

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BANDIE M. HARRISON,

Claimant,

v.

ATK ALLIANT TECHSYSTEMS /
AMMUNITION ACCESSORIES,

Employer,

and

INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,

Surety,
Defendants.

IC 2006-009634

IC 2007-035048

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

FILED
MAY 31 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a telephonic hearing from Boise on December 14, 2012. Claimant, Bandie M. Harrison, participated from Lewiston and was represented by Michael T. Kessinger, of Lewiston. Defendant Employer, ATK Alliant Techsystems/Ammunition Accessories (ATK), and Defendant Surety, Insurance Company of the State of Pennsylvania, were represented by Bentley G. Stromberg, of Lewiston. The parties presented oral and documentary evidence. No post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on February 15, 2013.

BACKGROUND

After hearing on this matter in Lewiston on December 15, 2008, the Commission issued its order of August 5, 2009, concluding that Claimant had proven that her bilateral wrist condition was caused by her work at ATK and that she was entitled to additional medical care,

including but not limited to surgery, for her bilateral wrist condition. After a second hearing in Lewiston on January 6, 2011, the Commission issued its order of August 12, 2011, concluding that Claimant sustained permanent impairment of 23% of the whole person due to her bilateral wrist condition caused by her work at ATK.

ISSUE

The sole issue is whether, and to what extent, Claimant is entitled to permanent partial disability in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant alleges that she is entitled to permanent partial disability benefits of 70% of the whole person, inclusive of her 23% permanent impairment, due to her industrial accident. She relies upon the opinion of Nancy Collins. Defendants maintain that she has proven no permanent disability in excess of her 23% permanent impairment. They rely upon the opinion of Dan McKinney.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. All evidence considered in the Commission's August 5, 2009, decision in this matter;
2. All evidence considered in the Commission's August 12, 2011, decision in this matter;
3. The Industrial Commission's legal file;
4. The testimony of Claimant taken at the December 14, 2012 hearing;
5. Claimant's Exhibits S and T admitted at the December 14, 2012 hearing; and
6. Defendants' Exhibits 26 through 31 admitted at the December 14, 2012 hearing.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1976 and is right hand dominant. She was 36 years old at the time of the 2012 hearing and had resided in the Lewiston-Clarkston area since 2006. She graduated from high school in 1995 with a 3.2 grade point average. In 1996, she attended Wenatchee Valley Community College. Also in 1996 she worked at Big 5 Sporting Goods as a cashier. Her duties included stocking, lifting 45-pound boxes, and cleaning.

2. In 1997 Claimant attended Walla Walla Community College and studied science. In 1997 or 1998 she attended one semester at Spokane Community College. She also worked at D&B Farm & Home Supply as a cashier and customer service representative. She lifted 90-pound bales of straw, bags of grain, and flowers. Claimant later worked at Shopko during the Christmas season where she cleaned, stocked shelves, and folded clothes. Thereafter, she worked as a receptionist and title clerk. In 1998 and 1999, Claimant worked entering data at Budget Auto Sales. For approximately one year she worked as a manual screen printer. From approximately 2002 until 2004, she worked for Alternative Nursing Services providing in-home care, cooking, cleaning and caring for clients in their homes. She worked as a head waitress at a restaurant. Claimant worked one summer on a road construction crew flagging, shoveling gravel, and carrying tar buckets. She worked as a technician at Severn Trent Laboratories for 18 months where she learned laboratory procedures for testing plutonium.

3. From 2002 to 2004, Claimant attended Lewis & Clark State College and studied science. In all, she earned approximately 122 college credits and by 2004 was within approximately 10 or 12 credits of completing her degree.

4. In September 2005, Claimant started working at ATK. On October 25, 2006, she sustained a work accident injuring both of her wrists and was ultimately diagnosed with bilateral carpal tunnel syndrome and de Quervain syndrome. On January 23, 2007, Steven Ozeran, M.D., performed a surgical release of the right first and third dorsal compartments and Claimant's symptoms improved. Claimant returned to work at ATK with restrictions. ATK terminated her employment in late 2007 when she was unable to resume her usual duties.

5. On September 8, 2009, John McNulty, M.D., performed a right carpal tunnel release and on October 8, 2009, he performed a left carpal tunnel release. Following recovery from the surgeries, Claimant experienced decreased numbness and pain at night in both of her hands. Her left hand strength improved somewhat; however, her right hand strength did not. On February 18, 2010, Dr. McNulty opined that Claimant had reached maximum medical improvement.

6. At the time of the 2011 hearing, Claimant's wrist condition continued to affect many activities of daily living and self-care including arranging her hair and brushing her teeth. Claimant's hand and wrist condition also affect her driving, folding laundry, chopping vegetables, lifting kitchen items, putting away dishes, pulling weeds, and changing diapers. She notes increasing hand and wrist pain with activity. Her dominant right hand and wrist are more symptomatic and weaker than her left.

7. At the time of the 2012 hearing, Claimant continued to work full-time as a lab technician for Amplicon-Express processing DNA replications. Her work at Amplicon requires bilateral dexterity but does not require her to lift more than approximately three pounds. Claimant has experienced difficulty handling plates at Amplicon and dropped a plate containing non-replaceable DNA in approximately 2011.

8. Amplicon has taken several measures to accommodate Claimant's wrist condition. Amplicon lab manager, Keith Stormo, Ph.D., described the following accommodations:

We have worked very closely with Bandie to try and improve her work environment to accommodate the damage she has with her fine motor motions, the loss of feeling and feedback as she holds and grasps items in her usual everyday tasks at her work. Some of the things we have done are: purchase special manual pipettes which require low force to aspirate and also low force to remove the tips from the pipettes. These special pipettes were significantly more expensive and the disposable tips are about 2 times more expensive than the standard that everyone else's pipettes use in the lab. We have also purchased a complete set of motorized pipettes for her in both the single channel and multi-channel variety so that she can still perform her routine tasks in the lab. I have also worked with her to try and modify some standard methods and operations so that her most severely injured hand is not taxed as much.

We have formed some small cold packs that conform to her wrist to help alleviate the pain and tenderness while she works but they help for a short amount of time. The cold packs also reduce her productivity at work when she has them on.

.... We have attempted to increase her administrative role that has less fine motor skills with plate transfers and pipetting but being a small company, everyone has many job functions and lots of overlap. Her hand and wrist also give her problems when she types or uses the mouse so a purely administrative position is not very likely either.

Defendants' Exhibit 30, p. 40.

9. In approximately 2011, Amplicon downsized from 20 to 12 employees. Claimant enjoys her work at Amplicon but is concerned about the longevity of her position there.

10. Having reviewed the additional evidence, the Referee continues to find that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

11. 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). Facts, however, need not be construed 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).

12. **Permanent disability.** The sole issue is the extent of Claimant's permanent disability. "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. 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 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. 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 proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

13. Physical restrictions. To evaluate permanent disability, permanent physical restrictions resulting from the industrial accident merit particular consideration. In the present case, Dr. Ozeran recommended Claimant avoid vigorous repetitive activity and seek more sedentary employment. In May 2008, Dr. McNulty found Claimant “able to perform sedentary work without repetitive movements of her right or left upper extremities. She should have a 5-lb lifting restriction with both right and left upper extremities.” Claimant’s Exhibit D, p. 5. Rodde Cox, M.D., recommended that Claimant avoid repetitive high force gripping with her hands. After a functional capacity exam in October 2008, Cliff Knelsen, P.T., noted that Claimant exerted maximum effort and reported “Client does demonstrate significant restrictions in activity tolerance of any activity involving wrist and hand coordination/dexterity. ... Physical limitations present a barrier to return to work unless modifications can be made. Most notably restrictions are focused around reduced strength and mobility of both wrists and hands.” Claimant’s Exhibit E, p. 2. He concluded that sedentary work was the most appropriate category. Dr. McNulty subsequently agreed with the functional capacity findings.

14. Vocational experts’ opinions. Defendants’ vocational expert, Dan McKinney, M.Ed. C.R.C., C.D.M.S., A.B.D.A., and Claimant’s vocational expert, Nancy Collins, Ph.D., C.R.C., have opined regarding Claimant’s ability to compete in the open labor market. Their conclusions are examined below.

15. *Dan McKinney.* Mr. McKinney did not meet with or interview Claimant telephonically or in person. He reviewed Claimant’s work history, educational history, and physical restrictions and prepared a vocational assessment. He observed that Claimant has experience using Word, Excel, PowerPoint, Windows, and QuickBooks, as well as the internet and email. Mr. McKinney considered Claimant’s average annual earnings over recent years and

concluded that she earned \$30,045.00 annually at the time of her accident and an average of approximately \$38,697.00 annually during the last three years since her accident; an increase of 26%. He acknowledged that a preponderance of the medical opinion in the record limits Claimant to less than frequent use of her hands bilaterally for handling and fingering.

Mr. McKinney concluded:

Ms. Harrison has not experienced a decrease in earnings as a consequence of her limitations. In fact, she has experienced a minimum increase in earnings of 26% over what she was earning at the time of injury resulting in no loss in earnings from employment activity subsequent to the industrial injuries. Her earnings could be further enhanced if she pursues the vocational objective of completing a four-year degree and obtaining a teaching certificate.

Defendants' Exhibit 30, p. 4. Mr. McKinney reported that Claimant has earned "a total of 122 college credits and is approximately 10 credits short of earning a 4-year degree in the field of natural science." Defendants' Exhibit 30, p. 2. He opined that if Claimant completed her four-year degree and obtained a teaching certificate she could enhance her earnings, noting that the starting annual salary for teachers in Idaho is \$39,870.00.

16. Mr. McKinney acknowledged that Claimant had likely sustained a loss of labor market access, but opined that she has a high probability of occupational success in the future considering her vocational history, motivation, and work ethic.

17. Mr. McKinney's report is particularly helpful in quantifying the extent of Claimant's actual earnings post-accident. However, his opinion fails to quantify, or even seriously address, the extent of Claimant's loss of labor market access. Furthermore, his conclusion that Claimant is within 10-12 hours of completing her college degree is erroneous. Although Claimant has earned 122 college credits, and by 2004 was within 10 or 12 credits of completing her degree, she testified at the 2012 hearing that "a lot of the requirements have

changed, so it would take quite a bit more for me to finish.” Transcript, p. 11, ll. 22-24. She testified that she had no plans to return to college.

18. *Nancy Collins.* Vocational expert Nancy Collins, Ph.D., is a certified rehabilitation counselor, forensic vocational expert, and certified life care planner. She interviewed Claimant and reviewed her work history, medical records, and physical conditions. Dr. Collins noted that Claimant had few transferrable skills because her prior work as a retail sales clerk, cashier, waitress, lab technician, and road crew flagger all required repetitive handling and lifting more than 10 pounds. Dr. Collins observed that Claimant is limited to sedentary work that does not require frequent handling. She opined that Claimant’s loss of labor market access exceeds 90%, noting that it took Claimant two years to find her present job at Amplicon which she performs only with accommodation and without which her earning capacity would be much lower. Dr. Collins concluded:

While Ms. Harrison cannot return to most of her past work, her earning capacity has been affected not only because her current wage is lower, but because her labor market access is so limited. It will take her much longer to find work and she will likely need accommodation. Examples of work she might consider include some reception jobs, security, and some light courier or light delivery work. These jobs will pay closer to \$9.00 per hour.

....

Bilateral hand restrictions are some of the most limiting restrictions a worker can have. Over 90% of the jobs in the labor market require frequent to constant handling. If I assume the two vocational factors of loss of earning capacity and loss of labor market access have equal weight, her disability rating is 55%. In my opinion her loss of access to the labor market should be given more weight as it is so significant. In my professional opinion, a fair disability rating for this worker is 70%.

Claimant’s Exhibit S, p. 9.

19. Dr. Collins’ report is particularly helpful in quantifying the extent of Claimant’s loss of labor market access and the probable earnings for positions within her limitations absent

accommodations. However, Dr. Collins' opinion is founded in part on the mistaken assumption that Claimant earns \$2,200.00 per month plus benefits at Amplicon. This significantly understates her actual earnings. Over the past three years at Amplicon, Claimant has earned at least \$2,850.00 per month in 2012, and as much as \$3,638.00 per month in 2010 when year-end bonuses are considered. As noted by Mr. McKinney, Claimant's average annual earnings at Amplicon equal \$38,697.00, or nearly \$18.60 per hour. In contrast, Dr. Collins reported that Claimant earned \$12.69 per hour in March 2012 at Amplicon as compared to \$14.73 per hour at the time of her industrial accident at ATK. The record demonstrates an actual post-accident 26% wage increase, rather than a 20% decrease. Thus, the Referee finds that Dr. Collins' calculations and resulting opinion overstate Claimant's disability. Nevertheless, if Claimant were unable to find an accommodating employer and was limited to reception, security, or light delivery work paying only \$9.00 per hour, she would then experience a loss of earnings of approximately 40% as compared to her time of injury wage.

20. Claimant's bilateral upper extremity limitations are substantial and her current employer, Amplicon, has taken significant measures to accommodate her limitations. Dr. McNulty's records indicate it would have taken Claimant approximately one and a half semesters to complete her degree in 2008. With the passage of nearly five more years, her testimony at the 2012 hearing of changed degree requirements and that it would take "quite a bit more" for her to complete her degree establishes that completing her four-year college degree is less likely. Dr. Collins recorded that it would take Claimant "a semester to a year to complete her degree. If she were to get a degree in education, it would take longer." Claimant's Exhibit S, p. 6.

21. Based on Claimant's permanent impairment of 23%, her permanent bilateral upper extremity restrictions, and considering her non-medical factors including but not limited to her age of 30 at the time of the accident, high school education, above average high school academic performance, numerous college courses, lack of a college degree, computer literacy, and pre-injury work experience, the Referee concludes that Claimant's ability to engage in regular gainful activity in the open labor market in her geographic area has been significantly reduced. Claimant has proven she suffers permanent disability of 55%, inclusive of her permanent impairment.

CONCLUSION OF LAW

Claimant has proven that she suffers permanent disability of 55%, inclusive of her 23% permanent impairment due to her bilateral wrist condition caused by her work at ATK.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusion of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 24TH day of May, 2013.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MICHAEL T KESSINGER
PO BOX 287
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BENTLEY G STROMBERG
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kh

_____/s/_____

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**IC 2006-009634
IC 2007-035048**

ORDER

FILED
MAY 31 2013

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor 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 has proven that she suffers permanent disability of 55%, inclusive of her 23% permanent impairment due to her bilateral wrist condition caused by her work at ATK.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 31ST day of May, 2013.

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 May, 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

MICHAEL T KESSINGER
PO BOX 287
LEWISTON ID 83501-0287

BENTLEY G STROMBERG
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/s/