BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA FUNES, Claimant, v. STEVE VANDERVEGT DAIRY, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2006-518506** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed December 23, 2010

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 Twin Falls on June 15, 2010. Claimant was present and represented by Patrick D. Brown of Twin Falls. Neil D. McFeeley of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of one post-hearing deposition. The parties submitted post-hearing briefs and this matter came under advisement on November 16, 2010.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether Claimant is entitled to permanent partial impairment (PPI) benefits for a work-related back injury and, if so, whether those benefits should be apportioned for a pre-existing condition.

2. Whether Claimant is entitled to permanent partial disability (PPD) benefits and, if so, whether those benefits should be apportioned pursuant to Idaho Code § 72-406.

3. Whether Claimant is entitled to an award of attorney fees.

CONTENTIONS OF THE PARTIES

Claimant contends that she is entitled to a 12% whole person PPI rating for a work-related lumbar injury without apportionment for asymptomatic pre-existing transverse process fractures. She is also entitled to at least 50% PPD inclusive of her PPI according to her retained vocational expert. Finally, Claimant is entitled to an award of attorney fees based on Defendants' unreasonable failure to pay Claimant the full 12% PPI, as assigned by her treating physician and failure to pay her the 50% PPD rating assigned by her vocational expert.

Defendants contend that Claimant's 12% whole person PPI should be apportioned by subtracting 5% for Claimant's pre-existing transverse process fractures, leaving 7% for her industrial accident. Further, Claimant has incurred whole person PPD of no more than 20% inclusive of impairment. Finally, Claimant's request for attorney fees is "frivolous" in that Defendants have paid all of Claimant's medical expenses, have paid all time loss benefits owing, and have paid the full 12% PPI rating. Defendants are under no obligation to pay PPD benefits until the Commission makes its determination in that regard.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Mary Barros-Bailey, Ph.D., and Nancy Collins, Ph.D., taken at the hearing.

2. Claimant's Exhibits 1-20, admitted at the hearing.

3. Defendants' Exhibits A-O, admitted at the hearing.

4. The pre-hearing deposition of David Christensen, M.D., taken by Claimant on May 21, 2010.

5. The post-hearing deposition of Rodde D. Cox, M.D., taken by Claimant on June 29, 2010.

The objections made during the course of taking the above depositions are overruled with the exception of Defendants' objections at pages 55 and 58, and Claimant's objection at page 93 of Dr. Cox's deposition, which are sustained.

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 Commission.

FINDINGS OF FACT

1. Claimant was 44 years of age at the time of the hearing and resided in Jerome. She was born and raised in Honduras and completed high school there. She came to the United States legally in 1998 and has resided in Jerome since 1999. Claimant can speak ". . . a word here and there" of English. She has primarily worked as a seasonal farm laborer.

2. On August 1, 2006, while employed at Employer's dairy, some hay bales fell on Claimant's back from a height of approximately 10 feet. Claimant presented to St. Benedicts Family Medical Center in Jerome, complaining of back and chest pain. She was examined and tested and it was determined that, because some of her tests were positive and she had an L2 compression fracture, it would be prudent to transfer her care to Magic Valley Regional Medical Center, where she would have access to a neurosurgeon, if necessary.

3. The above-referenced transfer was accomplished on August 1. She was diagnosed with an L2 fracture without neurological deficit. Claimant came under the care of David Christensen, M.D., an orthopedic surgeon with a spine specialty. Dr. Christensen

prescribed extensive bracing, but warned Claimant that if she kept the brace in place and her symptoms improved, that may be the only treatment required. However, if her symptoms did not improve, he would recommend an L2 corpectomy and strut graft and fusion. Claimant was discharged on August 5, 2006, wearing her brace.

4. Dr. Christensen treated Claimant conservatively from the date of the accident until February 13, 2007, at which time he declared Claimant to be at MMI and assigned a 12% PPI rating without apportionment and assigned restrictions. Shortly thereafter, Claimant decided to go ahead with the surgery recommended by Dr. Christensen, so on February 25, 2009, he performed a corpectomy with fusion to reduce the kyphosis[1] remaining after the L2 fracture itself had healed. On December 20, 2009, Dr. Christensen again found Claimant to be at MMI, but assigned no PPI above the 12% previously assigned. He also assigned certain permanent physical restrictions.

DISCUSSION AND FURTHER FINDINGS

PPI and Apportionment:

"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 nonprogressive 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 nonspecialized activities of bodily members. Idaho Code § 72-424. When determining

[1] Dr. Christensen explained that a kyphosis is a forward leaning of the spine that can cause muscle pain at the level of the fracture due to extra load on the muscles in keeping Claimant upright.

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).

Dr. Christensen:

5. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, 6th Edition (*Guides*, 6th), Dr. Christensen assigned a 12% whole person PPI rating for Claimant's L2 compression fracture and surgery. He did not apportion any of that rating to pre-existing conditions.

Dr. Cox:

6. Defendants retained Rodde D. Cox, M.D., to provide a PPI rating only (as opposed to a full-blown IME). Dr. Cox is board-certified by the Independent Medical Examiners, the American Board of Electrodiagnostic Medicine, as well as in Physical Medicine and Rehabilitation. He has an active practice and devotes between five and ten percent of his time conducting IMEs and impairment ratings. In a letter to Surety dated February 4, 2010, Dr. Cox indicated that upon his physical examination of Claimant and review of medical records provided by Surety, Claimant had incurred PPI of 12% of the whole person as the result of her industrial accident and injury. Dr. Cox utilized the *Guides,* 6th Edition.

7. Dr. Cox was later provided with additional medical records regarding a motor vehicle accident[2] wherein Claimant sustained transverse process fractures at L2, L3, and L4, among other, more serious injuries. Based on his review of the additional medical records, Dr. Cox authored another letter to Surety dated March 23, 2010, wherein he indicated that the

[2] Dr. Cox did not know, and the record does not otherwise reflect, why he was not provided with the additional records at the time he was first retained and was asked to address apportionment issues.

transverse process fractures warranted a 5% whole person PPI rating, thus reducing his original 12% to 7%.

8. Dr. Christensen disagreed with Dr. Cox and would assign 0% PPI for the transverse process fractures.

9. The parties have spent a considerable amount of time and energy on arguing whether, and how much, Claimant's pre-existing asymptomatic transverse process fractures constitute a ratable condition for PPI purposes. However, the Referee, while acknowledging that an interesting esoteric discussion was had, does not find it necessary to decide that issue. The issue raised is simply one of apportionment of PPI. Assuming that the transverse process fractures were ratable, they were nonetheless asymptomatic, non-radicular, healed themselves with no active treatment, and, significantly, caused no functional abnormalities.

10. Dr. Cox testified that he utilized the *Guides* to find a PPI rating for the transverse process fractures, just as he did to find the 12% PPI for the industrial injury. He further testified that, in his opinion, the authors of the *Guides* must have had a reason for giving transverse process fractures PPI ratings under the revised 6th edition and not in the original version of the 6th, but he did not know what that reason was. While asymptomatic injuries that cause no functional abnormalities and do not result in any physical restrictions may deserve a PPI rating in some instances, that does not mean such ratings should automatically be subtracted from a final rating without more of an explanation than was offered here.

11. The Referee finds that Claimant is entitled to PPI benefits equaling 12% of the whole person without apportionment to pre-existing conditions.

PPD:

"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 impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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 non-medical 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).

The Vocational Experts:

Nancy Collins, Ph.D.

12. Claimant retained Dr. Nancy Collins to evaluate her permanent partial disability. Dr. Collins' credentials are well-known to the Commission and will not be repeated here. Dr. Collins met with Claimant in the summer of 2007, before her back surgery and before her second motor vehicle accident. Dr. Collins reviewed vocationally pertinent medical records, tax records, personnel records, and vocational records, including ICRD case notes. Dr. Collins testified as follows at hearing regarding her assessment of Claimant's disability:

> I considered not only the fact that Ms. Funes had - - when I originally did this evaluation in 2007, her restrictions were actually light work, no lifting over twenty pounds, no repetitive bending, stooping, twisting, squatting, kneeling, no push/pull beyond 30 pounds. That's actually considered light work. In addition to the lifting and strength designation, it's not the entire pool of work because she has other restrictions of repetitive bending, stooping, twisting, squatting, pushing, and pulling.
>
> So realistically, for somebody like Maria, who is a laborer - - and if you think about the word "laborer" - - her pool of jobs really encompassed where you would think of bending, stooping, twisting, lifting, those kinds of activities, that's really what she had access to, she doesn't speak any English - - so the jobs that Maria could do before this injury included agricultural work, basically, farm work, grading and sorting, some cleaning jobs, some maybe fast-food work. You have to realize that that's a pretty small pool. So she started out with those jobs.
>
> And then with these restrictions that Dr. Christensen gave back in 2007, she only had access to some light work. Realistically, Maria doesn't have sedentary work skills. So basically a small part of the light work that is available in this area.
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> I actually did transferrable skills analysis, which provided a part of my opinion. And it - - what it said was what I actually just talked about, what she had left out of the jobs she had access to before were two job titles, housecleaning, cleaner and sorter, agricultural products. And that's basically what she has left, maybe some fast-food work, maybe some light housekeeping work.

> So if you consider the jobs she could do before and what she can do now, it's really my opinion that she can do about one in every ten jobs she used to be able to do, considering not only her restrictions, but her language barrier. So that's basically what I assumed.
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> She was given somewhat different restrictions later. Dr. Christensen increased it to 25 pounds, same restrictions otherwise. And Dr. Cox felt she could safely lift 35 pounds. So she does have access to some light/medium work. Most of the jobs really do require bending, stooping, twisting, unless you're a skilled technician. So she's got a limited number of light jobs available to her and a limited number of light/medium jobs available to her.
>
> It's just my opinion that she has a very significant loss of access to the labor market. Now, that wouldn't be true - - wouldn't be true if she had better English skills.

Hearing Transcript, pp. 63-66.

13. Dr. Collins noted that Claimant's work history consisted primarily of sporadic, seasonal, temporary work. She therefore concluded that Claimant has suffered no wage loss, but her 80-90% loss of access to her pre-injury labor market equates to a 50% PPD inclusive of PPI.

Mary Barros-Bailey, Ph.D.

14. Defendants retained Dr. Barros-Bailey to provide a disability evaluation. Dr. Barros-Bailey's credentials are well-known to the Commission and will not be repeated here. She did not meet with Claimant due to time constraints, but reviewed vocationally pertinent medical and vocational records. She submitted a report and testified at the hearing. Dr. Barros-Bailey opined that Claimant has suffered a 20% whole person PPD inclusive of her PPI. She reasoned:

> Sure. One of the things that's really important to understand in terms of how we do a loss of access, for example, is to understand the way that work is classified, using the Dictionary of Occupational Titles. When we look at the exertional ratings, particularly medium, heavy and very heavy, those are classified just by weight. When we look at sedentary and light, they're composite, and so they include a variety of different things for that classification.
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> So for example, a lot of people think of sedentary work as being that's [sic] mostly sitting. Well, according to the Department of Labor, not only does it have to be sitting, it also has to be 10 pounds or less. That's not the way we use it

in disabilities. So when they classified work and when they clustered work around the Dictionary of Occupational Titles, all of that is inclusive, sensing with light work.

Light work is not just 20 pounds or 25 pounds, it is also repetitive, upper-extremity, lifting and carrying and reaching a variety of different things. And so it's a composite. Sedentary and light are composites; they are not definites.

And so when we look at the restrictions, such as in this case, to limit these to light work is an incorrect way in terms of the way that the occupations were clustered within the Dictionary of Occupational Titles.

We have Dr. Christensen saying no lifting over 25 pounds, no pushing or pulling over 40 pounds, and no repetitive bending. The way that this would be classified, according to the U.S. Department of Labor, would be medium work within a broad range. But they don't look at that range; they just throw the whole thing in there and say the whole thing is medium.

Same thing with Dr. Cox's limitations. He says capable of lifting 35 pounds on an occasional basis. She should avoid repetitive bending, twisting, stooping, prolonged exposure to low-frequency libration. Again, the way this is classified by the U.S. Department of Labor is medium work, not light work.

And so if we just assume light work in terms of the classification in the way that the data is collected and classified by the U.S. Department of Labor, we are overstating how much somebody has lost in terms of loss of access. To look at the full range of medium work would be also overreaching. So you kind of have to come to an understanding that it is the full range of light, plus some range of medium, or else your classification in terms of the way you cluster work is way overreaching.

So, based on both Dr. Christensen and Dr. Cox, in the way that we look at loss of access, this, technically, would be considered medium work, not light work. And that makes a difference in terms of loss of access.

The other thing that I looked at in terms of Maria's - - from the earnings' side was her annual earnings. We have 2001, she earned $2,895, total; 2002, $5,046; 2003, $5,448; 2004, $3,833; 2005, $6,447. So the most that has been earned in past relevant work was $6,447. When I even grew that in terms of taking that base figure and applying like a 3 percent growth, wage growth, to it, to 2010 dollars, a job, 19 hours a week, at minimum wage, in Idaho is $7.25 an hour, would constitute - - would replace her wages.

And so when I look at the kind of work she could do, the classification, in terms of functional restrictions, and the fact that we're looking at at least 19 hours a week at minimum wage, there's work she can do, and very reasonably within the classifications that the Industrial Commission Rehab Division consultant had outlined. And so there wasn't a - - much contribution at all in terms of wage loss. What we're dealing with mostly is loss of access, and that loss of access within a consideration of full range of light and into the medium classification.

Hearing Transcript, pp. 22-25.

Greg Taylor, ICRD

15. ICRD consultant Greg Taylor of the Twin Falls field office opened his file on Claimant at Surety's request in October 2006. Mr. Taylor noted that at the time of her industrial injury with Employer, Claimant was working full-time, but had only been working weekends before that time.[3] Mr. Taylor further noted that Employer was willing to provide light-duty work, but when Claimant gave Dr. Christensen's light-duty work release to Employer, no light-duty employment offer was forthcoming. Mr. Taylor placed Claimant in the light-to-medium work categories. He identified possible employment opportunities for Claimant, including potato cleaner during harvest season, in-home caregiver for elderly clients who speak Spanish, light housekeeping, and fast-food restaurant cook. Mr. Taylor closed his file in June 2007, because Claimant was at MMI, had received an impairment rating, and informed him that she did not want to work at that time. Claimant also did not want the surgery that Dr. Christensen believed would have allowed her to return to her time-of-injury job. At the time of closure, Mr. Taylor lists Claimant's permanent restrictions as no lifting over 20 pounds, no repetitive bending, stooping or twisting, and no squatting or kneeling.

16. Mr. Taylor re-opened Claimant's file in July 2009 at her request. Claimant had undergone the surgery recommended by Dr. Christensen, completed physical therapy, and was apparently now willing to look for work. Her permanent restrictions were the same as before, except her lifting restriction was increased to 25 pounds and she was to avoid pushing/pulling more than 40 pounds, and was to be afforded ad-lib position changes. Claimant provided Mr.

[3] Claimant testified at hearing that she was only working part-time at the time of her accident, but had been offered full-time work. She later testified that she had been working full-time for 13 days at the time of her accident.

Taylor a list of places where she had unsuccessfully applied for work.[4] In a December 15, 2009, case note (the last entry of record), Mr. Taylor identified the following jobs that might be appropriate for Claimant: light custodial work, video store clerk at Mexican video store(s), watering plants and trees at local nurseries, kitchen worker at local Mexican restaurants, potato sorter/grader, crossing guard, and cow pusher at local dairies. Both vocational experts agree that the cow pusher job would probably exceed Claimant's physical restrictions.

17. Drs. Barros-Bailey and Collins are fairly close regarding their vocational assessments of Claimant's employability status. Both agree that Claimant has no loss of income capabilities as a result of her injury. They differ on the methodology used in arriving at a loss of access figure and, consequently, a final PPD figure. Of concern to the Referee is the potential for Claimant developing a "disability mindset." She appears to be more focused on what she cannot do rather than what she can do and expresses that attitude to prospective employers. Nonetheless, it is evident that she has lost access to at least some portion of her pre-injury labor market due to her permanent restrictions.

18. The Referee finds that when considering Claimant's labor market (both pre- and post-injury), her age and education, her work history, her inability to meaningfully communicate in English, her permanent physical impairment and restrictions, Greg Taylor's case notes, the opinions of Drs. Barros-Bailey and Collins, as well as Claimant's attitude towards re-entering the work-force, Claimant has incurred PPD of 40% of the whole person inclusive of her 12% whole person PPI.

[4] Claimant testified at hearing that she would tell prospective employers of her restrictions before any offer of employment could be made.

Idaho Code § 72-406 apportionment:

Idaho Code § 72-406 provides:

> 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.

19. Here, there is no evidence that any pre-existing physical impairment increased or prolonged the degree or duration of Claimant's disability. Therefore, the Referee finds that it would not be appropriate to apportion any of her PPD to any pre-existing PPI, if any there be.

Attorney fees:

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

20. Claimant requests an award of attorney fees based on Surety's failure to pay the full PPI rating and the PPD suggested by her vocational expert. Defendants assert, without evidence to the contrary, that they have paid all benefits owing, including the full 12% PPI rating. Claimant cites no statute or case law in support of her position regarding Defendants not paying the PPD rating, and the Referee is aware of none. A surety is under no obligation to pay an award of permanent partial disability pending a determination of that issue by the Commission and, here, the Referee has recommended a PPD award of less than that determined by Claimant's vocational expert.

21. The Referee finds that Claimant has failed to prove her entitlement to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant is entitled to permanent partial impairment (PPI) benefits equaling 12% of the whole person without apportionment.

2. Claimant is entitled to permanent partial disability (PPD) benefits equaling 40% of the whole person without apportionment.

3. Claimant is not entitled to an award of 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 __17th__ day of December, 2010.

INDUSTRIAL COMMISSION

_/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __23rd___ day of ___December___, 2010, 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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