

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

DOJIE LANGLEY,	)	
	)	<b>IC 2004-507709</b>
Claimant,	)	
	)	<b>FINDINGS OF FACT,</b>
v.	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND ORDER</b>
STATE OF IDAHO, INDUSTRIAL	)	
SPECIAL INDEMNITY FUND,	)	
	)	Filed June 27, 2011
Defendant.	)	
_____	)	

**INTRODUCTION**

A prior decision was issued in this matter on September 8, 2010. In that decision the Commission concluded that Claimant carried her burden of establishing the statutory elements for ISIF liability pursuant to Idaho Code § 72-332. The Commission further found that this matter should be retained for the parties to produce evidence to determine a PPI rating for Claimant’s neurocognitive condition related to the industrial accident. The parties were given 90 days to submit evidence for the purpose of determining the PPI rating due for Claimant’s neurocognitive condition. The Commission will now address the remaining PPI issue and application of the Carey formula.

Jonathan W. Harris of Blackfoot represented Claimant. Paul B. Rippel of Idaho Falls represented the State of Idaho, Industrial Special Indemnity Fund (“ISIF”). Claimant submitted the impairment rating of Dr. Harper and the parties took one deposition. The parties filed briefs and this matter came under advisement on April 21, 2011.

## **ISSUES**

The remaining issues to be decided are:

1. What is the permanent partial impairment (PPI) rating for Claimant's neurocognitive condition related to the industrial accident, and
2. Apportionment under the Carey formula.

## **CONTENTIONS OF THE PARTIES**

The Commission has previously concluded that Claimant's total permanent disability was due to a combination of her pre-existing knee arthritis combined with the flexion contractures she incurred in the 2004 accident and the brain injury. The only issues remaining are the amount of PPI related to Claimant's neurocognitive condition and the application of the Carey formula.

Claimant avers that the Commission should accept Dr. Harper's impairment rating of 29% whole person impairment due to Claimant's neurocognitive condition related to the industrial accident.

ISIF asserts that Dr. Harper's assessment of 29% impairment is an underrating of Claimant's mental impairment due to the industrial accident. Defendant argues that the impairment rating should increase by 1% to 9% whole person for Claimant's problems with balance and 1% to 39% for Claimant's loss of manual dexterity caused by her brain injury. Thus, Claimant's loss of function from her brain injury results in an impairment rating of 31% to 61%.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The deposition of Howard K. Harper, Ph.D., taken on March 4, 2011.

2. The Idaho Industrial Commission legal file, including testimony taken at hearing on December 2, 2009, exhibits entered at hearing, pre-hearing depositions, and post-hearing depositions.

All objections in the March 4, 2011, deposition of Dr. Harper are overruled.

After having considered all the above evidence and briefs of the parties, the Commission issues the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

#### **Dr. Harper's report and testimony**

1. In the spring of 2006, Claimant's neurocognitive functioning was evaluated by psychologist Howard K. Harper, Ph.D. Dr. Harper administered a number of tests<sup>1</sup> and determined Claimant's responses were valid. Claimant's test results indicated average overall intellectual skills and abilities. However, there were areas in which Claimant demonstrated lower-than-average functioning levels.

2. Claimant had a Verbal IQ score of 87 (low average), indicating weakness with verbal comprehension, verbal reasoning, and problem solving, and had significant difficulty with the language portion of her ability to spontaneously name objects. She also scored in the low average range in attention/concentration and learning/memory abilities. Her motor function also tested significantly below the norm, indicating profound fine and gross motor impairment bilaterally, somewhat worse on the right. Claimant's scores on executive functioning measures were "significantly below what might have been predicted based on estimation of her pre-morbid

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<sup>1</sup> Dr. Harper administered the Minnesota Multiphasic Personality Inventory, Wechsler Adult Intelligence Scale, Wechsler Memory Scale, Wide Range Achievement Test, Grooved Pegboard Test, Trail Making Test Forms A & B, Wisconsin Card Sort Test, Boston Naming Test and controlled Oral Word Association Test.

function.” Claimant’s Exh. N, p. 756. She demonstrated difficulty with applying feedback in problem solving, shifting between problem solving strategies, simultaneously sequencing strings of numbers and letters, and engaging in abstract reasoning to identify similarities among items.

3. On November 15, 2010 Dr. Harper issued an impairment rating of 29% of the whole person due to Claimant’s acquired cognitive deficit from her traumatic brain injury. Dr. Harper based his rating on his 2006 evaluation and 2009 interview. The November 2010 report states that Claimant’s deficits include memory impairment, diminished reasoning and problem solving skills, and increased susceptibility to depression.

4. In his 2010 report, Dr. Harper opined that Claimant’s current memory deficits make it more difficult for her to learn new information or to follow more than a simple set of instructions. Regarding her diminished reasoning and problem solving skills, Dr. Harper stated that Claimant demonstrates greater difficulty applying information or feedback in problem solving, she has greater difficulty identifying and attending to salient information in problem solving tasks, and she has greater difficulty recognizing similarities or engaging in abstraction of a principle or idea. Relating to Claimant’s susceptibility to depression, Dr. Harper explained that with Claimant’s acquired cognitive deficits she will tend to experience a decreased sense of confidence in her ability to effectively meet or adapt to the demands of changing life circumstances, and as such there is an increased risk of isolation or avoidance.

## **DISCUSSION AND FURTHER FINDINGS**

### **Impairment for Claimant’s Neurocognitive Condition**

5. “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 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).

6. At Claimant’s request, on November 15, 2010, Dr. Harper issued an impairment rating of 29% of the whole person due to Claimant’s acquired cognitive deficit from her traumatic brain injury. The rating was largely based upon Dr. Harper’s tests, administered in 2006, indicating Claimant has average overall intellectual skills and abilities, though some areas showed lower-than-average functioning. Claimant demonstrated a weakness in verbal comprehension, verbal reasoning, and difficulty in her ability to spontaneously name objects. Claimant also had difficulty with applying feedback in problem solving and shifting between problems solving strategies.

7. ISIF argues that Dr. Harper did not include Claimant’s balance trouble as well as her upper extremity dexterity difficulties when opining Claimant suffers from 29% whole person impairment for her neurocognitive condition. ISIF contends that the inclusion of these problems would substantially increase the impairment rating. During his deposition, Dr. Harper stated that he focused his impairment rating on Claimant’s cognitive function rather than balance and motor

skills. Dr. Harper was unwilling to assess additional impairment for balance trouble or dexterity difficulties during his deposition.

8. It is unclear the effect Claimant's brain injury had on her balance when combined with her well-established knee problems. Claimant's knee injuries account for considerable bilateral knee impairment and are a significant factor in her balance and gait derangement. Dr. Griffiths permanently restricted Claimant from climbing stairs or ladders and recommended only minimal standing and walking, limited to 10-15 minutes per hour due to her knee condition.

9. Further, in the September 8, 2010 decision the Commission acknowledged that Claimant had been treated for hand conditions which include carpal tunnel syndrome, osteoarthritis, and hand pain, noting that Dr. Harper observed Claimant's performance on tasks requiring fine motor skill was impaired. The decision went on to state that while the evidence demonstrates that Claimant's hand conditions caused difficulty with her fine motor skills, Claimant's neurocognitive condition coupled with her knee conditions, standing alone, are enough to cause her total and permanent disability.

10. While it may have been proper for Dr. Harper to opine additional impairment for Claimant's balance trouble and upper extremity motor skills, he chose not to, and the Commission does not feel it necessary to take that step. Further, Defendant did not present any conflicting or additional expert opinion on the amount of Claimant's neurocognitive impairment. On the evidence of record, the Commission finds Dr. Harper's impairment rating persuasive. Claimant has proven she is entitled to a PPI rating of 29% for her neurocognitive condition related to the industrial accident.

## **Carey Apportionment**

11. The Carey formula only applies when a pre-existing impairment combines with the current injury to create total and permanent disability. Hamilton v. Ted Beamis Logging & Constr., 127 Idaho 221, 899 P.2d 434 (1995). Its purpose is to apportion the non-medical disability factors between the employer and the ISIF. The formula comes from Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984), in which the Idaho Supreme Court held:

[T]he appropriate solution to the problem of apportioning the nonmedical disability factors, in an odd-lot<sup>2</sup> case where the fund is involved, is to prorate the nonmedical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment.

Henderson v. McCain Foods, Inc., 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006).

12. To establish the amount of ISIF liability, the extent, in percentage of the whole person, of qualifying permanent physical impairments is required. The Commission has found that Claimant's total permanent disability was due to a combination of her pre-existing knee arthritis combined with the flexion contractures she incurred in the 2004 accident and the brain injury.

13. The Commission has determined that Claimant's whole person permanent impairment due to her knee injuries is 59%, with half apportioned to her pre-existing condition. As stated above, the Commission has determined that Claimant's PPI rating for her neurocognitive condition is 29% whole person impairment all related to the industrial accident.

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<sup>2</sup> In Carey, the claimant was deemed totally and permanently disabled as an odd-lot worker. Application of Carey is not limited to cases in which the claimant's total disability is a result of the application of the odd lot doctrine. At bottom, Carey is a method of allocating liability for non-medical factors in total, permanent disability cases.

The total amount of impairment causing Claimant's total and permanent disability is 88% (29.5% pre-existing knee + 29.5% industrial accident knee + 29% industrial accident neurocognitive condition).

14. According to the Carey formula, ISIF is responsible for 33.52% of Claimants benefits. ( $29.5\% / 88\% = 33.52\%$ .) Employer/Surety's portion would have been 66.48%, which equals 332.4 weeks ( $66.48\% \times 500 \text{ weeks} = 332.4 \text{ weeks}$ ). The Commission has previously found that Claimant had reached MMI for her knee injuries and neurocognitive condition by June 1, 2006. Thus, ISIF is liable for permanent and total disability benefits commencing 332.4 weeks from June 1, 2006.

#### CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven she is entitled to a PPI rating of 29% for her neurocognitive condition related to the industrial accident.

2. ISIF is liable for permanent and total disability benefits commencing 332.4 weeks from June 1, 2006.

3. This decision is final and conclusive as to all matters adjudicated.

DATED this 27th day of June, 2011.

INDUSTRIAL COMMISSION

/s/  
Thomas E. Limbaugh, Chairman

/s/  
Thomas P. Baskin, Commissioner



/s/  
R.D. Maynard, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June, 2011, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS, and ORDER** were served by regular United States Mail upon each of the following persons:

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/s/