

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANNA MILLER,

Claimant,

v.

CLEAR SPRINGS FOODS, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Surety,
Defendants.

IC 2010-011241

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

FILED 7/25/2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls on October 3, 2012. Claimant, Janna Miller, was present and represented by Keith Hutchinson of Twin Falls. Defendant Employer, Clear Springs Foods, Inc., (Clear Springs), and Defendant Surety, Liberty Northwest Insurance Corp., were represented by Scott Harmon of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on April 18, 2013.

ISSUES

The issues to be decided were narrowed at hearing and include:

1. The extent of Claimant's permanent partial impairment; and
2. The extent of Claimant's permanent partial disability.

CONTENTIONS OF THE PARTIES

Claimant alleges that she is entitled to permanent partial disability benefits of 54%,

inclusive of her 7% permanent impairment, due to her industrial accident and resulting two-level lumbar fusion. She relies upon the opinion of vocational expert Douglas N. Crum. Defendants assert that she has proven no permanent disability in excess of her 7% permanent impairment; however, they also rely upon the opinion of vocational expert Mary Barros-Bailey, who opined that Claimant suffers permanent disability of 21%, inclusive of her 7% impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission's legal file;
2. The testimony of Claimant and David Duhaime taken at the October 3, 2012 hearing;
3. Claimant's Exhibits 1 through 4 admitted at hearing;
4. Defendants' Exhibits A through V admitted at hearing;
5. The post-hearing deposition of Douglas N. Crum, CDMS, taken by Claimant on October 31, 2012;
6. The post-hearing deposition of Tracy Lynn Ervin, P.T., taken by Claimant on October 31, 2012;
7. The post-hearing deposition of Nancy E. Greenwald, M.D., taken by Defendants on December 19, 2012; and
8. The post-hearing deposition of Mary Barros-Bailey, Ph.D., CRC, taken by Defendants on December 19, 2012.

All objections posed during the depositions are overruled and related motions to strike are denied, except as noted below. During Douglas Crum's post-hearing deposition, Defendants withdrew their objection to Mr. Crum's testimony regarding the Elks WorkFit key assessment functional capacity evaluation (WorkFit FCE) completed in July 2011, after acknowledging that

Mr. Crum's report—admitted into evidence without objection at hearing—extensively discussed and listed the findings and recommendations of the WorkFit FCE. Defendants' apparent renewal of this objection at page 11 of their Responsive Brief is hereby overruled. Furthermore, Defendants' objection posed at page 24 of Tracy Ervin's post-hearing deposition, and reiterated at page 11 of Defendants' Responsive Brief, is hereby overruled in part and sustained in part. Although the actual report of the 2011 WorkFit FCE discussed by Ms. Ervin in her post-hearing deposition was not offered or admitted in evidence at hearing, the findings of the WorkFit FCE—including the name of the assessment specialist, the validity of the assessment, and specific recommendations for sitting, standing, walking, lifting at various heights (both occasionally and frequently), pushing and pulling (both occasionally and frequently), carrying, squatting, crouching, stooping, bending, crawling, and kneeling—were known over a year prior to hearing and were extensively enumerated in Mr. Crum's report which was admitted into evidence without objection at hearing. Thus, Ms. Ervin's testimony regarding the findings of the WorkFit FCE, to the extent these findings are set forth in Mr. Crum's report, does not violate JRP 10(E) and Defendants' objection thereto is overruled. Ms. Ervin's testimony appearing at page 25, ll. 7-18 of her deposition, regarding aspects of the WorkFit FCE not contained in Mr. Crum's report, contravened JRP 10(E)(4) and Defendants' objection thereto, as well as Defendants' objection to the admission of Exhibit 2 to Ms. Ervin's post-hearing deposition, are sustained.

After having considered the above evidence and the arguments 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 born in Buhl in 1983. She was 29 years old at the time of the

hearing and had resided in the Buhl/Twin Falls area since prior to 2010. Since approximately eight years of age she has experienced chronic left hip pain resulting in a slight limp; however, her hip pain did not limit her activities. Commencing in elementary school, she struggled academically. She was regularly placed in special needs classes where teachers tutored her and assisted her with homework. She completed the 11th grade at Buhl High School but dropped out after the first week of her senior year due to difficulties with her classes. She did not complete high school and in spite of attending preparatory classes, has never obtained a GED. She has taken some computer classes but has no significant computer expertise and has pursued no other formal education.

2. Claimant began working as a cashier and grill cook at Arctic Circle during high school. After leaving high school, she continued to work at Arctic Circle for approximately 18 months and later worked as a cashier and cook at a bowling alley for approximately another 18 months.

3. In September 2003, Claimant began working full-time at Clear Springs. Her duties initially included weighing, sealing, and packaging fish. She was later assigned to processing and trimming fish, and ultimately to eviscerating and trimming fish.

4. Prior to April 2010, Claimant sustained work-related shoulder and ankle injuries. She missed approximately two weeks of work, her injuries resolved, and she returned to work without limitations. Prior to April 2010, other than treating with a chiropractor for hip and back stiffness on two occasions, she had no prior back conditions or symptoms and sought no medical treatment for her back.

5. At approximately 5:15 a.m. on Friday, April 30, 2010, Claimant was at work bending over to fill a tub with fish. As she attempted to straighten up, she felt a pop in her back

and experienced immediate and intense low back pain. She was unable to straighten up and was immediately approached by a coworker who had observed the event and was taken to obtain medical attention. Claimant presented that same day to Brian Johns, M.D., who assessed low back pain and prescribed hydrocodone and Flexeril. He encouraged Claimant to rest over the weekend. Claimant was working full-time and earning \$10.81 per hour at the time of her industrial accident.

6. On Monday, May 3, 2010, Claimant's low back pain continued and she called her supervisor, Kris Henna, and reported that she was in too much pain to work. Henna doubted the veracity of Claimant's report and recorded: "I have a feeling we will need to keep an eye on this one." Defendants' Exhibit C, p. 13. Later, on May 3, 2010, Claimant returned to Dr. Johns. He referred her to a chiropractor. On May 4, 2010, Claimant presented to David Long, D.C., with continued back pain producing uncontrolled shaking in her legs and lower back. Dr. Long recorded that Claimant was unable to tell when she needed to urinate. He directed her to return promptly to her physician.

7. On May 4, 2010, Claimant presented to William Stagg, M.D., who ordered a lumbar MRI. The MRI, performed that very day, revealed a large left paracentral L4-5 disc protrusion, with possible extruded component, producing moderate to severe canal stenosis and bilateral L5 nerve root impingement, and an L5-S1 central disc protrusion causing moderate canal stenosis and impinging the S1 nerve roots. On May 5, 2010, Claimant reported urinary incontinence to Dr. Stagg. He suspected cauda equina syndrome and immediately arranged for Claimant to be examined by neurosurgeon David Verst, M.D.

8. On May 5, 2010, Dr. Verst examined Claimant and performed L4-5 and L5-S1 discectomy and tension band annuloplasty for Claimant's cauda equina syndrome, secondary to

severe herniated discs at L4-5 and L5-S1. Claimant's urinary incontinence resolved; however, she continued to experience debilitating low back pain.

9. On June 16, 2010, Claimant began meeting and consulting regularly with Industrial Commission rehabilitation consultant David Duhaime.

10. On July 20, 2010, Claimant underwent another lumbar MRI that revealed early arachnoiditis.

11. On August 25, 2010, Claimant began treating with Michael Hajjar, M.D. On September 7, 2010, EMG and nerve conduction velocity tests revealed mild abnormality of the left lower extremity due to chronic L5-S1 radiculopathy. On November 17, 2010, Claimant began treating with neurosurgeon Paul Montalbano, M.D. He released her to light-duty work, four hours daily, and Clear Springs assigned her to work as a box labeler. Claimant returned to light-duty work but her back pain persisted.

12. On February 14, 2011, Dr. Montalbano performed L4-S1 fusion with instrumentation. Claimant testified that since her fusion surgery she has experienced frequent diarrhea. No physician has related this condition to her industrial accident or lumbar surgery. Claimant's back pain improved after fusion surgery, but did not entirely resolve. Claimant subsequently attended physical therapy with Tracy Ervin, P.T., several times each week for at least six weeks.

13. On April 28, 2011, Dr. Montalbano released Claimant to return to sedentary/light duty work four hours per day and restricted her to lifting no more than 40 pounds, with no repetitive stooping, bending, or twisting. Claimant returned to light-duty work at Clear Springs.

14. On June 13, 2011, Claimant tripped on a tree stump and stumbled. She reported increased back pain.

15. From approximately June 23 through July 12, 2011, Claimant participated in the Elks WorkFit Program in Boise directed by Nancy Greenwald, M.D. On July 12, 2011, Bill Moats, assessment specialist at the Elks Rehabilitation Hospital, performed a functional capacity evaluation at the conclusion of Claimant's enrollment in the WorkFit program. Mr. Moats documented Claimant's functional capacity of lifting 23.6 pounds above her shoulders occasionally, lifting from desk to chair of 25.8 pounds occasionally and 14.8 pounds frequently, and carrying 17 pounds occasionally. He further noted that Claimant was able to stand for three to four hours in 30 minute durations. Mr. Moats found the WorkFit FCE was a valid evaluation.

16. On July 17, 2011, Dr. Greenwald released Claimant to return to work and imposed permanent work restrictions including lifting no more than 40 pounds occasionally, 20 pounds frequently, and 10 pounds continuously; avoiding prolonged standing, walking or sitting; changing position ad lib; and avoiding frequent bending, twisting, or stooping.

17. On July 28, 2011, Claimant reported to Clear Springs for her first day back on the job after having completed the WorkFit program. Clear Springs then advised Claimant it could not accommodate her permanent medical restrictions and terminated Claimant's employment.

18. Claimant continued to seek employment with assistance from Mr. Duhaime who encouraged her to take the COMPASS Test and a Keyboarding Skills Test. She completed these tests on August 9 and 11, 2011, respectively. Claimant typed 22 words per minute with 90% accuracy. Claimant thereafter sought employment and contacted and/or applied for cashier or similar positions in the Buhl/Twin Falls area with WinCo, Target, Shopko, Bath & Body, Victoria's Secret, Gretics, Vanity, Aeropostale, Jack-In-The-Box, Wendy's, Burger King, 5 Guys, Oasis Stop & Go, Home Depot, Game Stop, Trade Home Shoe Store, Pretzelmaker, K-Mart, KFC, Petsmart, Albertson's, Jimmy John's, McDonald's, Johnny Carino's, Best Buy,

Michael's, Old Navy, Jamba Juice, JC Pennies, Sportsman, Famous Footwear, Payless, Honks, Family Dollar, Perkins, Tomato's, O-Reilly's, Arctic Circle, Hallmark, Walmart, Step, Fred Meyer, Shot-in-the-Dark, Rue21, Flying J, and Taco Bell. She did not receive a single interview.

19. On September 11 and 12, 2012, Tracy Ervin, P.T., performed a functional capacity evaluation which established Claimant's maximum safe lifting capacity at 20 pounds for 25 inches to waist, 10 pounds for waist to crown, and 15 pounds for carrying. Ms. Ervin did not recommend lifting from below 25 inches.

20. At the time of the hearing, Claimant continued to look for work, but had obtained no job interviews or offers. She was not registered with Job Service, but checked the Job Service postings daily. Claimant testified that she has persisting back and right leg pain. She believes she is able to lift 20 pounds, stand for five minutes, and walk one-half mile. She acknowledged that she can sit at a computer for two to three hours.

21. Having observed Claimant and David Duhaime at hearing, and reviewed the evidence, the Referee finds that both are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

22. 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).

23. **Permanent partial impairment.** The first issue is the extent of Claimant's permanent impairment. "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 non-progressive at the time of 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 employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized 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).

24. In the present case, Dr. Greenwald concluded that Claimant sustained a permanent impairment of 7% of the whole person due to her industrial back injury caused by her work at Clear Springs. The record contains no other impairment rating. The Referee finds that Claimant suffers a permanent impairment of 7% of the whole person due to her industrial accident.

25. **Permanent disability.** The next 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).

26. Physical restrictions. To evaluate permanent disability, permanent physical restrictions resulting from the industrial accident merit particular consideration. In the present case, after performing a two-level lumbar fusion, Dr. Montalbano released Claimant on April 28, 2011, to return to sedentary/light duty work four hours per day and restricted her to lifting no more than 40 pounds, with no repetitive stooping, bending, or twisting.

27. On July 12, 2011, the WorkFit FCE conducted by Bill Moats, assessment specialist at the Idaho Elks Rehabilitation Hospital, and extensively discussed in the report of vocational expert Douglas Crum, found Claimant capable of lifting 23.6 pounds above her shoulders occasionally, lifting 25.8 pounds from desk to chair height occasionally, and carrying 17 pounds occasionally. Mr. Crum noted that Mr. Moats considered the WorkFit FCE a valid assessment. Dr. Greenwald also repeatedly confirmed that Claimant's performance in the WorkFit FCE was valid.

28. On July 13, 2011, Dr. Greenwald imposed permanent work restrictions of: “40 # occ, 20 # frequent, 10 # continuous, Avoid prolonged standing, walking or sitting. Change position ad lib. Avoid frequent bending, twisting or stooping.” Defendants’ Exhibit R, p. 173. In her deposition, Dr. Greenwald noted the discrepancy between her lifting restrictions and the actual WorkFit FCE results recorded by Mr. Moats just the day before:

Q. (by Mr. Harmon) Did you have access, at the time you issued your restrictions and ratings, to any Functional Capacity Evaluations?

A. (by Dr. Greenwald) I did. And I have just a personal approach to Functional Capacity Evaluations. You know, it’s a great test, but it’s just what they are capable of lifting on that day at that time. What I really look at is whether they are valid or not and whether that’s consistent with the patient during the program. And she was valid. I did look it up last night, and it was a valid rating. So I really look at how they push themselves during the program, what they do, and she actually did a valid functional capacity rating, yeah.

Greenwald Deposition p. 9, ll. 4-17 (emphasis supplied). Dr. Greenwald also briefly reviewed the 2012 FCE performed by Tracy Ervin and commented:

And one of the first things I’ve noticed with them, and I don’t see it, is I don’t see that they do a validity test on it. So that’s one of the first things I look at, is I need a validity qualifier. The second thing is I generally don’t look at what they can lift or not lift, because, again, it’s just that at that moment that day, that’s the best that they could do. I generally look at the diagnostic: What happened, how many levels were operated on, what my physical exam showed, and then I adjust the weight limitations to that.

Greenwald Deposition, p. 9, l. 25 through p. 10, l. 12.

29. Tracy Ervin, P.T., testified that Claimant had improved slightly after the WorkFit Program as compared to her performance in physical therapy several weeks earlier based upon the results of the WorkFit FCE. Ms. Ervin noted that as established by the WorkFit FCE at the conclusion of the WorkFit program in July 2011, Claimant’s maximum safe lifting capacity was 23.6 pounds in waist to overhead lifting, 25.8 pounds in 18 inches to waist level lifting, 17

pounds carrying, and 56.3 pounds pushing and pulling. Lifting from floor to 18 inches was not recommended. Based upon the WorkFit FCE, Ms. Ervin testified:

Q. (by Mr. Hutchinson) Would it be your recommendation that you would alter those numbers significantly, either up or down, had that been your functional capacity evaluation?

A. (by Ms. Ervin) No, sir.

Q. So if a physician says she can lift 50?

A. That would be inappropriate based on the objective information obtained through the FCE.

Q. Or even lifting 40 pounds?

A. Still inappropriate.

Ervin Deposition, p. 27, ll. 11-21.

30. Regarding the September 2012 FCE which established Claimant's maximum safe lifting capacity at 20 pounds for 25 inches to waist, 10 pounds for waist to crown, and 15 pounds for carrying, Ms. Ervin testified that "overall there's been a slight decrease in [Claimant's] physical ability from the first FCE to the second FCE." Ervin Deposition, p. 29, ll. 15-17. Ms. Ervin opined that Claimant's decreased performance was due to deconditioning and noted that:

At the point that they do the key assessment, she had had extensive physical therapy as well as gone into a very intensive work-conditioning program to maximize her ability to perform functional and work activities. So the best she was ever going to be was following that intensive rehab, both through the Elks program as well as my program.

Ervin Deposition, p. 30, ll. 11-18 (emphasis supplied). Ms. Ervin testified that while there was room for some improvement in cardiovascular function, she did not expect any meaningful improvement in regards to moving "from a lighter sedentary work to a medium work category."

Ervin Deposition, p. 31, ll. 12-13.

31. Dr. Greenwald testified that Claimant gave good effort, worked hard, and produced a valid FCE at the conclusion of the WorkFit program. In spite of the valid WorkFit FCE, Dr. Greenwald then assigned permanent lifting restrictions of nearly twice the actual weight Claimant was able to safely lift, given her undisputedly valid WorkFit FCE at the conclusion of the Elks program. Dr. Greenwald was aware of Claimant's six weeks of physical therapy, three times weekly, followed by three weeks of intensive physical therapy at the Elks WorkFit program, but opined: "I always feel there's more that you can do." Greenwald Deposition, p. 14, l. 8. She testified:

Q. (by Mr. Hutchinson) Okay. Doesn't MMI mean that you have gotten to that point where you're not expected to get more, though?

A. (by Dr. Greenwald) It's basically a level where you don't see great gains in change, but, however, it's just like a fitness [sic]. I tell people—I do a little lecture at the beginning—"That at the end of three weeks, we don't expect you to run a marathon, but everyone at some point should be at least in good enough shape to run a marathon." So just with time and continued exercising, her ability to run that marathon, without being completely wasted at the end of it, improves as you continue that fitness level. So I do think that there is more fitness to be had, but it just takes time. So the MMI doesn't change.

Greenwald Deposition, p. 14, ll. 9-24.

32. Claimant's date of maximum medical improvement did not change. Neither did her actual safe lifting capacity. Claimant's physical abilities were substantially consistent in the later physical therapy sessions supervised by Ms. Ervin in 2011, the valid July 2011 WorkFit FCE performed by Mr. Moats, and the September 2012 FCE performed by Ms. Ervin.

33. The Referee finds unpersuasive Dr. Greenwald's offered justification for finding Claimant at maximum medical improvement and then assigning Claimant permanent lifting restrictions that are nearly twice the weight of her actual best efforts as consistently demonstrated over a 15-month period, including during her undisputedly valid WorkFit FCE. Although Dr.

Montalbano had imposed similar weight restrictions, he did so months earlier without the benefit of any FCE or other actual measurement of Claimant's physical capability.

34. The Referee finds well taken the restrictions imposed on Claimant by Dr. Greenwald to avoid prolonged standing, walking or sitting, change position ad lib, and to avoid frequent bending, twisting or stooping. However, Claimant's maximum lifting abilities are most accurately established by the WorkFit FCE documenting that Claimant's maximum safe capacity is 23.6 pounds occasionally in above shoulder lifting, 25.8 pounds occasionally in waist level lifting, and 17 pounds occasionally in carrying.

35. Vocational experts' opinions. Defendants' vocational expert, Mary Barros-Bailey, Ph.D., and Claimant's vocational expert, Douglas Crum, CDMS, have opined regarding Claimant's ability to compete in the open labor market. Industrial Commission rehabilitation consultant David Duhaime has also testified regarding Claimant's employability. Their conclusions are examined below.

36. *Dr. Barros-Bailey.* Dr. Barros-Bailey met with Claimant on December 21, 2011, reviewed her work history, educational history, and the physical restrictions imposed by Dr. Greenwald and prepared a vocational assessment. Dr. Barros-Bailey opined that Claimant's transferable skills in food preparation, food handling, and customer service would allow her to access positions in cashiering, customer service, and retail sales generally paying between \$8.00 and \$9.00 per hour—thus constituting a 25.5% wage reduction as compared to her time of injury wage. Dr. Barros-Bailey conceded that Claimant could not access a full range of cashier, retail sales or customer service representative positions. Considering the restrictions imposed by Dr. Greenwald, Dr. Barros-Bailey opined that Claimant sustained a loss of access of 16.5% due to

her industrial accident. Averaging 25.5% and 16.5%, Dr. Barros-Bailey concluded that Claimant sustained permanent disability of 21% $[(16.5+25.5)/2]$, inclusive of her impairment.

37. Dr. Barros-Bailey understood that Claimant's earnings for the year prior to her accident average \$512.42 per week, which equates to \$12.81 per hour, assuming a 40-hour work week. Additionally, Claimant received medical, dental, and vision insurance as part of her compensation package at Clear Springs. There is no evidence that Dr. Barros-Bailey considered these benefits in quantifying Claimant's loss of wage earning capacity as an element of her disability.

38. Dr. Barros-Bailey did not have the benefit of the 2011 WorkFit FCE or the 2012 FCE when she authored her report. She testified that she subsequently learned an FCE was completed as part of the WorkFit program and understood that Dr. Greenwald determined permanent restrictions from the WorkFit FCE. Dr. Barros-Bailey testified that if she were to "look at additional functional issues here, it would impact my opinion, but I don't know by how much." Barros-Bailey Deposition, p. 22, ll. 7-9. She later reaffirmed:

Q. (by Mr. Harmon) Okay. And just to make sure I understand your opinion from a report perspective, you believe that Ms. Miller suffers a 21 percent disability, inclusive of her impairment. But that number may be some higher if you incorporated the FCE results, but without working through, you're unable to tell us how much.

A. (by Dr. Barros-Bailey) Correct.

Barros-Bailey Deposition, p. 24, ll. 8-14.

39. *Douglas Crum*. Vocational expert Douglas Crum, CDMS, interviewed Claimant on January 30, 2012. He reviewed her work history, medical records, the WorkFit FCE results, and Dr. Greenwald's restrictions. Mr. Crum noted that Claimant had limited computer skills, had used a word processing program for a few simple papers in high school, and had not used a

computer on the job other than a cash register computer. Mr. Crum noted that Claimant struggled academically, did not finish high school, and in spite of her efforts in preparatory classes, had never obtained a GED. He testified that Claimant's COMPASS testing documented the opposite of someone ready for college; the testing revealed she would need extensive remediation to reach the level of a high school graduate.

40. Mr. Crum opined that Claimant could not return to any of her prior work at Clear Springs, principally because it did not allow for ad lib positional changes and required too much static standing. He testified that Claimant might be able to perform entry level food preparation positions such as a prep cook or fry cook, but may not be able to perform the full range of required duties depending upon the restaurant. He noted that fast-food restaurants require some lifting in excess of 25 pounds and may require extensive standing. Mr. Crum opined that kiosk-type work would be difficult for Claimant because of her standing limitation and that such opportunities in her labor market would be very few.

41. Mr. Crum testified that, given Claimant's education, skills, and training, she had access to, and was competitive for, approximately 8.9% of the jobs in her labor market prior to her accident. He testified that given Dr. Greenwald's restrictions post-injury, Claimant had access to approximately 6.1% of the jobs in her labor market, representing a 31% loss of labor market access. Mr. Crum testified that given the WorkFit FCE restrictions post-injury, Claimant had access to approximately 3.9% of the jobs in her labor market, representing a 65% loss of labor market access.

42. Mr. Crum evaluated Claimant's wage differential pre- and post-injury. He noted that Claimant was earning \$10.81 per hour at the time of her industrial accident and testified that she would likely earn about \$8.50 per hour assuming Dr. Greenwald's restrictions and \$7.25 per

hour assuming the WorkFit FCE restrictions. Mr. Crum noted that, pursuant to Dr. Greenwald's restrictions, Claimant would sustain a 21% reduction in wage-earning capacity and, based upon the WorkFit FCE restrictions, she would sustain a 33% reduction in wage-earning capacity.

43. Mr. Crum also noted that utilizing a time of injury wage of \$12.81 per hour, as stated in Dr. Barros-Bailey's report, Claimant would sustain a reduction in wage-earning capacity of 33% to 43%. Mr. Crum averaged Claimant's loss of access and wage loss and concluded that Claimant would suffer 33% permanent partial disability (inclusive of impairment), given Dr. Greenwald's restrictions, and 54% permanent disability (inclusive of impairment) given the WorkFit FCE restrictions.

44. Mr. Crum's opinion is more comprehensive and, thus, more persuasive than Dr. Barros-Bailey's opinion because he considered not only the restrictions imposed by Dr. Greenwald, but also the WorkFit FCE restrictions.

45. *David Duhaime.* In addition to the vocational experts retained by the parties, Claimant called Industrial Commission rehabilitation consultant David Duhaime to testify at hearing. Mr. Duhaime has over 20 years of experience with vocational rehabilitation in the Twin Falls area. He assisted Claimant in her attempts to return to work with Clear Springs and in her employment search after being let go by Clear Springs. Mr. Duhaime testified that Claimant's average weekly gross wage at the time of her injury was \$544.89. He testified that Claimant's restrictions preclude her from returning to any of her pre-injury jobs. Mr. Duhaime opined that merely obtaining a GED without more training would not allow Claimant to return to employment at her time of injury wage. He noted that her COMPASS test results indicate she would need two full semesters of pre-college training before she would be able to begin college level studies. Mr. Duhaime concluded that Claimant could not complete any type of formal

training in a two-year period that would make her competitive for jobs paying her time of injury earnings, given her present education and academic standing.

46. Considering Dr. Greenwald's restrictions, Mr. Duhaime opined Claimant was most likely employable in retail sales work with probable earnings of \$7.25 to \$7.50 per hour. He believed that because Claimant needed a sedentary position, she should seek retail environments such as small kiosks selling sunglasses, cell phone service, pictures, calendars, or jewelry. He opined that this would provide the best opportunity to approximate her time of injury wage. However, he noted that such opportunities were quite limited and competitive and that retail sales businesses usually start new employees in part-time or half-time positions and only after demonstrated good performance, advance employees to three-quarter or full-time positions.¹ Mr. Duhaime expressly opined that Claimant would not be competitive for call center work because of her limited sitting tolerance and need to change position ad lib.

47. Mr. Duhaime's testimony and notes indicate Claimant's average weekly wage was \$544.89 at the time of her industrial accident. This equates to \$13.62 per hour, assuming a 40-hour work week. Claimant testified that she earned \$10.81 per hour at the time of her accident. The difference is apparently due to the fact that Claimant often worked more than 40 hours per week at Clear Springs. Claimant's supervisor, Kris Henna, reviewed and approved Mr. Duhaime's job site evaluation listing wages from her time of injury position at \$544.89 per week. Dr. Barros-Bailey testified that Claimant earned an average hourly wage of \$12.81 during the year prior to her accident. As previously noted, Dr. Barros-Bailey's hourly wage calculation did not include the medical, vision, and dental insurance benefits that Clear Springs provided Claimant as part of her compensation package. There is no evidence of record that these

¹ At hearing, Claimant testified she had approached several such locations without success.

insurance benefits would likely be available in the jobs that Mr. Crum, Mr. Duhaime, or Dr. Barros-Bailey opined Claimant could perform post-injury.

48. Claimant has limited transferable skills and is not competitive for any of her prior jobs. She is not sophisticated and was assisted by tutors in her classes from elementary school onward. She dropped out of high school and has never obtained a GED. She advised Mr. Crum that there were many words in a typical newspaper article that she would not understand. At hearing, Claimant demonstrated limited verbal expressive skills, including limited vocabulary. She struggled to express herself clearly. She did not understand many questions as initially posed by counsel. Her attorney regularly rephrased his questions in simpler terms so she could respond to them. Claimant's limited verbal skills would hinder her ability to sell herself in conversation with a potential employer, especially in a job interview, and to communicate effectively with customers in many job settings. She has actively sought employment, and by the time of hearing had contacted and/or applied for cashier or similar positions with more than 40 potential employers in the Buhl/Twin Falls area without obtaining even a single interview. Clear Springs, one of the largest employers in the area, was unable to accommodate Claimant's physical restrictions as imposed by Dr. Greenwald.

49. Based on Claimant's permanent impairment of 7% for her bilevel spinal fusion, her permanent physical restrictions, and considering her non-medical factors including but not limited to her age of 27 at the time of the accident and 29 at the time of the hearing, lack of a high school education, failure to obtain a GED, limited computer literacy, very limited pre-injury work experience, and her inability to return to any of her pre-injury employments, the Referee concludes that Claimant's ability to compete for regular gainful employment in the open labor

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 2013, 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:

KEITH E HUTCHINSON
ATTORNEY AT LAW
PO BOX 207
TWIN FALLS ID 83303-0207

JOSEPH M WAGER
LAW OFFICES OF HARMON & DAY
PO BOX 6358
BOISE ID 83707-6358

mg

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANNA MILLER,

Claimant,

v.

CLEAR SPRINGS FOODS, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Surety,
Defendants.

IC 2010-011241

ORDER

FILED 7/25/2013

Pursuant to Idaho Code § 72-717, Referee Alan R. 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 sustained permanent impairment of 7% of the whole person due to her lumbar injury caused by her work at Clear Springs.
2. Claimant has proven that she suffers permanent disability of 54%, inclusive of her permanent impairment, due to her lumbar injury caused by her work at Clear Springs.

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

DATED this 25th day of July, 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 25th day of July 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

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