no mention of her August 26, 2009 industrial injury, but Claimant discussed stress at work and her concern that she needed to seek disability for her

medical conditions. Dr. Boettcher took Claimant off work indefinitely because of her right ankle and referred her to a rheumatologist for her back.

17. On September 9, 2009, Claimant attended another meeting at the plant—this time with her union representative, the facility manager, and the human resource director. Defendant’s purpose in calling the meeting was to terminate Claimant’s employment based on her falsification of the doctor’s note and her initial denial that she had done so. However, Claimant opened the meeting by explaining that Dr. Boettcher had taken her off work because of her many medical problems, and that she needed to leave her job because she could no longer perform her duties. Defendant accepted Claimant’s resignation, alleviating the need for a discussion regarding termination. Claimant subsequently applied for and received both Social Security Disability Income (SSDI) and her retirement benefits from Defendant.

***CLAIM CHRONOLOGY, CONTINUED***

18. Claimant returned to Dr. Hicks on September 11, 2009. She reported that lifting her grandchild caused her increased back pain; she also discussed her recent medical retirement. She did not mention any work-related injury, and there is nothing in the notes to suggest that Claimant’s low back pain was work-related.

19. The first indication that Claimant related new back symptoms to her August 26, 2009 injury was in a recorded statement she made to Defendant’s claims adjuster on September 21, 2009. In her statement, Claimant told the adjuster that she was moving standard liquor filter frames, weighing from sixty to eighty pounds each, off a stack, and that the fourth frame slipped from her hands and hit her right foot:

And I’m very careful with that foot anyway because it’s tender all the time but that filter just happened to catch it right across my toes. And it hurt so bad that I didn’t even realize that I’d done something to my back too.

D's ex. 21, p. 262. Claimant went on to state that by 2:00 p.m. that same day, she could tell that her back was starting to hurt. When questioned how, precisely, the frame falling on her foot caused her back to hurt, Claimant stated:

Well I bent over and grabbed that filter and moved it off and when I moved it off I twisted to the right, like I did before, and I could feel . . . I should have sensed that I'd done something to my back but I was so worried about that foot and getting the filter off my foot.

*Id.*, at p. 265. Claimant also told the adjuster that her back problems began two years earlier when she injured her back at work. There is no evidence of an industrial injury to Claimant's back two years previous, though a first-aid report does mention a valve-lifting incident on September 16, 2008.

## **DISCUSSION AND FURTHER FINDINGS**

### ***CAUSATION***

20. The burden of proof in an industrial accident case is on the claimant.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

*Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the Defendant provide reasonable medical treatment, including medications and procedures.

21. The record in the instant case supports a causal relationship between the August 26, 2009 industrial accident and the blunt trauma injury to Claimant's right big toe. The record

does not support a finding that there was any causal relationship between the industrial accident and any other condition, including Claimant's low back and right lower extremity problems—both of which pre-existed her August 26 accident. As discussed below, no physician who saw or treated Claimant offered an opinion that Claimant's lumbar back problems or her right foot problems were either the result of, or aggravated by, the industrial accident of August 26, 2009.

***Dr. Hicks***

22. Defendant corresponded with Dr. Hicks to verify that Claimant had not mentioned her August 26, 2009 industrial accident when she saw him for an evaluation sixteen days later on September 11, 2009. Defendant also asked Dr. Hicks if his diagnosis and treatment plan for Claimant were different in September 2009 than they had been in July 2009 when he last saw her. Defendant also provided Dr. Hicks with Claimant's medical records for his review. By letter dated October 24, 2010 (D's ex. 20, p. 244), Dr. Hicks confirmed that Claimant had not reported her August 26, 2009 injury to him or to Dr. West, who was also treating her. Dr. Hicks explained that he was treating her for chronic back pain, caused by degenerative disc and joint disease in her spine. He confirmed that there was no physical evidence to suggest worsening of her low back between July 31, 2009 and September 11, 2009.

23. Defendant deposed Dr. Hicks post-hearing. At that time, he reaffirmed his opinions as set out in his letter of October 2010. By the time of his deposition, Dr. Hicks also had an opportunity to review MRI findings from January 7, 2010. He concluded that the findings were primarily degenerative, although a bulging disc at L4-5 could have been old or new. Claimant did not report any radicular symptoms when he was treating Claimant, either before or after her August 26, 2009 industrial injury. Dr. Hicks opined that there could be many possible causes of Claimant's disc bulge, but could not attribute it to the industrial accident on a

more likely than not basis.

***Dr. Hansen***

24. Dr. Hansen treated Claimant on six occasions between August 2009 and the date of the hearing. Initially, he was of the opinion that Claimant's repeated lifting of heavy liquor filter frames caused her claimed low back injury. However, Dr. Hansen based his initial opinion on Claimant's description of the mechanism of injury:

[Claimant] reports that the mechanism of onset/injury was from bending over to pick up 80 lb filters and having to twist to place them back down. She states that she had to pick up 88 filters a day with a gradual onset. She states that at one point she even dropped one of the filters on her right foot. She states that she had called her safety manager to report what had happened and she said that she was having some back pain at the time but her foot hurt so bad . . . She has not been able to work since the incident happened.

C's ex. 35, p. 72. As discussed elsewhere in the findings, Claimant's history was misleading in several respects:

- Claimant was not bending to pick up the filter frames, she was lifting them off of a stack;
- Claimant did not pick up eighty-eight filters a day. On the date of injury, Claimant had a co-worker take down a dozen filters, and she only lifted four herself before her injury. Eighty-eight filters approximated the number of filters that Claimant and three co-workers would handle in a day;
- The filters did not weigh eighty pounds;
- Claimant did not report her August 26 injury to the safety supervisor and she made no complaint about her back until September 21;
- The August 26, 2009 injury did not immediately render Claimant unable to work. She continued working until Defendant suspended her on September 3, 2009.

When Dr. Hansen obtained a more accurate description of the claimed mechanism of injury, he declined to provide a causation opinion relating the August 26 accident to Claimant's back complaints. Further, Dr. Hansen did not review Claimant's relevant medical records, or review her post-injury imaging; he relied only on his own chart notes.

### ***Spine Idaho***

25. Claimant sought treatment for her back from Scott Huneycutt, M.D., and Lorraine C. Novich Welter, M.D., of Spine Idaho in January and February 2010. Dr. Novich Welter recorded Claimant's history of injury as occurring while changing an eighty-pound filter, but offers no causation opinion. Dr. Huneycutt specifically declined to offer a causation opinion, citing a clinic policy to leave causation issues to other experts.

### ***Dr. Boettcher***

26. As discussed in the primary findings, Dr. Boettcher's chart notes do not include any mention of an August 26, 2009 injury. In May 2010, his notes indicate a subjective report from Claimant that her back problems began in August 26, 2009 when she dropped a heavy item on her foot and bent and twisted to remove it. Dr. Boettcher does not attempt to reconcile this statement with his earlier chart notes reflecting a history of back pain and osteoarthritis of the spine. Neither does he offer any opinion on a causation relationship between Claimant's back and right foot problems and the August 26, 2009 injury.

### ***Dr. Reedy***

27. Peter Reedy, M.D., evaluated Claimant's low back in June 2010 upon referral by Dr. Boettcher. Dr. Reedy reported the mechanism of injury as "twisting and removing a big filter at work . . ." D's ex. 18, p. 237. Dr. Reedy reviewed Claimant's January 2010 MRI findings and concluded: "She does have significant degenerative disease throughout the lumbar spine, but nothing that I can point to that is clearly responsible for her back pain." *Id.*, at p. 239.

### ***MEDICAL CARE***

28. Claimant is entitled to medical benefits related to the blunt trauma injury to her right big toe. Claimant did not dispute Defendant's assertion that it had paid for the emergency

room visit necessitated by Claimant's August 26, 2009 industrial injury—the only medical care related to the injury. Claimant failed to establish a causal relationship between the industrial injury and her back complaints or the condition of her right lower extremity, relieving Defendant of any liability for medical care related to her back.

### ***TTD/TPD***

29. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Once a claimant establishes that she is within the period of recovery from the industrial accident, she is entitled to temporary disability benefits:

- Until evidence establishes that she has been released for light duty work and that (1) her Defendant has made a reasonable and legitimate offer of employment which she is capable of performing under the terms of her light duty work release and which employment is likely to continue throughout the period of recovery; or that
- There is employment available in the general labor market which she has a reasonable opportunity of securing and which employment is consistent with the terms of her light duty work release.

See, *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791-792, 727 P.2d 1217, 1219 (1986).

30. Claimant is not entitled to any TTD or TPD benefits on the facts of this case. Claimant finished her shift on the date of her injury and continued to work her regular shift the remainder of the week (August 27 and August 28). Claimant went to the emergency room on Sunday, August 30. She was treated and released to modified work duty through September 3. Defendant provided Claimant with modified duty until suspending her on September 3, 2009 for reasons unrelated to her industrial accident. While Claimant was suspended, she decided that her worsening back complaints, together with her non-industrial right foot and ankle problems, made

it impossible for her to perform her job. On September 9, 2009, while still on suspension, Claimant tendered her resignation.

***PPI***

31. “Permanent impairment” is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

32. Claimant has failed to carry her burden of proving that she has any permanent impairment as a result of her August 26, 2009 industrial accident. The record in this proceeding includes no evidence that Claimant suffered any permanent impairment as a result of her industrial accident. No physician has advised Claimant that she has permanent impairment related to her back or her right foot as a result of the industrial injury, and no physician assigned any impairment rating based on her industrial accident. While the Commission is the ultimate evaluator of impairment, it will not presume to make such an evaluation where the record is devoid of any medical appraisal of impairment.

***PPD***

33. Idaho worker's compensation law defines "disability" as "a decrease in wage-

earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors." Idaho Code § 72-102(11). A claimant's permanent disability rating is determined by appraising the combined effect of those medical and nonmedical factors on the "injured employee's present and probable future ability to engage in gainful activity." Idaho Code § 72-425.

34. A claimant's permanent impairment is one of the factors that the Commission must consider in making a determination about a worker's disability, if any. Though PPI is only one of many factors, it is a necessary factor, without which there can be no finding of disability. See, *Davidson v. Riverland Excavating, Inc.*, 147 Idaho 339, 209 P.3d 636 (2009). Claimant failed to establish that she sustained any permanent impairment as a result of her industrial injury; without impairment, there can be no disability.

#### ***ATTORNEY FEES***

35. A claimant is not entitled to attorney fees as a matter of right under the Idaho Workers' Compensation Law, but the Commission may make an award of attorney fees when the Commission makes a finding that employer or surety:

- Unreasonably contested a claim for compensation; or
- Neglected or refused to pay the injured employee or his dependents the compensation provided by law within a reasonable time after receipt of a written claim for compensation; or
- Discontinues payment of compensation owed without reasonable grounds.

Idaho Code § 72-804. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

36. Claimant has failed to establish any grounds for payment of attorney fees in this proceeding.

### **CONCLUSIONS OF LAW**

1. Claimant failed to carry her burden of proving that she sustained an injury or aggravation of a pre-existing injury to her low back as a result of her August 26, 2009 industrial injury.

2. Claimant established by a preponderance of evidence that she suffered a blunt trauma injury to her right great toe as a result of her August 26, 2009 industrial accident.

3. Claimant failed to carry her burden of proving that she sustained an injury to her right foot and ankle other than the blunt trauma injury to her right great toe as a result of her industrial accident.

4. Claimant failed to carry her burden of proving that her industrial accident caused her low back condition and her pre-existing right foot and ankle condition.

5. Claimant's back complaints and her right foot and ankle complaints are due in whole to her pre-existing injuries and conditions.

6. Claimant is entitled to medical care for her blunt trauma injury to her right great toe, which consists of one emergency room visit, paid by Defendant.

7. Claimant has failed to establish an entitlement to TTD or TPD benefits.

8. Claimant has failed to establish an entitlement to PPI benefits.

9. Claimant has failed to establish an entitlement to PPD benefits.

10. Claimant has failed to establish an entitlement to attorney fees.

**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 7 day of February, 2012.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Rinda Just, Referee

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

DEBBIE BAIR, )

)

Claimant, )

)

**IC 2009-023498**

v. )

)

AMALGAMATED SUGAR CO., LLC, )

**ORDER**

)

Self-Insured )

Filed: February 23, 2012

Employer, )

Defendant. )

)

)

)

---

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 failed to carry her burden of proving that she sustained an injury or aggravation of a pre-existing injury to her low back as a result of her August 26, 2009 industrial injury.

2. Claimant established by a preponderance of evidence that she suffered a blunt trauma injury to her right great toe as a result of her August 26, 2009 industrial accident.

3. Claimant failed to carry her burden of proving that she sustained an injury to her right foot and ankle other than the blunt trauma injury to her right great toe as a result of her industrial accident.

4. Claimant failed to carry her burden of proving that her industrial accident caused her low back condition and her pre-existing right foot and ankle condition.

5. Claimant's back complaints and her right foot and ankle complaints are due in whole to her pre-existing injuries and conditions.

6. Claimant is entitled to medical care for her blunt trauma injury to her right great toe, which consists of one emergency room visit, paid by Defendant.

7. Claimant has failed to establish an entitlement to TTD or TPD benefits.

8. Claimant has failed to establish an entitlement to PPI benefits.

9. Claimant has failed to establish an entitlement to PPD benefits.

10. Claimant has failed to establish an entitlement to attorney fees.

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

DATED this 23 day of February, 2012.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_

Thomas E. Limbaugh, Chairman

/s/ \_\_\_\_\_

Thomas P. Baskin, Commissioner

/s/ \_\_\_\_\_

R.D. Maynard, Commissioner

ATTEST:

/s/ \_\_\_\_\_

Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23 day of February, 2012, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS, and ORDER** were served by regular United States Mail upon each of the following persons:

PATRICK D BROWN

335 BLUE LAKES BLVD N

TWIN FALLS ID 83301

SUSAN R VELTMAN

PO BOX 2528

BOISE ID 83701-2528

djb

/s/ \_\_\_\_\_