

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEAN K. RING,)
)
 Claimant,)
)
 v.)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendant.)
_____)

IC 2005-002601

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

Filed: June 25, 2010

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 Lewiston, Idaho, on November 24, 2009. Claimant, Jean K. Ring, was present in person and represented by Scott Chapman of Lewiston. Defendant, the State of Idaho Industrial Special Indemnity Fund (ISIF), was represented by Thomas W. Callery of Lewiston. Employer, Kindred Nursing Centers West, L.L.C. (Kindred), and its surety, Insurance Company of the State of Pennsylvania, reached a settlement in this matter with Claimant shortly before the hearing and thus did not participate in the hearing. The parties presented oral and documentary evidence. Briefs were submitted and the matter came under advisement on April 5, 2010.

ISSUES

The issues to be decided by the Commission were narrowed at hearing and are as follows:

1. Whether the ISIF is liable pursuant to Idaho Code § 72-332.
2. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984).

CONTENTIONS OF THE PARTIES

Claimant argues that she is totally and permanently disabled due to the combined effects

of her 2005 industrial accident and a number of pre-existing conditions. Claimant asserts that she suffers 14% impairment of the whole person due to her 2005 industrial accident, plus pre-existing whole person permanent impairments of 10% due to hypertension, 8% due to diabetes, 7% due to lumbar stenosis, 5% due to lumbar radiculopathy, 5% due to depression, 5% due to cervical radiculopathy, 5% due to fibromyalgia and chronic pain syndrome, and 2% due to left foot fracture and fifth metatarsal deformity. Claimant asserts that her pre-existing physical impairments were manifest, hindered her in obtaining employment, and combined with her 2005 industrial injury to render her totally and permanently disabled.

The ISIF readily acknowledges that Claimant is not employable, but argues that it bears no liability because Claimant's 2005 accident alone rendered her totally and permanently disabled. The ISIF relies upon the testimony of vocational expert Nancy Collins, Ph.D.

EVIDENCE CONSIDERED

Employer and its surety disclosed Exhibits A through U prior to settling with Claimant. These exhibits were adopted and offered into evidence by the ISIF, together with the ISIF's Exhibits V through X. Thus the record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken March 25, 2009, and admitted into evidence at hearing as Claimant's Exhibit 13a;
3. The pre-hearing deposition of Claimant, taken September 3, 2009, and admitted into evidence at hearing as Claimant's Exhibit 13b;
4. The testimony of Nancy J. Collins, Ph.D., taken at the November 24, 2009 hearing; and
5. Claimant's Exhibits 1 through 15 and Defendant's Exhibits A through X, admitted at the November 24, 2009 hearing.

The objection posed during Claimant's deposition on September 3, 2009, is sustained. After considering 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 1949 and was 60 years old at the time of the hearing. She did not testify at hearing. Claimant is right hand dominant. She graduated from high school in Lewiston. In 1972, she received her LPN degree from Walla Walla Community College. Claimant worked as an LPN at a care center in McCall for several years and then returned to Lewiston in approximately 1975, where she worked as an LPN for nearly 30 years. She has had no job outside of the nursing field as an adult. Claimant excelled in caring for the elderly. In 1977, she commenced work at Kindred, where she eventually became the staff development coordinator.

2. In approximately 1992, Claimant suffered back pain and was hospitalized briefly. She was diagnosed with a bulging lumbar disc and L5 radiculopathy and received conservative treatment, including epidural injections. Her lumbar condition stabilized and she resumed working without restrictions. Claimant has received conservative medical treatment for occasional flare-ups of back pain since that time, but has always returned to her usual work activities.

3. In approximately 1996, Claimant was diagnosed with fibromyalgia. She managed her fibromyalgia with exercise and continued working. No later than 1997, Claimant was diagnosed with hypertension. She has successfully used medication to control her hypertension since that time. In 1998, Claimant was diagnosed with depression and, since then, has been treated for recurring depression from time to time. She found her work therapeutic and her work performance was not restricted by her depression. In 2001, Claimant was diagnosed with elevated blood sugar and cervical pain. She was diagnosed with type 2 diabetes but managed her condition with diet. In 2002, Claimant fell at home and fractured her left foot. She underwent three foot surgeries in 2003 and finally achieved full recovery.

4. In February 2005, Claimant slipped on ice outside Kindred's facility and fell on her left shoulder. She sustained a four-part left humerus fracture with displacement of the humeral head. Orié Kaltenbaugh, M.D., performed reduction and prosthetic replacement of the proximal humerus. Claimant received extensive physical therapy but was unable to regain the function of her left arm and shoulder. She attempted to return to work, but her left upper extremity continued to be highly symptomatic.

5. In January 2006, Roger Dunteman, M.D., performed arthroscopic subacromial decompression and extensive debridement of Claimant's left glenohumeral joint. Her left arm function did not significantly improve. Claimant tried to return to work at Kindred, but required significant accommodations and was ultimately unable to continue. Dr. Dunteman opined that Claimant could not continue to work because her duties were making her condition worse.

6. In December 2006, Chester McLaughlin, M.D., examined Claimant and reported that she was markedly limited in using her left upper extremity, other than to support the function of her right upper extremity, and that she was unable to do anything at or above shoulder level with her left upper extremity. In April 2007, Dr. Dunteman restricted Claimant to no activity at or above shoulder level on the left and no lifting of more than two or three pounds with her left arm. Ultimately, Dr. Dunteman indicated that Claimant could not use her left arm for work activities and could work only four hours per day. Claimant desired to return to work; however, Kindred could not accommodate her medical restrictions. She has not worked since.

7. Claimant is very limited in her activities of daily living, including household duties and self-care. Her husband helps with household duties. She washes, cooks, and performs virtually all activities one-handed.

DISCUSSION AND FURTHER FINDINGS

8. The provisions of the 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).

9. **ISIF liability.** Claimant asserts that the ISIF is liable pursuant to Idaho Code § 72-332, which provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of her employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of her income benefits out of the ISIF account. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court summarized the four inquiries a claimant must satisfy to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

10. In the present case, Claimant has suffered a number of health problems over the years, including lumbar and cervical pain, hypertension, depression, fibromyalgia, diabetes, and a left foot fracture. In spite of these challenges, after medical treatment, she continued to work and performed her duties without restriction. The ISIF has acknowledged that Claimant is now totally and permanently disabled. However, the ISIF asserts that the requisite combining is absent because Claimant is totally and permanently disabled due to the effects alone of her 2005 industrial accident.

11. Claimant has significant work restrictions. After her 2005 accident, Dr. Dunteman recommended that she not return to nursing. He opined that she has a non-functional left arm and that as a result of her 2005 industrial injury, she cannot use her left arm for work activities. He has also restricted her to lifting no more than 10 pounds with her right arm. Dr. McLaughlin agreed with these restrictions. Claimant is a one-armed worker. Dr. Dunteman has also restricted Claimant to working no more than four hours per day. Dr. McLaughlin concurs with this restriction.

12. Nancy Collins, Ph.D., evaluated Claimant's employability in November 2009. She found nothing in Claimant's medical records that showed any pre-existing restrictions. Dr. Collins noted that Claimant is restricted to sedentary work, a classification usually requiring bilateral upper extremity use. Dr. Collins testified that Claimant's left shoulder injuries alone preclude her from employment. She testified that Claimant is now a one-armed worker and opined that Claimant is not employable because, although she can do most but not all of the work of a two-handed individual, it will take her twice as long to complete work assignments. Dr. Collins contacted all of the nursing facilities in Lewiston asking about one-handed work and found nothing. She concluded that Claimant would need a part-time job and that only a sympathetic employer would hire Claimant because she is a one-armed worker due to the limitations resulting from her 2005 industrial accident.

13. Industrial Commission rehabilitation consultant Lynette Schlader tried to find Claimant a job, but was unsuccessful. Schlader suggested various positions including nursing tutor, teacher's aide, elder care director, receptionist, and hotel desk clerk. However, Dr. Collins noted that all required bilateral manual dexterity and/or advanced education—specifically an RN degree—that Claimant did not possess.

14. Claimant provided no expert vocational evidence. Claimant herself did not testify that she was not totally and permanently disabled due solely to the effects of her industrial

accident. Rather, she testified in her September 3, 2009 deposition that it was her shoulder injury that drove her from employment. There is no testimony that Claimant's total disability results from the combined effects of her pre-existing conditions and her 2005 industrial accident.

15. Having observed Dr. Collins at hearing and compared her testimony to other evidence in the record, the Referee finds that Dr. Collins is a credible witness and her testimony is persuasive. The Referee concludes that Claimant's 2005 industrial accident alone, with its resulting left arm and shoulder injuries, rendered Claimant totally and permanently disabled.

16. Claimant has not proven the ISIF's liability pursuant to Idaho Code § 72-332.

17. **Carey apportionment.** The issue of apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54, (1984), is moot.

CONCLUSIONS OF LAW

1. Claimant has not proven that the ISIF is liable pursuant to Idaho Code § 72-332.

2. The issue of apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.

RECOMMENDATION

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

DATED this 15th day of June, 2010.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 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:

SCOTT CHAPMAN
PO BOX 446
LEWISTON ID 83501

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

sc

_____/s/_____

/s/
Thomas E. Limbaugh, Commissioner

Unavailable for Signature
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

SCOTT CHAPMAN
PO BOX 446
LEWISTON ID 83501

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

sc

/s/