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

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| DONNA MCINTYRE,<br><br>Claimant,<br><br>v.<br><br>WALGREEN COMPANY,<br><br>Employer,<br><br>and<br><br>ZURICH AMERICAN INSURANCE COMPANY,<br><br>Surety,<br><br>Defendants. | **IC 2006-004336**<br>**2007-007732**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>Filed November 3, 2010 |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers. Claimant is represented by Dennis Petersen of Idaho Falls. Eric S. Bailey of Boise represents Defendants. By agreement of the parties, no hearing was conducted. Rather, the parties relied upon the record generated in a prior case,[1] as well as supplementary exhibits.

## ISSUES

By agreement of the parties, the issues currently ripe for decision are:

1. Whether Claimant is entitled to permanent partial impairment (PPI) benefits stemming from her March 30, 2006, accident.

[1] *See,* McIntyre v. Walgreen Co., 2008 IIC 0982.

2. Whether Claimant is entitled to permanent partial disability (PPD) benefits stemming from her March 30, 2006, accident.

3. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate.

## CONTENTIONS OF THE PARTIES

Claimant contends that she is owed a 7% whole person PPI rating (without apportionment) assigned by her treating physician. She is also owed at least 50% whole person PPD benefits as opined by her retained vocational evaluator.

Defendants contend that Claimant is entitled to no more than 3.5% whole person PPI as apportioned by their independent medical evaluator because Claimant has a documented, symptomatic pre-existing left ankle condition. They also assert that utilizing the *Carey* formula might be reasonable in this case to determine PPD due to the difficulty in ferreting out from which condition(s) Claimant's alleged PPD arises. Using that approach, Defendants argue that they are responsible for approximately one-fifth of any PPD benefits awarded when considering Claimant's pre-existing foot complaints, her fibromyalgia, and left foot problems developing post-March 2006; this equates to a PPD award of between 7-10% inclusive of 3.5% PPI for which Defendants should bear responsibility.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file including the record generated in connection with the hearing held on January 4, 2008.

2. Claimant's Supplemental Exhibits 10-21 admitted without objection.

3. Defendants' Supplemental Exhibits 7-21 admitted without objection.

## FINDINGS OF FACT

1. Claimant was 55 years of age and resided in Twin Falls at the time of the January 4, 2008, hearing. She has an AA degree as a certified medical assistant. On March 30, 2006, while working as a pharmacy technician for Employer, Claimant rolled her left ankle after getting her foot caught on a rubber mat. She was taken to surgery on May 23, 2006, for a posterior tibial tendon repair. Defendants accepted this claim.

2. Claimant alleged that she was involved in a subsequent accident causing injury to her left ankle on October 2, 2006. The Commission found this accident to be noncompensable (*see*, footnote 1).

3. Claimant now seeks PPI and PPD benefits arising from her March 2006 accident and left foot injury.

## DISCUSSION AND FURTHER FINDINGS

**PPI benefits:**

"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).

4. Claimant argues that she is entitled to whole person PPI benefits equaling 7% without apportionment based on the opinion of her treating physician Randal Wraalstad, D.P.M. Dr. Wraalstad testified that Claimant's March 2006 accident resulted in an injury to a different part of her ankle than had been previously treated and was not evidence of a pre-existing condition. He carefully illustrated his reasoning by referring to anatomically correct drawings of the foot and ankle. Defendants argue that Dr. Wraalstad's rating is overinclusive because it includes the injury Claimant allegedly suffered in her noncompensable accident. However, the Referee finds that contention to be speculative because at the time Dr. Wraalstad issued his PPI rating in December 2006, Claimant had not yet told him of the October 2006 accident. Nevertheless, based on an IME performed for Defendants by Richard T. Knoebel, M.D., the Referee will discuss apportionment of the 7% PPI rating, with which Dr. Knoebel agrees.

5. When Claimant was first examined by Dr. Knoebel on January 25, 2007, he assigned a 7% whole person PPI rating for her industrial ankle injury. Dr. Knoebel again evaluated Claimant on December 13, 2007, after her second surgery following her noncompensable accident. Dr. Knoebel addressed the apportionment issue after his second evaluation:

> Based upon the fact that the patient was symptomatic prior to the incident,[2] and being actively treated for tenderness over that area, and given the fact that the MRI scan showed thickening of the tendon, which is an evidence of chronic change, I think it's reasonable to apportion 50 percent.

Dr. Knoebel Deposition, p. 24.

6. Claimant saw Craig D. Holman, D.P.M., initially on February 18, 2008, for left foot pain. During his course of treating Claimant through January 26, 2010, Dr. Holman

[2] Dr. Knoebel is referring to the March 30, 2006 accident.

observed, "I have cautioned her that her primary problem is the severe pes planus foot (flat foot) which is congenital and certainly responsible for her ankle pain medially and laterally." Claimant's Supplemental Exhibit 20, p. 9. Dr. Holman diagnosed sinus tarsi syndrome, but related that condition to Claimant's flat foot deformity which occurred long before her ankle injury of March 2006. More documentation of Claimant's pre-existing left ankle/foot problems can be found in the office notes of Dr. Wraalstad, who recorded complaints of pain between Claimant's 4th and 5th metatarsal heads, mid-foot pain and on February 9, 2006, less than two months before her March 30, 2006, accident, he diagnosed her with plantar fasciitis of her left heel.

7. The Referee finds that, under the facts of this case, it is not appropriate to apportion Claimant's PPI for pre-existing conditions. Dr. Wraalstad has treated Claimant over a period of time, including two surgeries, and is in the best position to know for what condition(s) she was treated - - and the physical location(s) thereof. His testimony that Claimant never complained before of a posterior tibial tendinitis on the left with a possible rupture is credible and persuasive: "She was in the office numerous times and there was [sic] never any complaints of that area, so I don't know how preexisting it could have been." Dr. Wraalstad Deposition, p. 60. Dr. Wraalstad is a foot/ankle specialist whereas Dr. Knoebel is a retired general orthopedic surgeon and Dr. Wraalstad's testimony is given more weight.

8. The Referee finds that Claimant has incurred whole person PPI of 7% without apportionment.

**PPD benefits:**

"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).

It is axiomatic under Idaho's workers' compensation system that an employer and its surety are liable only for a permanent partial disability arising from a permanent partial

impairment that arises from an industrial accident causing a personal injury. Here, there are certain pre-existing, and perhaps post-existing, physical conditions that may have resulted in restrictions which may have an impact on Claimant's employability that must be discussed.

Douglas N. Crum, C.D.M.S.:

9. Claimant retained Douglas N. Crum, C.D.M.S., to assess her employability. Mr. Crum's credentials are well known to the Commission and will not be repeated here. Mr. Crum conducted a telephone interview with Claimant on February 1, 2010. He reviewed pertinent medical records including those of Drs. Knoebel and Wraalstad. He prepared a report dated February 2, 2010. Rather than deposing Mr. Crum, the parties agreed to rely on his written report.

10. Mr. Crum reported that at the time of Claimant's March 30, 2006, accident, she was earning $11.50 an hour as a pharmacy technician. He further reported that prior to her March accident she had no problems with her left heel or ankle. Mr. Crum did note that Dr. Wraalstad had treated Claimant from 2003 through 2005 for mid- and fore-foot problems. He was aware that Claimant's alleged October 2, 2006 accident was deemed by the Commission to be noncompensable. Mr. Crum noted various pre-existing conditions he found to be vocationally relevant including migraine headaches, fibromyalgia, back pain, problems with concentration, and depression. Claimant informed Mr. Crum that she was receiving Social Security Disability benefits for her left ankle, fibromyalgia, and migraine headaches.

11. Mr. Crum reported Claimant is a 1971 high school graduate with average grades and no significant academic issues. She then took courses in cosmetology, becoming licensed in 1973. In 2001, Claimant received an Associate of Science degree from the College of Southern

Idaho in Medical Assisting. Claimant possesses basic computer skills and can do e-mails and get around on the web although she is a "hunt and peck" typist.

12. Claimant's work history includes self-employment as a hair stylist, cashiering, stocking, pricing, working at a customer service desk, and managing the beer, wine, and candy department at K-Mart, working as a bank teller, and, from 1992 until 2007 as a pharmacy technician.

13. Regarding Claimant's permanent physical restrictions arising from her March 2006 accident, Mr. Crum referenced Dr. Wraalstad's limiting Claimant to working four to five hours a day on her feet, and he would "support" her in working at a job that would allow her to sit 80%-90% of the workday. Because most of the jobs Claimant has performed required her to be on her feet for her entire work shift, Mr. Crum opined that she has lost between 35% and 50% of the jobs she could do pre-injury. He further opined:

> Based on a preliminary analysis of Ms. McIntyre's labor market access loss, based on her age, education, work history, skills, the nature of her labor market and the impact of her industrial injury, I estimate that she has lost access to approximately 75% of the jobs that she could perform on a pre-injury basis. That is, of full time jobs that she would be otherwise able to compete for, she is no longer competitive for approximately 75% of those jobs. Dr. Wraalstad's restrictions will preclude her from working on a full time basis in any of the types of jobs she had previously held.

Claimant's Supplemental Exhibit 18, p. 4.

14. Claimant was earning $11.50 an hour with health insurance benefits at the time of her March 2006 accident and injury. Mr. Crum opined that Claimant could compete for jobs earning approximately $8.50 an hour without benefits. This represents an approximate 35% reduction in wage earning capacity.

15. In the event Dr. Knoebel's opinions are accepted, Claimant would have no PPD. However, Mr. Crum testified, "Based on my current understanding of Ms. McIntyre's situation, assuming the restrictions recommended by Dr. Wraalstad at his deposition, in my opinion it would be reasonable to propose that Ms. McIntyre has sustained permanent partial disability, inclusive of permanent impartial impairment, of approximately 45% to 50%." *Id*., p. 5.

16. Defendants take issue with Mr. Crum's conclusions and label his report and methodology as "flawed." They argue that Mr. Crum relied exclusively on Dr. Wraalstad's restrictions and ignore certain pre-existing conditions that are relevant to her employability. For example, Mr. Crum does not mention that Claimant's pre-existing migraines and fibromyalgia required her to take extreme amounts of narcotic medications in order to simply survive her days. Mr. Crum does not mention how such narcotic use may affect Claimant's employability. Also not mentioned by Mr. Crum is Claimant's treatment with Dr. Holman after her March 30, 2006 accident. Although Dr. Holman relates his treatment to problems stemming from Claimant's congenital flat foot condition, he has nonetheless recommended foot fusion surgery which may have an impact on her ultimate disability. In fact, Mr. Crum's report does not even list Dr. Holman as a physician whose medical records were reviewed.

17. The Referee agrees that Mr. Crum's report is of limited value in this case. While his is the only vocational evidence presented, nonetheless, the Commission is not bound to accept it. "The opinion of an expert is not binding on the trial court, and, as long as it does not act arbitrarily, the trial court may reject expert testimony even when it is uncontradicted." *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004).

18. Claimant's pre-existing fibromyalgia and migraine headaches have caused her to be dependent on narcotic medications that could ostensibly negatively impact her ability to

secure and retain employment. Mr. Crum makes no mention of this. His conclusions regarding disability are based solely on Dr. Wraalstad's standing restriction. Defendants direct the Commission to a 1983 claim for an accident at K-Mart that injured Claimant's right upper extremity. This injury resulted in a 5% whole person PPI rating. Claimant testified in her deposition that because she was unable to continue performing her medium capacity work at K-Mart, she was retrained to become a pharmacy technician, a lighter duty position. Following her K-Mart accident, her treating physician imposed the following permanent restriction: "No lifting over 25# - this must be strictly observed." Defendants' Supplemental Exhibit 19, p. 44. Mr. Crum fails to mention this injury or the permanent restriction arising therefrom, or how this may affect her employability.

19. Defendants also direct the Commission's attention to a 1993 claim regarding another right upper extremity injury resulting in restrictions of no repetitive heavy lifting of over 30 pounds. It was around this time that Claimant began developing fibromyalgia symptoms. She was also being treated for migraine headaches, which she has had all of her life. During the course of treatment for her migraine headaches and fibromyalgia, Claimant was (and is) prescribed numerous potent narcotic medications. It is unknown what effect the taking of such medications has on her employability; Mr. Crum does not address this potential problem.

20. Another factor not mentioned by Mr. Crum is that Claimant was terminated from her job for industrially unrelated reasons effective November 17, 2007, over a year and a half after her March 2006 accident. Had it not been for Claimant's violation of company policy regarding writing her own prescriptions, it is a reasonable inference that she would still be working there. While it is true that Dr. Wraalstad had Claimant to return to work on a graduated hourly schedule beginning August 29, 2006, he did release Claimant to return to work without

restrictions on October 25, 2006, even though the day before she presented with an unrelated painful ingrown toenail (See Claimant's Exhibit 7, pp. 34-35) and rated her for PPI on December 5, 2006. Dr. Wraalstad's deposition testimony in that regard is not clear:

> Q. (By Mr. Bailey): Then it appears on December 5, 2006, there was an impairment rating.
>
> A. Yes, it looks like mine.
>
> Q. You gave her a 7 percent whole person?
>
> A. Based upon my interpretation of the American Medical Association evaluation.
>
> Q. Did you give her any restrictions there on December 5, 2006, Doctor?
>
> A. **I don't think I did any additional restriction plan**, I think it was mainly for the impairment rating.
>
> Q. The last one we have shows her working four hours per day. Did you release her back for full time there on December 5, 2006?
>
> A. If I don't have any release to work papers, then I don't recall doing that. **I don't have any release to work sheet here**. I think what was done on the 5th was my impairment rating.
>
> Q. What restrictions would you have given her there on December 5, 2006, based on your impairment rating and examining her?
>
> **A. I don't think I would have changed anything at that point**.
>
> Q. Which would have been what, then?
>
> A. **If** she was still at four or five hours, **I'm not sure**, but at the end of the impairment rating there is a sentence here, about the fourth line from the bottom, where she still does require the use of the ankle support during the course of her work shift. Probably what I would have advised at that point is to **continue doing what is getting you through**.

Dr. Wraalstad Deposition, pp. 52-53. (Emphases added).

21. Dr. Wraalstad was obviously confused regarding Claimant's restrictions. He no doubt did not have in front of him his October 25, 2006 work release and it was not referenced by counsel at his deposition. Between his full duty return to work release of October 2006 and his PPI rating of December 2006, he records nothing about any additional restrictions. Dr.

Wraalstad's deposition testimony, alone, is insufficient to establish Claimant's restrictions, however, his records demonstrate unequivocally that, as of December 2006, there were none relating to her March 30, 2006, industrial accident.

22. It is the date of medical stability from a compensable injury that gives rise to PPD. *See, Stoddard v. Hagadone Corporation*, 147 Idaho 186, 207 P.3d 162 (2009). Thus, Mr. Crum's reliance of Dr. Wraalstad's "restrictions" is mislaid at best. Mr. Crum admitted in his report that if he relied on Dr. Knoebel's "no restrictions" scenario, Claimant would not have incurred any PPD above her PPI. A reasonable inference may be made that Mr. Crum would reach the same conclusion had he been aware that Dr. Wraalstad had assigned no new restrictions after he released Claimant to return to work without restrictions.

23. It is unfortunate that Dr. Wraalstad was not questioned about the discrepancy between the October 25, 2006, work release and his deposition testimony regarding the restrictions he imposed before the release. Perhaps he could have cleared up the confusion; perhaps not. In any event, the Referee is constrained to attach great weight to the straight-forward document returning Claimant to work without restrictions and consequently, attach little weight to Mr. Crum's report and his opinions expressed therein.

24. The Referee finds that Claimant has incurred no PPD above her 7% whole person PPI as the result of her March 30, 2006, industrial accident and injury.

## CONCLUSIONS OF LAW

1. Claimant is entitled to PPI equaling 7% of the whole person.

2. Claimant is not entitled to PPD in excess of her 7% whole person PPI.

## 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 __21st___ day of October, 2010.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the ___3rd____ day of ___November_____, 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:

DENNIS R PETERSEN
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Gina Espinosa

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

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| DONNA MCINTYRE,<br><br>Claimant,<br><br>v.<br><br>WALGREEN COMPANY,<br><br>Employer,<br><br>and<br><br>ZURICH AMERICAN INSURANCE COMPANY,<br><br>Surety,<br><br>Defendants. | ) | **IC 2006-004336**<br>**2007-007732**<br><br>**ORDER**<br><br>Filed November 3, 2010 |

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 this recommendation. 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 impairment equaling 7% of the whole person.

2. Claimant is not entitled to permanent partial disability in excess of her 7% whole person permanent partial impairment.

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

DATED this __3rd___ day of ___November____, 2010.

INDUSTRIAL COMMISSION

__/s/_____
R.D. Maynard, Chairman

___/s/_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the __3rd___ day of _November___ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

ERIC S BAILEY
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ge __/s/_____