

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LAURA MARIE BYRNE,

Claimant,

v.

CONAGRA FOODS, INC.,

Self-Insured Employer,

Defendant.

IC 2009-005208

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed July 31, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on October 17, 2013. Claimant was present at the hearing and represented by Jeff Stoker of Twin Falls. Eric S. Bailey of Boise represented the self-insured Employer (Conagra) via speaker phone. The parties presented oral and documentary evidence. No post-hearing depositions were taken, but additional documentary evidence was admitted pursuant to the parties' stipulations filed on January 24 and February 13, 2014. Post-hearing briefs were filed, and the matter came under advisement on April 8, 2014. Additional undisputed evidence of Claimant's GED progress was submitted by both parties in their briefs. The Referee has, *sua sponte*, reopened the record to admit this evidence.

ISSUES

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

1. Whether and to what extent Claimant is entitled to benefits for:
 - a. Total permanent disability under the odd-lot doctrine;

- b. Permanent partial disability (PPD) in excess of permanent partial impairment (PPI);
- c. Total temporary disability (TTD); and
- d. Retraining.

At the hearing and in her opening brief, Claimant also asserted entitlement to payment on two medical bills. Defendants conceded liability for these bills in their brief. Therefore, that issue will not be addressed.

CONTENTIONS OF THE PARTIES

Claimant contends that she is totally and permanently disabled as an odd-lot worker as a result of her February 12, 2009 right knee and low back injuries sustained when she stepped in a drain at work. In the event she is not found totally and permanently disabled, she asserts entitlement to PPD of 60% inclusive of PPI. She also seeks one year of retraining benefits, including her GED test charges (\$150) as well as TTD payments from January 17, 2010 until July 24, 2011. Claimant relies primarily upon the opinions of Dr. Blair, M.D., her treating spine physician, as well as inferences drawn from the report of Douglas Crum, CRC, vocational consultant.

Defendants contend that Claimant is not totally and permanently disabled. At most, she has sustained 26% PPD inclusive of PPI. Further, there is no basis for an award of retraining benefits or any additional TTD payment. Defendants rely primarily upon the opinions of Dr. Knoebel and Douglas Crum, CRC, vocational consultant.

OBJECTIONS

All pending objections preserved in the deposition transcripts are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following, admitted at the hearing and pursuant to the parties' February 13, 2014 stipulation:

1. The testimony taken at hearing of Claimant and Brian Alan Fahey;
 2. Joint Exhibits (JE) 1 through 27 admitted at the hearing;
 3. JE 28 admitted following receipt of the parties' February 13, 2014 stipulation;
 4. JE 29 admitted following receipt of the parties' January 24, 2014 stipulation;
- and
5. The undisputed allegation by both parties in their respective briefs that Claimant was ultimately unable to pass her GED testing.

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

FINDINGS OF FACT

BACKGROUND

1. Claimant was 47 years of age at the time of the hearing and residing between Ford, Washington, and Spokane, Washington. She lives approximately 5 to 10 miles from Ford, with a population Claimant guessed to be merely 25; and approximately 35 to 40 miles from Spokane, with a population in excess of 400,000. As a practical matter, she must travel to Spokane to work. The minimum wage in Washington was \$9.19 per hour at the time of the hearing. At the time of her industrial accident, Claimant resided

in the Pocatello, Idaho area, with a minimum wage of \$7.25, earning a little over \$13.00 per hour. Claimant moved to Ford in February 2012.

2. Educationally, Claimant finished the eleventh grade. She has no further formal education. At the time of the hearing, Claimant had been working on getting her GED for two or three months. She had passed the science and social studies portions, but still needed to pass the reading, writing, and math sections. Nevertheless, Claimant was ultimately unsuccessful in her GED pursuit.

3. Prior to her tenure at Conagra, Claimant worked in positions including, but not limited to: restaurant bus person for family friends; vehicle upholsterer; delivery driver for an auto parts store; harvest truck driver; form-filler in the material control department at Northrop Electronics (a job procured through her aunt); waitress and bar back; laborer doing cleanup on construction sites; clerical worker, then installer, at a fiberoptic company; yard worker; house cleaner; food preparer; and house painter. Regarding her fiberoptic installation work, Claimant received on-the-job training. She installed fiberoptic cables at the houses of top military personnel because “they needed a female in there and then somebody that was precise or would take their time with [*sic*].” TR-27. Her work consisted of “taking out all the old wire, all the old boxes, punching in the fiberoptics into the boxes, tagging, making tags for the pits for all the big cables, once they’re spliced together, and then I would make the tags for that and climb down there and tag them.” *Id.*

4. At Conagra, Claimant was a sanitation worker. “[W]e had to take the hoses and spray all the tables down, sterilize them, pick up the tails and dump them. Just everything was sanitized.” TR-29. She was earning \$13.09 per hour, on a forty hour per

week basis, at the time of her industrial accident resulting in right knee and low back injuries (see below).

5. At the time of the hearing, Claimant was taking classes to obtain her GED. She had not gotten her résumé together, but was working on it. She had applied for some jobs online but was unable to complete those applications because they would not allow her to continue applying after she indicated she does not have the equivalent of a high school education. She also applied at other places like McDonald’s, Safeway, and a couple of daycares. Ultimately, Claimant is not sure she would be able to do those jobs if she were hired. She planned to talk to Richard Hunter, ICRD consultant, about her opportunities within a week. Claimant believes that, physically, she could do sedentary work if given the right chair and opportunities to get up and move around.

6. Claimant’s Social Security earnings history as per the report of Douglas Crum, CRC:

2009	<i>\$7,491.61 (W-2 only)</i>		
2008	<i>\$406</i>	1995	<i>\$3,122</i>
2007	<i>\$2,284</i>	1994	<i>\$7,507</i>
2006	<i>\$0</i>	1993	<i>\$2,178</i>
2005	<i>\$0</i>	1992	<i>\$40</i>
2004	<i>\$0</i>	1991	<i>\$13,126</i>
2003	<i>\$4,600</i>	1990	<i>\$12,614</i>
2002	<i>\$0</i>	1989	<i>\$3,074</i>
2001	<i>\$9,992</i>	1988	<i>\$2,012</i>
2000	<i>\$6,851</i>	1987	<i>\$14,703</i>
1999	<i>\$899</i>	1986	<i>\$16,795</i>

1998	<i>\$0</i>	1985	<i>\$6,011</i>
1997	<i>\$0</i>	1984	<i>\$1,372</i>
1996	<i>\$0</i>		

JE-234-235.

7. According to her ICRD file (see below), Claimant worked for her husband's construction business from 2005 through 2007, earning \$14 per hour.

MEDICAL BACKGROUND

8. Claimant lived in California prior to moving to Idaho in approximately 2007. No pre-industrial injury medical records are in evidence. Claimant testified that she has been pretty healthy, except for a bout with the flu within the last few years. When she was a teenager, Claimant sustained a concussion and a neck injury in a rollover accident. These conditions resolved and she had no further problems related to that event either at the time of her industrial accident or at the time of the hearing.

INDUSTRIAL INJURIES AND TREATMENT

9. On February 12, 2009, Claimant stepped into a deep drain with her right leg, injuring her right knee and her low back. "My left leg was stuck between my buttocks, my right leg was twisted, and I was, like, my back went down to the concrete. It was at a dead weight; I didn't know it was there. So when I walked in, I - - I thought I broke my left leg, but then I realized I went into a drain." TR-29, 30.

10. Claimant received medical treatment for strains to her right knee and low back and was returned to Conagra on February 20, 2009, in a part-time light-duty position sorting potatoes, wearing a right knee brace. She continued to have right knee and low

back pain, and continued to receive treatment, including physical therapy, for these conditions. She also periodically complained of left knee pain.

11. **Right knee.** On April 20, 2009, Claimant underwent an independent medical evaluation (IME) by Stan Griffiths, M.D., an orthopedic surgeon, regarding her right knee. Following examination and review of Claimant's MRI in consultation with Peter Vance, M.D., radiologist, Dr. Griffiths recommended arthroscopic surgery on Claimant's right knee.

12. On September 21, 2009, Claimant underwent arthroscopic surgery on her right knee by Dr. Wathne. He had delayed surgery to allow Claimant's MCL sprain to heal. Following a period of recovery, including physical therapy, Dr. Wathne noted on December 15, 2009 that Claimant's symptoms had subsided and that he would follow her on an as-needed basis.

13. **Low back.** Claimant had low back pain throughout her knee treatment. Her complaints in this regard increased during the beginning of October 2009. Claimant underwent a lumbar spine MRI on November 17, 2009. Dr. Wathne referred Claimant to his practice partner, Benjamin Blair, M.D., for follow-up on her low back condition. On December 15, 2009, Dr. Blair noted that Claimant was unable to work due to back and knee pain. He also noted that Claimant's November 2009 MRI findings are "significant for internal disc derangement at the L4-5 level with significant loss of signal within the disc itself and collapse of the disc with associated disc bulge. In addition there is an annular tear posteriorly at L4-5." JE-93. Dr. Blair recommended an epidural steroid injection (ESI), which Surety approved in late December 2009. Claimant obtained short-term relief from this procedure.

14. **IME: Dr. Knoebel.** On January 7, 2010, Claimant was evaluated by Richard Knoebel, M.D., an orthopedic surgeon, at Conagra's request. Dr. Knoebel examined Claimant's back and knee and reviewed her medical records, including those of Dr. Blair. Dr. Knoebel found Claimant's right knee condition to be at maximum medical improvement (MMI) and assessed 4% whole person PPI and restrictions including lifting limits of twenty pounds occasionally, ten pounds frequently, and only very occasional bending, squatting, kneeling, climbing, twisting, pushing, and pulling. He also cautioned against other activities involving comparable physical effort on more than a very occasional basis. As to Claimant's low back, Dr. Knoebel opined that her pain was subjective only, accompanied by significant pain behaviors without objective findings. He assessed no diagnosis, PPI, or restrictions to Claimant's back condition. In addition, Dr. Knoebel opined Claimant was not a credible patient, and that epidural steroid injections for Claimant's low back were contraindicated because she had no evidence of radiculopathy.

15. Upon receipt of Dr. Knoebel's report, Conagra paid the recommended PPI and ceased Claimant's TTD benefits. Conagra did not offer Claimant any employment within her restrictions. Claimant asserts she was unable to work during this period, at any job, because she could not squat or lift much weight.

16. **Continued low back treatment.** Claimant continued to receive treatment for her low back condition from Dr. Blair, who recommended a repeat ESI in February 2010, and noted that surgery may be required as early as February 18, 2010. Surety denied the ESI request. On March 5, 2010, Dr. Blair assessed low back-related restrictions of "no lifting more than 20 pounds, minimal bending, twisting, squatting and no sitting more than 30 minutes without a five minute break." JE-98. He related Claimant's low back condition

and restrictions to her February 2009 industrial injury, and again noted that Claimant may ultimately require surgery. In May 2010, he administered another ESI which, like the first, failed to provide long-term relief. Dr. Blair continued to opine that Claimant's low back required further care:

- On March 31, 2010 he responded to a letter from Claimant's counsel, opining that "further treatment, including epidural steroid injections, are reasonable and necessary for proper care and treatment to improve Ms. Byrne's symptoms and improve her function." JE-99.
- On June 9, 2010, following examination, Dr. Blair recommended fusion surgery and fitted Claimant with a back brace for postoperative immobilization.
- On July 12, 2010, Dr. Blair responded to a letter from Claimant's counsel, reaffirming his causation opinion and recommending surgery. "Her symptoms have been ongoing for greater than six months and she has failed multiple attempts at conservative care. She remains markedly symptomatic and her symptoms interfere with her activities of daily living. Therefore, I believe she is indicated for surgical intervention in the form of lumber [*sic*] interbody fusion." JE-101.
- On November 3, 2010, Dr. Blair wrote to Claimant's attorney, opining that she had sustained 8% whole person PPI, as per the *AMA Guides, Fifth Edition*, all due to her industrial injury.

17. **IME: Dr. Selznick.** On April 6, 2011, Claimant underwent an IME by Hugh Selznick, M.D., an orthopedic surgeon. Dr. Selznick opined that Claimant had sustained a motion segment injury or internal disc disruption at L4-5 as a result of her February 2009 industrial accident. In doing so, he acknowledged that he disagreed with Dr. Knoebel's opinion and agreed with Dr. Blair's. Thereupon, Conagra resumed Claimant's benefits, including TTD benefits.

18. **First low back surgery.** Claimant ultimately underwent two L4-5 fusion surgeries to treat her low back condition. The first surgery (anterior approach) was performed on July 11, 2011 by Scott Honeycutt, M.D., neurosurgeon.

19. **IME: Dr. Vincent.** Claimant continued to have problems and underwent an IME by Ronald Vincent, M.D., also a neurosurgeon, on May 2, 2012. By that time, she had moved to Washington. Dr. Vincent opined, among other things, that Claimant was not medically stable, that the first surgery appeared to have failed, and that she needed additional treatment.

20. **Second low back surgery.** The second surgery (posterior approach) was performed on September 11, 2012 by Jeffrey Larson, M.D., an orthopedic surgeon. Dr. Larson followed Claimant through her recovery. On December 18, 2012, following examination, Dr. Larson recommended 4-6 weeks of physical therapy, but no more. "She is exhibiting a pain behavior and I do not find any objective findings to warrant further PT, especially since the modalities seem to be aggravating her condition at this time. Of note, the radicular findings related to the pseudoarthrosis have resolved." JE-218.

21. **IME: Dr. Ludwig.** On February 6, 2013, Claimant was evaluated by Michael Ludwig, M.D., a physiatrist. He opined that Claimant was medically stable. He assessed 7% whole person PPI to Claimant's low back condition utilizing the *AMA Guides, Sixth Edition*, and light-duty restrictions of up to 20 pounds of occasional force, 10 pounds of frequent force and/or a negligible amount of constant force.

22. **Claimant's subjective condition at the hearing.** Claimant described her back and right leg pain at the hearing as constant, normally about three or four out of ten but up to an intensity of eight out of ten at times, from about waist level down to her right thigh. Sitting and overexerting herself increases her pain. Sitting in the right kind of chair helps her sit longer. Claimant's pain interrupts her sleep. Claimant's husband, Brian Fahey, described observations of her that corroborate her pain claims.

VOCATIONAL EVIDENCE

23. **Brian Fahey.** Claimant's husband testified to some of the types of jobs he believed Claimant was unqualified for, or physically unable to do. Mr. Fahey lacks expert vocational or medical qualifications; therefore, he is not a credible witness in these areas and his testimony is unpersuasive.

24. **Industrial Commission Rehabilitation Division (ICRD).** Roy Murdock and Richard Hunter, both vocational consultants with the ICRD, assisted Claimant in developing a re-employment goal and plan, and provided job leads, from May 14, 2013, through and after the hearing date. The ICRD file references the following post-MMI medical restrictions:

- *Lumbar spine.* (Dr. Ludwig) Post-lumbar fusion lifting limits of light-duty work with ten pounds of frequent force, twenty pounds of occasional force, and/or a negligible amount of constant force.
- *Right knee.* (Dr. Knoebel) Post-arthroscopic surgery lifting limits of ten pounds frequently and twenty pounds occasionally; and very occasional bending, squatting, kneeling, climbing, twisting, pushing, pulling, or other activities involving comparable physical effort.

25. Claimant's work history for the five years preceding her industrial injury, as well as her education information, were also detailed in the ICRD file.

26. As of June 10, 2013, Claimant was uninterested in a job search because she was concentrating on GED preparatory classes. By July 9, she had taken one of the five GED exams, was ready to take two more, and was studying math on Mondays and

Wednesdays. She was still unprepared to look for work. As of August 20, Claimant had passed the social studies and science exams.

27. Claimant conveyed to Mr. Hunter that she would like to work in a job where she can bake, provide customer service, or work with kids or animals. She was willing to commute to Spokane, where her husband worked. Mr. Hunter provided Claimant with contact information for several jobs, some of which required the equivalent of a high school diploma, and some of which did not. Claimant applied for five jobs that did not require a GED, all of which were food worker or retail clerk positions (McDonalds, Subway, Dollar Tree, Safeway, Zips Drive-In), and paid the Washington minimum wage (\$9.18, according to Mr. Hunter). She applied for eight jobs that required a GED (teacher aide, food worker, retail clerk, and paraprofessional educator), all of which offered wages that were dependent upon experience.

28. Claimant reported on October 11, 2013 that most of the positions were problematic because they were part-time and required a food handlers' card, which she could not obtain due to the government shutdown. Mr. Hunter responded by providing information on how to obtain the card online, and Claimant said she would follow up. He asked her to make ten employment contacts per week.

29. On October 16, 2013, the day before the hearing, Mr. Hunter prepared a Labor Market Summary. He opined, based upon Dr. Ludwig's and Dr. Knoebel's restrictions, Claimant is limited to light-duty work. Utilizing the *Dictionary of Occupational Titles*, Mr. Hunter defined light-duty work as, "Exerting up to 20 pounds of force *occasionally*, and/or up to 10 pounds of force *frequently*, and/or a negligible amount of force *constantly* to move objects." JE-360.

30. Due to her light-duty restriction, Claimant is unable to return to her time-of-injury position. However, Mr. Hunter opined that Claimant could be competitive for unskilled positions that require no more than one month of training. She has transferrable skills related to home painting; automotive work; automotive, airplane, and motorcycle upholstery; and food processing plant labor. Given her medical restrictions, Mr. Hunter opined that Claimant could find work in Spokane in retail sales, general merchandising, deli and other food service, cashiering, sewing machine operation, or as a barista, all without her GED. These positions paid from \$9.19 to \$9.50 to start.

31. Mr. Hunter opined that Claimant's age is not a significant non-medical factor. Her commute of approximately 37 miles to the Spokane area, where her husband and neighbors also work, was not problematic. Her lack of a high school-equivalent education is not a bar to employment, though her opportunities would increase with a GED.

32. Mr. Hunter recommended no additional formal training, as Claimant could recapture her time-of-injury hourly wage with no more than a GED.

33. **Douglas Crum, CRC.** Mr. Crum prepared a vocational disability analysis on December 1, 2013. Previously, he interviewed Claimant and reviewed her medical and vocational records; the transcript of her July 26, 2010 deposition; her answers to Defendants' interrogatories; her ICRD case notes; and functional job analyses for the positions of sanitation laborer and general laborer at Lamb Weston. Mr. Crum is qualified to render a vocational opinion.

34. Mr. Crum noted Claimant is functionally limited by her industrial low back and right knee impairments, as well as her eleventh grade education, her lack of computer skills, and her employment history. As to Claimant's physical impairment, Mr. Crum

acknowledged Claimant's medical restrictions assessed by Drs. Knoebel and Ludwig. He also considered Claimant's vocationally transferable work skills, her age and the nature and composition of Claimant's pre and post-injury labor markets.

35. Mr. Crum opined that, on a pre-injury basis, utilizing labor market statistics for the Pocatello area, she had access to approximately 9.8% of the jobs in her local labor market. Post-injury, she had access to approximately 5.9% of those jobs, for a total loss of access of 39.6%. He further opined that Claimant could likely find a job that pays \$10 per hour, for a 23.6% loss in wage earning capacity. Overall, Mr. Crum opined that Claimant has sustained 30% PPD, inclusive of PPI, when the Pocatello labor market is considered.

36. Utilizing labor statistics for the Spokane area, Mr. Crum opined that Claimant had access to 10.7% of the jobs prior to her industrial injuries. Subsequently, she only had access to 6.8%, for a total loss of access of 36%. Her wage earning capacity, he opined, is reasonably \$11.00 per hour post-injury, for a loss of 16%. Overall, Mr. Crum opined that Claimant has sustained 26% PPD, inclusive of PPI, when the Spokane labor market is considered.

DISCUSSION AND FURTHER FINDINGS

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).

RETRAINING

37. Claimant seeks retraining benefits. Idaho Code § 72-450 provides that income benefits may be paid to an individual who is receptive to and in need of retraining in another field, skill, or vocation in order to restore his or her earning capacity. Claimant seeks one year of retraining benefits to obtain her GED. Claimant failed in her 2013 GED attempt. Defendants argue that Claimant is not entitled to this retraining, because the GED is unnecessary to increase her wage earning capacity, and Claimant is insufficiently motivated and unlikely to pass her GED test.

38. Under Idaho Code Title 72-450, Claimant has the burden of showing retraining is necessary in order to restore her earning capacity, and that she is receptive to the same. Claimant's time-of-injury wage was \$13.09 per hour, full-time. Post-injury, Mr. Crum opined that Claimant had the capacity to earn \$11.00 per hour in Spokane County (16% reduction), and \$10.00 per hour in the SE Idaho labor market (23.6% reduction). Mr. Crum did not discuss what impact, if any, a GED would have on Claimant's wage earning capacity.

39. While the ICRD vocational report lends some support for Claimant's desired GED program, the report contains inconsistencies. First, the ICRD's wage calculations show that a GED could help Claimant restore or even exceed her time-of-injury wage by giving her access to jobs paying from \$9.29 to \$14.37 per hour in the Spokane area. Without a GED, the ICRD opined that Claimant could access jobs paying \$9.19 to \$11.05 per hour. Although the wage range with a GED is higher, the GED does not guarantee Claimant will exceed her time-of-injury wage. The ICRD opined that a

GED “is not needed to be successful in returning to work at her time of injury wage.”

Exh. 26, p. 365.

The claimant remains capable of entry level work that does not require a high school diploma or GED. Due to her permanent work restrictions, she is unable to return to her time of injury position as a food processing laborer, and is limited to the light work category or entry level positions. According to research through the Washington Occupational Employment and Wage Release 2012, and job listings with the Washington Work Source, there are current employment options available. The fact that the claimant does not have a GED, does not play a role in her ability to secure employment. This is demonstrated by the job postings identified, as they do not require a GED, although having her GED will increase the number of employment possibilities.

Exh. 26, p. 363.

The ICRD also did not recommend formal training for Claimant. Exh. 26, p. 362. In all, IRCD tried to direct Claimant to initiate a dedicated job search, yet did not discourage her from obtaining a GED.

40. Even though the ICRD was less than enthusiastic in recommending that Claimant pursue a GED, we believe that the evidence is sufficient to support the conclusion that successfully pursuing her GED would improve Claimant’s employment opportunities. However, as developed below, we cannot conclude that Claimant is, in fact, receptive to retraining.

41. Claimant’s 2013 attempt to achieve her GED was unsuccessful, notwithstanding Claimant’s attendance at classes periodically over more than six months. Claimant testified that the 2014 GED exam program is more difficult than the 2013 GED exam program she failed, and she is uncertain she could pass the 2014 exam. Given Claimant’s failure to pass the 2013 program, there is insufficient evidence in the record

from which to determine that Claimant is a good candidate for pursuing her GED. Therefore, we conclude Claimant is not receptive to retraining.

42. While we find that Claimant has not met her burden of establishing entitlement to prospective retraining benefits, we do believe she is entitled to recover from surety the costs associated with her attempts to pursue her GED in 2013. It was reasonable for Claimant to attempt to improve her earning capacity by obtaining her GED, and the cost to Employer was trivial compared to the benefit Employer would have enjoyed had Claimant been successful. That Claimant's unsuccessful attempt did nothing but demonstrate that Claimant is not a retraining candidate does not dissuade us from concluding that the attempt was appropriate, and that Claimant should be reimbursed for her out-of-pocket expenses associated with tuition, books, etc. Claimant's classes were free; her tests cost \$30 each, for a total of \$150. As such, Claimant has established that she is entitled to an award of \$150 as reimbursement for her GED classes under Idaho Code § 72-450. She has failed to establish entitlement to any further costs related to retraining.

43. Because Claimant has not shown she is entitled to retraining, the Referee will now consider the issue of permanent disability.

PERMANENT DISABILITY

44. "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.

45. 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 nonmedical 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).

46. **Maximum medical improvement (MMI).** As a prerequisite to determining Claimant’s PPI or PPD, the evidence must demonstrate that she is medically stable. To wit, "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 evaluation. Idaho Code § 72-422.

47. *Right knee.* Dr. Knoebel’s opinion that Claimant’s industrial right knee condition became medically stable as of January 7, 2010 is persuasive.

48. *Low back.* Dr. Ludwig’s opinion that Claimant’s industrial low back condition became medically stable as of February 6, 2013 is persuasive.

49. **Total permanent disability.** Claimant contends that she is totally and permanently disabled because her lack of a high school education plus her industrial injuries will likely preclude her from being competitive for any jobs. The Referee finds insufficient evidence in the record to support this position. Both Mr. Hunter and Mr.

Crum opined that there are regularly available jobs that Claimant is qualified for and can do. This evidence is persuasive. Claimant has failed to prove by a preponderance of evidence that she is totally and permanently disabled.

50. *PPD*. Only one vocational consultant opined as to Claimant's PPD. Mr. Crum opined that Claimant has suffered 26% PPD in Spokane area labor market, or 30% PPD in the Pocatello area labor market. Claimant seeks an order that Claimant has suffered at least 60% PPD. In an attempt to establish her goal, she criticizes the foundation for Mr. Crum's opinion and suggests alternative conclusions to his calculations. However, Claimant does not offer any affirmative evidence to support her various positions. It is true that Mr. Crum did not list specific jobs that Claimant can do; however, he had reviewed Mr. Hunter's notes, and he asserted that he had identified positions that Claimant could do based upon her relevant vocational factors, including her transferrable skills, and authoritative local labor market statistics.

51. Most troubling, Mr. Crum did not specify whether or not he included jobs requiring a GED in his analysis. He wrote, "Ms. Byrne has less than a high school education at this time, but anticipates completing a GED by the end of 2014. She has already passed several of the tests toward that degree," suggesting that he may have included positions requiring a GED. If he did, his estimate of Claimant's PPD is too low. Report of Mr. Crum; January 24, 2014 Stipulation.

52. Claimant bears the burden of proving her disability. She did not depose Mr. Crum, and she produced no additional labor market evidence to rebut his opinion. Mr. Crum was aware that Claimant did not possess a GED when he prepared his report. His opinions establish a reasonably calculated baseline PPD, which Claimant has not rebutted

with credible evidence. Further, Claimant's spotty earnings history results in a lifetime average annual wage that she could replace with a full-time minimum wage job, suggesting that Mr. Crum's earnings loss estimates are too high. The Referee is not persuaded that Mr. Crum's PPD estimates should be increased.

53. The proper time for determining Claimant's PPD is the time of the hearing. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). Here, there is no reason to believe that Claimant relocated to manipulate these proceedings. Therefore, under *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 8701 P.2d 1292 (1994), the Spokane area labor market, which lies within a reasonable geographical area of Claimant's residence at the time of the hearing, is the proper market to consider in determining her PPD. Mr. Hunter's notes state that Claimant was considering a move back to Pocatello in or around the time of the hearing. Nevertheless, she resided in the Spokane area at that time, and the evidence of record is insufficient to establish that Pocatello labor market information is more reflective of her future employment opportunities.

54. Claimant has established entitlement to 26% PPD inclusive of PPI.

TEMPORARY TOTAL DISABILITY

55. Idaho Code §§ 72-408 and 409 provide time loss benefits to an injured worker who is temporarily totally disabled. Under *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), once a claimant establishes by medical evidence that she is within a period of recovery from the industrial accident, she is entitled to TTD benefits *unless* and *until* evidence is presented that she has been medically released for light work and (1) that an employer has made a reasonable and legitimate offer of suitable employment to her or that (2) there is employment available in the general labor market

which claimant has a reasonable opportunity of securing, and which is consistent with her physical abilities.

56. Here, it has been determined that Claimant worked at a light-duty job for Conagra following her industrial injury until approximately September 20, 2009, when she underwent arthroscopic knee surgery. Following her recovery from that surgery, she was released to light-duty work on January 7, 2010 by Dr. Knoebel. Conagra paid TTD benefits through this time, after which it paid 4% whole person PPI in consideration of Claimant's right knee injury.

57. When Claimant's right knee was determined to be medically stable, she was still receiving treatment for her low back injury. Dr. Blair began recommending further treatment, based upon imaging demonstrating work-related pathology at L4-5, before the end of 2009. Although Claimant asserts he recommended surgery on January 17, 2010, the record demonstrates that he first recommended surgery on June 9, 2010. Surety finally approved further treatment after Dr. Selznick's IME on April 6, 2011. Claimant asserts that Surety did not restart her TTDs until approximately July 25, 2011.

58. Conagra does not dispute that Claimant's low back injury is work-related. However, it maintains that it does not owe Claimant any TTD payments related to her low back because, at the time it stopped paying these benefits, she had been released to light-duty work with respect to her low back injury *and*, until her first low back surgery, there was employment available in the general labor market which Claimant had a reasonable opportunity of securing, and which was consistent with her physical abilities. Therefore, under *Maleug*, Conagra is not liable for any additional TTD benefits.

59. The record contains no Pocatello labor market information for the relevant period, and the Referee declines to speculate as to this information. Even assuming there were jobs Claimant could otherwise obtain during this time, the Referee is not persuaded that Claimant was likely to be hired for any of them because back surgery had not yet been ruled out. Dr. Blair administered the first ESI in December 2009, conservatively probing for the extent of treatment Claimant would require. He likely discussed the possibility of surgery with Claimant on December 15, 2009, when he noted a detailed conversation about her potential options. Certainly, he had discussed potential surgery with her on February 18, 2010.

60. Under these circumstances, it cannot be concluded that Claimant was likely employable in a new job. She may have been able to return to light-duty work for Conagra, but none was offered. Claimant remained in a period of recovery from February 12, 2009 (the date of her industrial injury) until February 6, 2013. Conagra has failed to establish that it was exempt from paying TTD benefits during any part of this period. Claimant seeks TTDs from January 17, 2010 through July 24, 2011. She has proven her entitlement to such benefits, less an offsetting credit for TTD benefits paid by Conagra, if any, during this period.

CONCLUSIONS OF LAW

1. Claimant has established she is entitled to permanent partial disability of 26% inclusive of permanent partial impairment.
2. Claimant has established she is entitled to reimbursement for retraining benefits in the amount of \$150.
3. Claimant has failed to prove entitlement to any additional retraining benefits.

4. Claimant has proven entitlement to temporary total disability benefits from January 19, 2010 through July 24, 2011. Defendants are liable to Claimant for such benefits, with credit for TTD payments already made, if any, for any portion of this period.

RECOMMENDATION

Based on 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 30th day of June, 2014.

INDUSTRIAL COMMISSION

/s/
Michael E. Powers, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JEFF STOKER
PO BOX 1597
TWIN FALLS ID 83303-1597

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

ge

Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LAURA MARIE BYRNE,

Claimant,

v.

CONAGRA FOODS, INC.,

Self-Insured Employer,

Defendant.

IC 2009-005208

ORDER

Filed July 31, 2014

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended 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 these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based on the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has established she is entitled to permanent partial disability of 26% inclusive of permanent partial impairment.
2. Claimant has established she is entitled to reimbursement for retraining benefits in the amount of \$150.
3. Claimant has failed to prove entitlement to any additional retraining benefits.
4. Claimant has proven entitlement to temporary total disability benefits from January 19, 2010 through July 24, 2011. Defendants are liable to Claimant for such benefits, with credit for TTD payments already made, if any, for any portion of this period.

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

DATED this ___31st_____ day of ___July___, 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 ___31st___ day of ___July___, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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