BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RITA RIOS,

Claimant,

v.

MCCAIN FOODS, INC.,

Employer,

and

TRANSCONTINENTAL INSURANCE COMPANY,

Surety,

Defendants.

IC 2002-009126

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION

Filed January 20, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on September 10, 2009.[1] Claimant appeared and participated *pro se*. Mark C. Peterson of Boise represented Employer/Surety. Mauricio Jaramillo interpreted from English to Spanish and from Spanish to English. Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on November 23, 2009.

[1] A hearing was also held on March 31, 2009. However, when it was discovered that Claimant had undergone a recent MRI, that hearing was continued to allow Defendants an opportunity to gather information regarding the MRI.

ISSUE

The sole issue to be decided is whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that as the result of a compensable industrial accident resulting in a lumbar fusion, she has incurred PPD in excess of her 23% whole person permanent partial impairment (PPI). While conceding that no medical provider has taken her off work due to her 2002 industrial accident and low back injury, nonetheless she contends that she is unable to work in any capacity due to her unrelenting back pain.

Defendants contend that Claimant is due no PPD above her PPI because her perception that she cannot work is just that; her perception. Other than a 35-pound lifting restriction, no physician has assigned any permanent physical restrictions and she has been released to return to work at her time-of-injury job. Claimant has not looked for work since her accident in 2002. She has not incurred any loss of earning capacity and is not entitled to any disability above her impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.
2. Defendants' Exhibits 1-11 admitted at the hearing.

FINDINGS OF FACT

1. Claimant turned 55 years of age on the date of the hearing and resided in Burley. She came to the United States from Mexico when she was 14 years of age.

2. Claimant finished the 6th grade in Mexico and has no further formal education here.

3. Claimant's ability to speak and understand English is quite limited.

4. Claimant's work history consists mainly of sorting/trimming of potatoes. She began working for Employer on the line when she was 19 years of age and worked for them until she was terminated in February 2003.

5. On May 24, 2002, Claimant was lifting a bundle of boxes when the bundle started to slip from her grasp. She tried to catch the boxes before they fell and injured her low back in the process.

6. Claimant presented to Cassia Regional Medical Center the following day where the attending physician diagnosed a lumbosacral strain. As Claimant had the next three days off, the physician recommended no lifting or stooping until she returned to her regular work, then there would be no restrictions.

7. Claimant returned to work at light duty.

8. Claimant eventually came under the care of Bernard Boehmer, M.D., who she first saw on June 7, 2002. Dr. Boehmer diagnosed mechanical low back pain and treated her conservatively with medications and physical therapy. By July 15, 2002, Dr. Boehmer questioned whether Claimant was "overreacting" regarding her back sprain. On November 20,

2002, Dr. Boehmer indicated that Claimant was not at MMI because she could still improve, but still assigned her a 30-pound permanent lifting restriction. He did not assign any PPI.

9. On August 13, 2002, orthopedic surgeon Richard Knoebel, M.D., performed an Independent Medical Evaluation at Surety's request. Dr. Knoebel examined Claimant and reviewed relevant medical records. He diagnosed nonspecific back pain without evidence of radiculopathy and noted Claimant to be obese and deconditioned. He opined Claimant would reach MMI in about three months without PPI. Dr. Knoebel precluded Claimant from light/medium work. "This contemplates that the individual has a lifting capacity which is limited to 20 pounds on an occasional basis and 10 pounds on a frequent basis and the capacity for bending, squatting, kneeling, climbing, twisting, pushing, pulling, or other activities involving comparable physical effort is limited to a very occasional basis." Defendants' Exhibit 4, p. 31. On December 3, 2002, Dr. Knoebel reviewed additional medical records. He reiterated his permanent 30-pound lifting restriction and, "A return to regular work appears reasonable, since it is not significantly different than her current work restrictions based upon the history available."[2] *Id*., p. 22. Dr. Knoebel also noted that Claimant continued to have subjective complaints unsupported by objective findings and her deconditioning was what was limiting her functionality.

10. Claimant first saw orthopedic surgeon David Verst, M.D., on March 3, 2003, complaining of low back and leg pain. Dr. Verst diagnosed profound degenerative disc disease at L5-S1 with "classic discogenic pain." He recommended that Claimant either live with her pain or consider an L5-S1 interbody fusion.

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[2] Apparently Claimant told Dr. Knoebel that the maximum she was required to lift at her job was 38 pounds.

11. Claimant was referred to the Industrial Commission Rehabilitation Division (ICRD) by the Idaho Division of Vocational Rehabilitation. Her initial interview was on August 23, 2003. Claimant informed ICRD consultant Eddie Lopez that she was fired by Employer due to her injury and, "She conveyed resentment towards her dismissal, and appears to be bitter as a consequence." Defendants' Exhibit 9, p. 97. Mr. Lopez opined that overcoming her resentment would be a "key factor" in a successful return to work effort.

12. In a September 24, 2003 case note, Mr. Lopez indicated that Employer had phased out Claimant's position due to Employer's going to an eight-hour shift from 12 hours. According to Employer, Claimant was encouraged to apply for other jobs within the company that would be easier on her back; for reasons unknown, Claimant refused to do so and was terminated effective February 8, 2003.

13. On October 22, 2003, Claimant saw Henry West, Jr., D.C., at her then-attorney's request. Dr. West reported that Claimant's subjective complaints were substantiated by objective clinical findings. He criticized Dr. Knoebel's IME because Dr. Knoebel did not use instrumentation to confirm his range of motion assessment and did not review diagnostic testing. Dr. West began treating Claimant until February 16, 2004, at which time he declared her at MMI yet referred her to a neurosurgeon for "consultation and evaluation."

14. On November 3, 2003, Dr. Verst approved two job site evaluations submitted by Mr. Lopez; one for her pre-injury position (even though no longer available) and one for a "Grade 2" position. On December 1, 2003, Mr. Lopez closed his file: "Based on the restrictions/limitations, or lack thereof, from this industrial injury, the claimant is able to return

to her customary occupation, or otherwise. Consequently, the claimant's pre-injury wage earning capacity has been restored." Defendants' Exhibit 9, p. 101.

15. Claimant saw Benjamin Blair, M/D., an orthopedic surgeon, at Dr. West's request on May 13, 2004. At that time, Claimant was complaining of low back pain with radiation into the left lower extremity. Dr. Blair diagnosed L4-5, L5-S1 degenerative disc disease and recommended a discogram.

16. On October 19, 2004, Dr. Verst performed an anterior lumbar interbody decompression and fusion, prosthetic graft insertion, and instrumentation at L5-S1. Dr. Verst declared Claimant at MMI on February 24, 2005.

17. Claimant saw Rodde Cox, M.D., a physiatrist, for an IME at Surety's request on March 29, 2005, with the chief complaints being lower back and left arm pain. Dr. Cox diagnosed low back pain status post L5-S1 diskectomy with fusion; symptom magnification; and probable depression. Dr. Cox noted, "The subjective complaints are not consistent with the objective findings. Symptom magnification behavior was evident." Defendants' Exhibit 8, p. 91. Dr. Cox found Claimant to be at MMI and assigned a 23% whole person PPI rating for Claimant's low back condition. He also assigned the following physical restrictions: Avoid repetitive bending, twisting and stooping. Avoid lifting more than 35 pounds on an occasional basis.

DISCUSSION AND FURTHER FINDINGS

"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, and 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 should also be 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.

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).

18. Dr. Verst testified in his deposition (Claimant was present and asked questions) that Claimant's low back pain is not related to the injury she sustained in her accident:

> Q. (By Mr. Peterson): Okay. In your response dated November 2nd, 2006, the No. 2, it states - - I'll just read it - - then ask questions about it. It says, "I do not feel that Rita's problems are directly related to the industrial injury of 2002. She is likely suffering from progressive degenerative disc disease that is

> part of the natural history of the disease." Could you describe what you meant by that statement?
>
> A. I meant that Rita was continuing - - she was having pain, and the question is, are her pains currently related to 2002? And I felt that her current pain that she was suffering from was more muscular in nature, with associated degenerative discogenic disease coming from adjacent levels in her lumbar spine. That answer was justified on an MRI scan that did not show any change in the disc space at L4 at this point in time, in '06, compared to her surgery which was back in '02.

Dr. Verst Deposition, p. 11-12.

19. Dr. Verst will not recommend further back surgery absent further diagnostic testing and does not believe any further treatment, if necessary, would be related to her original injury, but rather to the natural progression of her underlying degenerative disc disease.

20. The Referee agrees with Defendants regarding the nature of Claimant's alleged disablement; it is her perception that she cannot work that is keeping her from working. This Referee's impression of Claimant gleaned from the two hearings is that she wants to be pain-free - - **period**. While Claimant may well be experiencing pain in various parts of her body including her back, the only credible medical evidence of record suggests that such pain is no longer related to the back injury she suffered in her accident, but due to the natural progression of her underlying degenerative disc disease.

21. Claimant's permanent restrictions are relatively minor and do not preclude her from the labor market available to her for the type of work she performed pre-injury. Significantly, Claimant has not searched for or attempted work since her termination. She has not registered at Job Service, even though she has used them in the past and is aware of their services. She informed ICRD that she could not do any work. Claimant is convinced that there is no work available to her that she can physically tolerate; the record does not support her

conviction. No physician has told Claimant that she cannot work. Claimant (although she refers to this proposition as a "lie") was encouraged to apply for other positions with Employer at the time of the termination, but refused to do so. But for Claimant's attitude toward her employability, she is as employable now as she was pre-injury. She has lost little to no access to her pre-injury labor market and her earning capacity has not been diminished due to her industrial accident.

22. Claimant has failed to prove her entitlement to any PPD above her 23% whole person PPI.

CONCLUSION OF LAW

Claimant has failed to prove her entitlement to PPD benefits.

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 __12th___ day of January, 2010.

INDUSTRIAL COMMISSION

__/s/_______________________________
Michael E. Powers, Referee

ATTEST:

____/s/_______________________________
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___20th____ day of January, 2010, 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:

RITA RIOS
184 PALMER RD
BURLEY ID 83318

MARK PETERSON
PO BOX 829
BOISE ID 83701

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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ORDER

Filed January 20, 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 conclusion 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 conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove her entitlement to permanent partial disability benefits.

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

DATED this __20th___ day of ____January____, 2010.

INDUSTRIAL COMMISSION

Unavailable for signature____
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 ___20th___ day of ____January____ 2010, 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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ge

Gina Espinosa