

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LOLA J. LIENHARD,

Claimant,

v.

SODEXO, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Surety,
Defendants.

IC 2011-002489

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

FILED JUL 8 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Lewiston on November 15, 2013. Anthony C. Anegon represented Claimant. W. Scott Wigle represented Defendants Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on March 24, 2014 and is now ready for decision.

ISSUES

According to the parties' briefs, the issues have resolved to the following:

1. Whether and to what extent Claimant is entitled to benefits for:
 - a) Medical care,
 - b) Permanent partial disability in excess of permanent partial impairment, and
 - c) Attorney fees; and
2. Whether apportionment for a pre-existing condition under Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends her permanent disability should be rated at 62%. She is entitled to future medical care. Defendants unreasonably refused to allow and pay timely for medical care

contrary to the written opinion of their IME physician; attorney fees are awardable under Idaho Code § 72-804.

Defendants contend that Claimant has retired, has made no job search, and has not established any permanent disability in excess of the 7% lower extremity PPI previously paid. They paid for medical care promptly upon receipt of a written demand from Claimant's attorney and are not liable for attorney fees under Idaho Code § 72-804. Because they paid full invoice for medical care under *Neel*, they should not also be assessed attorney fees, even if otherwise awardable.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and her husband;
2. Claimant's exhibits 1 through 14; and
3. Defendants' exhibits 1 through 5.

Having analyzed all evidence of record, the Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. Claimant worked for a caterer at the University of Idaho for several years. The employing entity changed hands but her job did not change substantially. She retired in 2006 after a nonindustrial motorcycle accident. In December 2009 Employer recruited her to return to work.

2. On November 29, 2010 Claimant fell at work and broke her left femur.

Medical Care

3. She sought immediate medical care. Steven Pennington, M.D., at Gritman

Medical Center reduced the fracture and affixed hardware, a rod or "nail," the next day.

4. In April 2011 Claimant underwent a nonindustrially related surgery to ameliorate symptoms of gastroesophageal reflux disease.

5. Claimant's fractured femur failed to knit. On May 5, 2011 Dr. Pennington performed a nail dynamization and removed the distal affixing screws. By the end of June, X-rays showed healing bone growth but Claimant reported no symptomatic changes.

6. A July 2011 bone density test showed Claimant suffers from osteoporosis.

7. By October 2011 Dr. Pennington discussed a possibility of returning her to work. Claimant was pessimistic. Dr. Pennington was similarly doubtful that Claimant would ever again be able to stand on a concrete floor as part of a full-time job.

8. A November 14, 2011 X-ray showed that a proximal affixing screw had broken and shifted position. Claimant reported her symptoms had lessened. Dr. Pennington opined that surgery was not required yet. In subsequent visits, Claimant reported continuing recovery.

9. On December 17, 2011 Robert Friedman, M.D., examined Claimant at Surety's request. He opined Claimant was medically stable and rated her PPI at 7% of the lower extremity without apportionment. He opined her left leg was shortened by the fracture. He equivocated about whether her need for a cane was caused by the industrial accident or by unrelated osteoarthritis. He imposed no restrictions related to the industrial accident and recommended she return to work with ad lib position changes and a mat to stand on. He opined the rod or broken screw should be removed if Claimant became symptomatic but that placing a larger rod was not then recommended.

10. By April 16, 2012 Dr. Pennington recommended it was time to remove the broken screw and, because healing bone appeared to be adequate, an unbroken screw.

He removed them on May 9, 2012. (Some surgical records refer, by typographical error, to May 19.) Claimant's pain largely subsided, but she still limped.

11. However, as of a July 30, 2012 visit, Claimant's pain was reported as being "as bad as it ever has been."

12. In December 2012 as Dr. Pennington considered a repeat surgery involving possibly removing the stabilizing nail, affixing a plate, packing the fracture with bone graft material to induce healing, or some combination of these, he recommended she obtain a second opinion.

13. After examination on December 26, 2012 consultant Carla Smith, M.D., recommended exchanging the nail for a larger one.

14. Dr. Pennington performed the surgery on March 13, 2013. He exchanged the nail for a larger one and reworked the edges of the fracture to stimulate healing bone growth. An unexpected small fracture of the greater trochanter was observed. Otherwise, the nail exchange was performed as planned.

15. At a follow-up visit on March 25, 2013 Claimant reported her leg pain had subsided. By June 3 she had only slight pain at the tip of the trochanter and X-ray showed the fracture was finally beginning to heal as it should. By September 3 Claimant was essentially healed with only a bit of bursitis pain.

16. On October 9, 2013 John McNulty, M.D., reviewed records and examined Claimant. He noted left leg atrophy, length discrepancy, and restricted range of motion as well as bursitis. He concurred with Dr. Friedman's 7% lower extremity PPI rating without apportionment. He disagreed about restrictions and opined she should not stand for more than one hour consecutively for a total of no more than four hours in an eight-hour workday

with an occasional, 15-pound, floor-to-waist lifting restriction. He cautioned against stairs and ladders.

Prior Medical Care

17. Claimant broke her left tibia and fibula in a motorcycle accident on June 25, 2006. On June 26 Charles Jacobson, M.D., surgically reduced the fractures and affixed hardware to stabilize the tibia. Claimant's recovery was complicated by compartment syndrome. By October 17 X-rays showed inadequate bone formation around the tibia fracture. On March 14, 2007, affixing screws were surgically removed from her tibia. By May 31 she was still recovering. Claimant experienced lingering difficulty when walking more than one-quarter mile. On December 11, 2007 Dr. Jacobson noted she could move as tolerated and recommended a one-year interval for a follow-up visit.

18. A May 18, 2010 X-ray showed that tibial affixing screws had loosened. Surgery was required.

19. Claimant, being in her 60s, has a number of age-related and other preexisting conditions. The evidence does not support a finding that any of these likely provide a basis for a PPI rating or that any or all of these in combination likely limit her ability to compete for jobs.

Vocational Factors

20. Claimant, born March 12, 1945, was 68 years old on the date of hearing.

21. Claimant completed the 10th grade. She never earned a GED. She never attended any formal vocational training.

22. Claimant has worked as a cleaning lady, a bartender, and in food service. She and her husband owned a secondhand antique store.

23. Moscow is the largest municipality in her local labor market. Claimant has also worked in the communities of Princeton and Harvard within that labor market.

24. At the time of injury Claimant earned \$9.45 per hour. She worked full time for most of her years with Employer and its predecessors. In September 2010, Claimant's hours were cut from 8-hour days to 7.5-hour days. In October 2010, a few weeks before the accident, her days were cut from five to four per week as part of a general reduction. This reduction was based upon student usage of food services.

25. Claimant began receiving Social Security retirement benefits at age 62 and Medicare benefits at age 65. She came out of retirement at Employer's urging to accept employment and her benefits were reduced when her wage earning exceeded amounts specified by the Social Security Administration. Since the accident, she has received Social Security benefits.

26. Claimant gained some transferrable skills helping her husband run a secondhand store. She makes a good first impression and would be an asset to an Employer, for example, in a customer service or retail clerk position.

27. Claimant is familiar with and willing to perform hard work.

DISCUSSION AND FURTHER FINDINGS OF FACT

28. The provisions of the Idaho 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). Contested facts need not be so liberally construed. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 834 P.2d 878 (1992).

Permanent Partial Disability

29. “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.

30. 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, 766 P.2d 763 (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, 896 P.2d 329 (1995).

31. Loss of wage earning capacity is a factor, but may not be the sole factor considered in determining permanent disability. *Vassar v J.R. Simplot Co.*, 134 Idaho 495, 5 P.3d 475 (2000).

32. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425, *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of*

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

33. Claimant's retirement status and failure to conduct a job search would disqualify her from odd-lot status. Although Claimant makes a brief mention of odd-lot criteria in her brief, she did not raise this issue for hearing and does not argue that she qualifies. Claimant's failure to conduct a job search does not otherwise affect analysis of her permanent disability.

34. Claimant's argument for disability appears based substantially upon a reduction in wage. Although the equation provided in Claimant's brief does not yield the 62% number Claimant intended, her theory of calculation is clear: 20 hours per week at minimum wage of \$7.25 per hour yields 62% of full-time work at \$9.45 per hour. Claimant was capable of full-time work at the time of injury. However, this calculation is based upon somewhat tenuous facts when Claimant's actual hours at the time of injury are considered.

35. Dr. Friedman's PPI rating, although prematurely provided, was borne out by Dr. McNulty's examination when Claimant actually reached medical stability. Because of his actual observation of Claimant's condition upon medical stability, Dr. McNulty's opinions about restrictions carry greater weight. Claimant will be unable to compete for full-time jobs which require standing as a primary position.

36. Claimant may compete for jobs allowing ad lib position changes and part-time jobs requiring standing. Claimant's restrictions preclude her from returning to work for Employer.

37. Defendants suggest that Claimant, financially, does not "need to work." Defendants fail to show a relevant impact on disability when making this argument.

38. Considering Claimant's PPI, Dr. McNulty's restrictions, Claimant's age,

education, wage earning capacity, local labor market, and all other relevant factors, Claimant showed it likely she suffered permanent partial disability arising from the compensable accident and injury rated at 55%, inclusive of PPI previously paid.

§ 406 Apportionment

39. An employer is liable only for the disability caused by the industrial accident and injury:

In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

Idaho Code § 72-406(1). Where § 406 apportionment is required, a two-step procedure for determining apportionment is appropriate. *Page v McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008).

40. Both Drs. Friedman and McNulty rated Claimant's PPI without apportionment. No physician opined that Claimant suffered preexisting permanent physical impairment. To the extent that medical restrictions may be considered evidence of permanent physical impairment, none were imposed between the 2006 motorcycle accident and Claimant's 2010 industrial accident. Dr. Friedman's suggestion that Claimant reasonably use a cane might be considered a restriction but only a temporary one, because by the time of hearing Claimant had recovered sufficiently so that she did not need one. Moreover, Dr. Friedman's opinion that Claimant was medically stable when he examined her is outweighed by Claimant's subsequent recovery upon further surgery and other medical care. Claimant worked full time, standing eight hours per day, when she returned to work for Employer in December 2009. Thus, Dr. McNulty's proposed restrictions are unambiguously based upon the effects of the compensable accident and injury.

41. Claimant's old tibial injury healed slowly but without residual symptoms. The record does not support a finding that it affected her activities of daily living. Therefore, without a physician's opinion otherwise to establish impairment, we will not speculate whether the record may imply that any preexisting PPI exists. Similarly, although Claimant's osteoporosis may have prolonged her recovery for purposes of temporary disability benefits not at issue here, the record does not support a finding that it permanently affected her activities of daily living for purposes of establishing permanent disability.

42. The record does not set forth a basis for applying Idaho Code § 72-406 here; there is insufficient evidence to show it likely that Claimant's permanent disability was increased or prolonged by a preexisting physical impairment.

Medical Care

43. A claimant is entitled to medical benefits immediately after a compensable industrial accident and for a reasonable period afterward. Idaho Code § 72-435.

44. While the dispute over medical benefits preceding the date of the hearing appears to have resolved, Claimant seeks future medical benefits, if necessary. It is axiomatic in Idaho Workers' Compensation Law that there is no statute of limitations by which a surety may cut off such benefits. Although Claimant has not averred that any specific procedure is planned or anticipated, her right to future medical treatment related to the accident and injury continues.

Attorney Fees

45. Attorney fees are awardable where the criteria of Idaho Code § 72-804 are met.

46. Here, Claimant showed that Surety sent written notice to a treating physician that it would not pay any more medical care. This refusal was made January 26, 2012.

This refusal was made despite the fact that Dr. Friedman expressly opined in favor of a surgery to remove the broken screw if it became clinically necessary and that such surgery would be related to the industrial accident.

47. The fact that no surgery was scheduled nor recommended for imminent scheduling when Dr. Friedman saw Claimant in December 2011 does not excuse Surety from its duty evaluate a claim on an ongoing basis. Dr. Pennington's recommendation for additional surgery was reasonable. It was consistent with Dr. Friedman's opinion. Surety's refusal was made contrary to statute which requires all related medical care to be paid. Idaho Code § 72-435.

48. The assertion that Surety's "former claims examiner" somehow "misinterpreted" Dr. Friedman's opinion constitutes argument in briefing and is not established by the record. Moreover, Defendants' suggestion that "improper motive" was not present is immaterial; the attorney fee statute does not require a showing of malice. Given Dr. Friedman's opinion, Surety's refusal notice was unreasonably sent.

49. Claimant needed additional surgery and got it on May 9, 2012. Claimant was forced to resort to other means to obtain payment for her medical care. Relying upon the refusal notice, Claimant's physician did not bill Surety but obtained payment by other means. Claimant was fortunate that these other means of payment did not significantly delay her surgery. Claimant's luck at this point does not make Surety's refusal reasonable.

50. Defendants argue that Surety made payment timely upon demand from Claimant's attorney and any delay was caused by the physician's failure to bill Surety. Defendants' argument is not well taken. Claimant's physician is not required to perform a futile act. He was already on notice that payment for this medical care had been denied.

Claimant's attorney exerted time and influence to obtain benefits payments which had been unreasonably denied.

51. Defendants' argument that the application of *Neel* somehow partially eclipses Idaho Code § 72-804 is not well taken. Section 435 and cases like *Neel* set forth principles of law regarding the extent of liability for cost of medical care. Section 804 sets forth principles of law by which attorney fees are awardable. These are separate principles which involve separate analyses. Unreasonable delay in payment of medical bills remains an unreasonable delay under § 804 regardless of the amount of medical benefits ultimately required to be paid.

52. Claimant is entitled to an award of attorney fees for representation to and including the date Surety actually paid the last of these denied medical bills which arose after January 26, 2012. From the record, it appears that the anesthesiologist's bill which was paid April 16, 2013 may represent the date through which Claimant's attorney fees should be paid.

CONCLUSIONS

1. Claimant is entitled to permanent partial disability rated at 55% of the whole person, inclusive of PPI previously paid;
2. The record does not show it likely that Claimant's permanent disability was increased or prolonged by a preexisting physical impairment; apportionment under Idaho Code § 72-406 does not apply in this matter;
3. Claimant is entitled to all related future medical care as required by her treating physicians;
4. Claimant is entitled to attorney fees under Idaho Code § 72-804 for her attorney's

efforts to obtain payment for medical care benefits due her regarding the May 9, 2012 surgery through the last date upon which any payment of such medical bills was made by Surety; and

5. The holding in *Neel* does not provide a limit or credit to an award of attorney fees under Idaho Code § 72-804.

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 25TH day of JUNE, 2014.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of JULY, 2014, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

ANTHONY C. ANEGON
P.O. DRAWER 698
LEWISTON, ID 83501-0698

W. SCOTT WIGLE
P.O. BOX 1007
BOISE, ID 83701

dkb

/S/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LOLA J. LIENHARD,
v.
SODEXO, INC.,
and
NEW HAMPSHIRE INSURANCE COMPANY,
Claimant,
Employer,
Surety,
Defendants.

IC 2011-002489

ORDER

FILED JUL 8 2014

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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 recommendations 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 upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant is entitled to permanent partial disability rated at 55% of the whole person, inclusive of PPI previously paid.
2. The record does not show it likely that Claimant's permanent disability was increased or prolonged by a preexisting physical impairment; apportionment under Idaho Code § 72-406 does not apply in this matter.
3. Claimant is entitled to all related future medical care as required by her treating physicians.

4. Claimant is entitled to attorney fees under Idaho Code § 72-804 for her attorney's efforts to obtain payment for medical care benefits due her regarding the May 9, 2012 surgery through the last date upon which any payment of such medical bills was made by Surety.

5. The holding in *Neel* does not provide a limit or credit to an award of attorney fees under Idaho Code § 72-804.

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

DATED this 8TH 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 8TH day of JULY, 2014, a true and correct copy of **ORDER** were served by regular United States Mail upon each of the following:

ANTHONY C. ANEGON
P.O. DRAWER 698
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/S/ _____