BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEBBRA MORRIS, Claimant, v. U.S. BANK, Employer, and OLD REPUBLIC INSURANCE CO., Surety, Defendants.	**IC 2008-027719** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed August 1, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, Commissioner R.D. Maynard conducted a hearing in this matter in Coeur d'Alene, Idaho on July 25, 2013. Starr Kelso of Coeur d'Alene represented Claimant. Nathan T. Gamel of Boise represented Defendants. The parties submitted oral and documentary evidence, took one post-hearing deposition,[1] and filed post-hearing briefs.[2] The matter came under advisement on February 14, 2014 and is now ready for decision.

ISSUE

By agreement of the parties, the sole issue to be decided is whether Claimant is entitled to temporary total disability benefits (TTDs) from February 1, 2012 through April 16, 2013.

[1] The parties indicated at hearing that additional post-hearing depositions would be taken, but the only deposition transcript submitted to the Commission was that of Dr. John Sturges. No other deposition was cited in the parties' briefs.

[2] Defendants' responsive brief was submitted by Eric S. Bailey.

CONTENTIONS OF THE PARTIES

On May 24, 2012, the Commission issued a decision in this case with the following conclusions of law:

> 1. Having established a compensable claim of occupational disease, Claimant is entitled to medical care for her bilateral hand and wrist complaints. Defendants shall reimburse Claimant for past denied medical care in accordance with *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).
>
> 2. Claimant is entitled to TTD benefits from January 22, 2008 until such time as she is found to be medically stable. Defendants are entitled to an offset for wages paid to Claimant during her period of recovery.
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> 3. Claimant is not entitled to attorney fees.

Morris v. U.S. Bank, 2012 IIC 0044.23.

At issue before the Commission now is the extent of Claimant's entitlement to TTDs. Defendants concede that Claimant is still in the period of recovery but assert that she is not entitled to TTDs for the period from February 1, 2012 through April 16, 2013, because Claimant "self-terminated" from her position with Employer, and, per the rule set forth in *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), there was employment available to Claimant in the general labor market.

Claimant contends that her position with Employer was not suitable employment, and that there was no work available in the general labor market consistent with her restrictions.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing;

2. Claimant's exhibits 1 through 55;

3. Defendants' exhibits 1 through 5;

4. The post-hearing deposition of John Sturges, M.D., taken on July 26, 2013; and

5. The Industrial Commission legal file pertaining to this claim, including the evidence admitted at the prior hearing.

All pending objections are overruled.

After having considered the above evidence and the briefs of the parties, the undersigned Commissioners issue the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was born on July 9, 1968. At the time of hearing, she was 45 years old and resided in Tacoma, Washington.

2. Claimant developed a compensable occupational disease while working as a customer service representative at Employer's Coeur d'Alene call center. The disease affected Claimant's hands and wrists, causing serious, persistent pain. On January 11, 2008, Dr. Geoffrey Emry imposed work restrictions that included a) no lifting over five pounds, b) no hand or wrist/arm work, and c) no fine manipulation. These restrictions disabled Claimant from her employment.

3. On March 13, 2008, Claimant presented to Dr. J. Craig Stevens for an independent medical examination ordered by Defendants. Dr. Stevens opined that there was "nothing wrong with Claimant that could give rise to a workers' compensation complaint." *Morris*, 2012 IIC at 0044.9, ¶ 22. Surety denied Claimant further medical care, and shortly thereafter, Claimant returned to work, even though she remained in pain and Dr. Emry's restrictions had not been lifted.

4. In the Commission's May 24, 2012 decision ("first decision"), we made the

following relevant findings, which are hereby incorporated into this decision:

> The Commission concludes that there is substantial medical evidence to support a finding that when her claim arose in January 2008, Claimant suffered from hand and wrist disease related to repetitive motion. A specific diagnosis would have been helpful in providing care and treatment for Claimant at the outset of her claim. However, there is nothing in statute or case law that requires that an occupational disease be named with specificity or its etiology identified before it becomes a disease. By the time of hearing, substantial medical evidence supports a finding that Claimant, more likely than not, suffered from CTS and required surgical intervention.
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> […]
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> In January 2008, Dr. Emry imposed restrictions that took Claimant off work for approximately seven weeks. During that period of time, Claimant was actually and totally incapacitated from performing her work. It is undisputed that Surety did not pay TTD benefits to which Claimant was entitled while she was off work pursuant to Dr. Emry's restrictions. She returned to work in March following Dr. Stevens' report and the termination of her medical benefits. *However, Claimant returned to work not because her condition had stabilized, or because Dr. Emry changed her restrictions, but because Surety denied her claim. In effect, Claimant was forced to return to her time-of-injury position despite still being in a period of recovery and, pursuant to her restrictions, actually and totally incapacitated from performing her job tasks.* Her condition has not yet stabilized; indeed, it has worsened. Claimant has therefore established that she has been in a period of recovery since January 22, 2008 and is entitled to TTD benefits from that date until such date as she is deemed medically stable. Defendants are entitled to an offset for wages paid to Claimant during this period.

Morris, 2012 IIC at 0044.17, 0044.21, ¶¶ 59, 74 (emphasis added).

5. Essentially, the Commission found that Claimant's job was not suitable for her because of her restrictions. Nevertheless, Claimant, needing to support herself, was forced to return to work. Her condition grew worse, and on January 31, 2012, Claimant resigned. At hearing, she explained that her pain had become unbearable. She was also interested in relocating

to Tacoma, where she had family.

6. In Tacoma, Claimant applied for numerous positions at various bank branches, as well as at other employers. She was briefly employed by Umpqua Bank from June 27, 2012 until September 28, 2012. Claimant testified that her duties at Umpqua were similar to those that she had with Employer, but were "lighter." Hearing Tr. 73, l. 8. For example, Claimant did not handle nearly as many customer calls at Umpqua as she had at Employer. Despite this, she continued to experience "terrible pain." Hearing Tr. 82, l. 5. Claimant's position at Umpqua was terminated due to downsizing. Since then, Claimant has been unable to secure employment.

7. On April 16, 2013, Claimant presented to Dr. John Sturges, who imposed significant restrictions. Defendants do not contest Claimant's entitlement to TTDs commencing April 17, 2013. However, Defendants argue that Claimant is not entitled to TTDs from February 1, 2012, the day after she quit her position with Employer, to April 16, 2013, the day Dr. Sturges imposed the new restrictions.

DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW

A disabled employee is entitled to disability benefits during the period of recovery. Idaho Code § 72-408. Once it is established that a claimant is in the period of recovery, the claimant is entitled to total temporary disability benefits unless and until evidence is presented that she has been medically released for light duty work and that 1) the employer has made a reasonable and legitimate offer of employment to the claimant which she is capable of performing under the terms of her light work release and which employment is likely to continue throughout the period of recovery, or that 2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of the light duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791-792,

727 P.2d 1217, 1219-1220 (1986). The burden is on the defendants to show that the *Malueg* requirements have been met. *Swanson v. Kraft, Inc.*, 116 Idaho 315, 320, 775 P.2d 629, 634 (1989).

8. It is undisputed that Claimant has been in the period of recovery throughout the period in question. Thus, the burden is on Defendants to show either that Employer made a reasonable and legitimate offer of employment to Claimant consistent with her restrictions, or that other employment consistent with Claimant's restrictions was available to her in the general labor market. This, Defendants have failed to do.

9. **Offer of employment**. The Commission has already found that Claimant's position at Employer was unsuitable for reasons thoroughly explained in the first decision. We will not revisit this finding now, as the first decision was final and conclusive as to all matters adjudicated pursuant to Idaho Code § 72-718. *Morris*, 2012 IIC at 0044.24. Defendants argue that Employer made certain changes, including changes to Claimant's work station, in order to accommodate her, but this is immaterial, because it was Claimant's job *duties* that she was disabled from, and those duties did not change. As Dr. Sturges observed in his deposition, Claimant's condition was "aggravated…every time she got on the phone or used the keyboard." Sturges Depo. 7, ll. 10-12.

10. Defendants have not presented any evidence that Claimant's job duties were changed sufficiently enough to be consistent with Dr. Emry's restrictions. Nor have Defendants presented any evidence that Employer offered Claimant an alternative position that was consistent with Dr. Emry's restrictions. Defendants' argument seems to be that since Claimant continued working, she was capable of the work, and did not need an alternative position. In so arguing, Defendants ignore the worsening of Claimant's condition, which indicated that she was

not, in fact, capable of the work. Had she been capable, she would have been able to work without causing herself further harm. Claimant continued to work, not because she was capable, but because she was desperate: as she testified at hearing, she needed to support herself and her daughter.

11. The fact that Claimant quit an unsuitable position has no bearing on her entitlement to TTDs. It was not reasonable for Defendants to expect Claimant to remain so employed.

12. Defendants have failed to show that they made a reasonable and legitimate offer of employment to Claimant for a position that Claimant was capable of performing.

13. **Employment available in the labor market**. Despite Employer's failure to offer Claimant a suitable position, Defendants may still prove that Claimant is not entitled to TTDs if they can show that there was suitable employment available in the general labor market that Claimant had a reasonable opportunity to secure. The record, however, is dearth of evidence that would demonstrate this. Defendants did not, for example, offer testimony from a vocational expert on the employment opportunities available to Claimant. Rather, Defendants argue that 1) Claimant was able to obtain a position at Umpqua Bank, however short-lived it turned out to be; and 2) Claimant herself identified a suitable labor market by applying for numerous positions at banks, retailers, and other employers.

14. There is not much evidence in the record on what Claimant's duties at Umpqua Bank entailed; however, her testimony indicates that the Umpqua job was similar to her job with Employer. Her pain level was high at Umpqua, as it had been at Employer. Such evidence does not support a conclusion that the position was suitable employment for Claimant, and to meet their burden under *Malueg*, Defendants must show that the employment was not only available

but suitable.

15. Defendants' other argument — that Claimant, by applying for a number of jobs, identified her own labor market — is unpersuasive. People who are out of work and interested in finding work apply for jobs. It does not automatically follow that they are qualified for those jobs. Defendants' *Malueg* burden obliges them to show that there was suitable work available to Claimant in the labor market that Claimant had a *reasonable opportunity to secure*. Defendants have offered insufficient evidence on either the suitability or the availability of the jobs Claimant applied for, let alone the other jobs in the market.

16. Having failed to meet their *Malueg* burden, Defendants have failed to show that Claimant lacked entitlement to TTD benefits during the period from February 1, 2012 through April 16, 2013.

17. Claimant, being in the period of recovery, was entitled to TTDs from February 1, 2012 through April 16, 2013. Defendants are entitled to an offset for any wages received by Claimant during this period.

ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant was entitled to TTD benefits from February 1, 2012 through April 16, 2013.

2. Defendants are entitled to an offset for any wages received by Claimant during this period.

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

DATED this ___1st__ day of August, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, 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 _1st__ day of August, 2014, 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:

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