

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

In the Matter of:)
)
MARTHA WHITAKER,)
)
Decedent,)
_____)
)
JOHN MACKIN, Personal Representative)
of Decedent's Estate/Successor in Interest,)
)
Claimant,)
)
v.)
)
HANCOCK FABRICS, INC.,)
)
Employer,)
)
and)
)
AMERICAN HOME ASSURANCE)
COMPANY,)
)
Surety,)
)
Defendants.)
_____)

IC 2004-004552

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

FILED 09/09/2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor. Martha Whitaker filed her Complaint herein by counsel on December 22, 2008. Defendants filed their Complaint Against the Industrial Special Indemnity Fund (ISIF) on September 29, 2009. Martha Whitaker passed away on April 11, 2010 from non-industrial causes. The Commission dismissed ISIF from the case on May 24, 2010. Proceedings were continued by John P. Mackin as personal representative of the estate of Martha

Whitaker. The Referee conducted a hearing in Idaho Falls on November 29, 2010. Claimant John Mackin, as personal representative of the estate of Martha Whitaker, was represented by Delwin W. Roberts, of Idaho Falls. Defendant Employer, Hancock Fabrics, Inc. (Hancock), and Defendant Surety, American Home Assurance Company, were represented by Alan K. Hull, of Boise. The parties presented oral and documentary evidence. One post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on June 7, 2011.

ISSUES

The issues to be decided by the Commission were narrowed, pursuant to Idaho Code § 72-431, and include the following:

1. The extent of Martha Whitaker's permanent disability, including whether she was permanently and totally disabled;
2. If Ms. Whitaker was not permanently and totally disabled, whether apportionment for a pre-existing or subsequent condition, pursuant to Idaho Code § 72-406, is appropriate.

CONTENTIONS OF THE PARTIES

Claimant alleges that Martha Whitaker was significantly disabled, but not totally and permanently disabled, and that her estate is entitled to additional income benefits unpaid at the time of her death. Defendants maintain that when all of Ms. Whitaker's physical limitations and personal factors are considered, she was totally and permanently disabled at the time of her death and that, pursuant to Idaho Code §72-431, her estate is entitled to no further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. The pre-hearing deposition testimony of Martha Whitaker, taken June 12, 2009, and admitted as Claimant's Exhibit C and Defendants' Exhibit 23;
3. The pre-hearing deposition testimony of Ms. Whitaker's personal representative, John P. Mackin, taken July 12, 2010, and admitted as Defendants' Exhibit 31;
4. The pre-hearing deposition testimony of Kenneth Blanchard, taken June 23, 2010, and admitted as Defendants' Exhibit 30;
5. The testimony of Ken Blanchard and Cathy Quick, taken at the November 29, 2010 hearing;
6. Claimant's Exhibits A through D and Defendants' Exhibits 1 through 23 and 25 through 35, admitted at the hearing;
7. The post-hearing deposition testimony of Douglas N. Crum, CDMS, taken February 22, 2011.

All objections posed during Doug Crum's deposition are overruled except Defendants' objections posed at pages 66 and 76 thereof, which are sustained. All objections posed during Ken Blanchard's deposition are overruled, except Defendants' objections posed at page 62, ll. 1-4, and page 63 thereof, which 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. Martha Whitaker was born in Oregon in 1944. She lived in Washington, Montana, North Dakota, New Jersey, Nebraska, Virginia, and Idaho. In 1962, she graduated from Idaho Falls High School. Thereafter, she moved to Tennessee and attended Vanderbilt University, graduating in 1966 with a degree in home economics and music. She took

hypertension medication throughout her life from her late teens and smoked about a half pack of cigarettes per day for most of her life. She was five feet one inch tall and weighed approximately 110 pounds most of her adult life.

2. While in college, Ms. Whitaker physically defended another woman from an assault. The assailant shattered Ms. Whitaker's left thumb. She underwent two surgeries encompassing bone grafting and a tendon transfer. Her left thumb improved and she was able to use it again without difficulty for many decades.

3. Following graduation from college, Ms. Whitaker worked at Cain-Sloan Department Store in Nashville, Tennessee in customer service and alterations. She later returned to Vanderbilt University, where she obtained her master's degree in fine arts. She then resumed her full-time employment at the department store, where she became the chief designer of wedding dresses and veils, bridesmaid dresses, and party dresses. She was a talented seamstress.

4. In the mid-1970's, Ms. Whitaker developed bilateral carpal tunnel syndrome from repetitive sewing. She underwent carpal tunnel releases and, after recovering from surgery, continued working at the department store. She also developed ovarian tumors, for which she underwent 16 major surgeries between approximately 1972 and 1979. She recovered and experienced no residual ill-effects.

5. In approximately 1978, Ms. Whitaker was promoted to supervisor of customer service at the department store, where she managed 25 employees and oversaw alterations, fur storage, gift wrap, and servicing weddings.

6. In 1985, Ms. Whitaker developed right elbow soreness and underwent right ulnar nerve surgery. She recovered without residual ill-effects and returned to work.

7. In 1987, Ms. Whitaker dislocated her right shoulder and underwent shoulder surgery. She recovered without residual ill-effects and returned to work. She continued working at the department store until 1988 when it was sold.

8. From approximately 1988 through 1990, Ms. Whitaker worked collecting defaulted student loans. She also worked part-time doing alterations, fitting dresses at weddings, painting portraits, and decorating food. In 1990, she worked collecting medical accounts. From approximately 1990 through 1992, she managed a small country furniture and craft store. In approximately 1993, she commenced working as an assistant manager at Cloth World, where she supervised five employees. She subsequently worked as an editor and assistant for a television show host.

9. In 1999, Ms. Whitaker moved back to Idaho Falls to care for her aging parents. After they passed away in 2001 and 2002, she oversaw the winding up of their estate.

10. On August 25, 2003, Ms. Whitaker began working part-time for Defendant Hancock Fabrics. By January 2004, she was working approximately 25 hours per week and earning \$5.25 per hour. Her duties included customer service, cashiering, and cutting cloth. She had no difficulty performing any of her work duties.

11. On the evening of January 3, 2004, Ms. Whitaker was helping a customer load an 80-pound package into the customer's vehicle when her right thumb became caught in a packaging strap. The package turned, twisting her right thumb backwards down on her hand and also twisting her right wrist. She thought her thumb had dislocated. Claimant reported her injury the next day to her supervisor. She continued working for several days thereafter with a makeshift splint on her right thumb. Eventually, she could no longer manipulate scissors and sought medical attention. Ms. Whitaker subsequently came under the care of John Andary, M.D.

12. On May 4, 2004, Dr. Andary performed a right thumb inter-positional arthroplasty surgery. However, Ms. Whitaker's right thumb continued to be very symptomatic. On June 1, 2004, Dr. Andary performed a second surgery on Ms. Whitaker's right thumb and removed hardware utilized in the first surgery. Her symptoms continued.

13. Ms. Whitaker thereafter came under the care of Stan Griffith, M.D. Electrical conduction studies showed abnormalities and on March 1, 2005, Dr. Griffith performed a right wrist arthrodesis of the scapho-trapezoid joint, repair and reconstruction of the scapholunate interosseous ligament, and ulnar nerve release at the right wrist. Within days after surgery, Ms. Whitaker developed symptoms of loose surgical hardware. On March 4 and 22, 2005, Dr. Griffith surgically removed pins placed during the March 1 procedure. Claimant's right thumb and wrist continued to be symptomatic. On July 19, 2005, Dr. Griffith performed a right total wrist replacement arthroplasty and explored the right thumb with carpo-metacarpo joint distraction and internal fixation. On October 13, 2005, Dr. Griffith performed a right wrist reconstruction at the distal radial ulnar joint with tendon graft. Ms. Whitaker's right wrist continued to be symptomatic. She developed symptoms of tennis elbow in her left elbow due to overuse of her left arm.

14. By June 23, 2006, Ms. Whitaker came under the care of Dominic Gross, M.D., of Boise. Dr. Gross noted that she had suffered surgical misadventures and would benefit from a salvage procedure to fuse her right wrist. On September 19, 2006, Dr. Gross performed right wrist arthrodesis for failed wrist implant arthroplasty. Ms. Whitaker's right wrist improved somewhat, however, she developed carpal tunnel-like symptoms and trigger finger in her left hand from overuse. By December 19, 2006, Dr. Gross found that Ms. Whitaker had a solid fusion and could go back to work with restrictions. However, Hancock Fabrics had no suitable

work available. Electrodiagnostic testing revealed continued abnormalities and Ms. Whitaker's right wrist continued to be symptomatic.

15. On August 2, 2007, Dr. Gross performed right distal radial ulnar joint reconstruction, ulnar nerve submuscular transposition, ulnar nerve decompression at the right wrist, tenolysis of the flexor and extensor tendons, and excision of the extensor carpi ulnaris tendon. By October 15, 2007, Ms. Whitaker weighed only 78 pounds. By March 2008, Dr. Gross noted that she had a very unstable right distal radioulnar joint.

16. On March 20, 2008, Dr. Gross performed a right distal radial/ulnar joint replacement with Scheker prosthesis, and neurectomy of a neuroma of the right arm. While recovering from her wrist surgery in Boise, Ms. Whitaker fell and sustained an inversion injury to her left ankle and suffered bruising and swelling in her left foot. She subsequently developed left peroneal nerve palsy. She underwent a lumbar MRI, which revealed moderate to severe degenerative changes, including canal stenosis.

17. By April 2008, Dr. Gross concluded that Ms. Whitaker's right wrist was much improved, however, he referred her to Ron Kristensen, M.D., for her back and left foot issues.

18. On June 27, 2008, Dr. Kristensen evaluated Ms. Whitaker's left foot condition. He initially proposed a surgical solution, but concluded it was not viable, and Ms. Whitaker wore a foot brace thereafter to support her left ankle.

19. On November 21, 2008, Dr. Gross observed that Ms. Whitaker was medically stable and needed no further surgeries. On March 27, 2009, Dr. Gross rated her permanent impairment at 35% of the whole person due to her upper right extremity. Defendants began paying permanent partial impairment benefits. Dr. Gross referred Ms. Whitaker to Holly Zoe, M.D., for long-term pain control.

20. On March 30, 2009, Ms. Whitaker underwent a functional capacity evaluation which established, among other things, that she could use her upper extremities for three to four hours in 30-minute durations, lift from approximately five to 20 pounds, and carry approximately eight pounds.

21. On April 22, 2009, Dr. Gross placed permanent physical restrictions on Ms. Whitaker's use of her right upper extremity, including no repetitive motion, no gripping motion, no lifting or carrying more than five pounds for more than 30 minutes with 30-minute rest periods. He restricted her to sedentary work with lifting up to 10 pounds occasionally.

22. At the time of Ms. Whitaker's deposition, taken June 12, 2009, she continued to have nerve pain in her left hip, a residual from the removal of bone for wrist fusion; nerve pain radiating into her chest and neck, a residual from prior wrist surgeries; chronic left shoulder pain from overuse; left hand pain resulting from overuse; and persisting numbness and pain in her right hand and wrist. She testified that she could no longer sew, paint, make jewelry, or pick up her cats. She was able to shop for her own groceries, but not able to lift items off shelves above shoulder-height. To carry bagged groceries from her car into her home, she tied them to her left hand. She was not able to lift a gallon of milk, carry a laundry basket, make clay or resin figurines, or do portraits. Washing dishes was difficult. She had to tape a mop handle to her left arm to be able to mop her own floor. She was working with Idaho Industrial Commission rehabilitation consultant Ken Blanchard to find employment, but noted that Blanchard had been unable to locate any suitable employment, and expressed doubt that there was a job within her restrictions.

23. Ms. Whitaker testified that her left shoulder was painful from years of overuse. She estimated that she could lift only five or six pounds with her right arm. She was unable to

close her right index and middle fingers to her right thumb, thus sewing with her right hand was impossible and her left hand was too unsteady for sewing. She testified that she could sign her name, use a screwdriver, cut meat, and use scissors a little with her left hand. She could no longer play the piano, write a letter, or push repetitively with her right hand. She confirmed that Dr. Gross had restricted her to working for 30 minutes, then resting for 30 minutes, because her pain became unbearable. She acknowledged that she had no appreciable computer skills.

24. Ms. Whitaker continued to reside in Idaho Falls until the time of her death on April 11, 2010, from a nonindustrial condition.

25. At hearing, Ms. Whitaker's former neighbor and friend, Cathy Quick, testified regarding Ms. Whitaker's abilities. Ms. Quick knew Ms. Whitaker for about three years. She testified that Ms. Whitaker's multiple hand surgeries did not seem to improve her right hand function. She noted that Ms. Whitaker was able to vacuum, wash her clothes, and prepare her own food, but could not write very well and that her left hand was starting to "wear out" due to overuse. Ms. Quick testified that Ms. Whitaker helped her on several occasions for a total of 12 hours in 2008, organizing and cashiering estate sales. She testified that Ms. Whitaker also sewed, played computer games, and made jewelry. She acknowledged that Ms. Whitaker complained of left hand and shoulder pain, and could not walk well due to her left leg.

DISCUSSION AND FURTHER FINDINGS

26. 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).

27. **Permanent disability.** The first issue is the extent of Ms. Whitaker's permanent disability, including whether she was totally and permanently disabled. "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). Pursuant to Idaho Code § 72-422, "The proper date for disability analysis is the date that maximum medical improvement has been reached." Stoddard v. Hagadone Corp., 147 Idaho 186, 192, 207 P.3d 162, 168 (2009).

28. To evaluate Ms. Whitaker's permanent disability, a number of items merit

examination, including her permanent impairments, the physical restrictions resulting from her permanent impairments, and her potential employment opportunities—particularly as identified by vocational rehabilitation experts.

29. Permanent impairment. All parties agree that Ms. Whitaker suffered a permanent impairment of 35% of the whole person due to her industrial injuries. The record contains no permanent impairment for any other condition.

30. Physical restrictions. Dr. Gross restricted Ms. Whitaker's use of her right upper extremity as follows: no repetitive motion, no gripping motion, no lifting or carrying more than five pounds for more than 30 minutes with 30-minute rest periods. He also restricted her to sedentary work, with lifting no more than 10 pounds occasionally.

31. Employment opportunities. Ken Blanchard, rehabilitation consultant for the Industrial Commission, worked for an extended period with Ms. Whitaker in her preparations to return to work after her industrial accident. He testified that she enjoyed beading and making jewelry as a hobby and attempted to do so after her injury, but was limited by her right hand condition and found it slower and difficult. Blanchard investigated employment opportunities at a bead store, but the manager declined to consider an individual with restrictions. Blanchard noted Ms. Whitaker reported difficulty typing with her right hand because of pain. He testified that she was open to office work and wanted to take a basic computer class to help prepare for a sedentary position. However, he noted that her restriction forbidding repetitive right upper extremity use cast serious doubt upon the suitability of such training. Blanchard also confirmed that Ms. Whitaker was having left hand and shoulder problems due to overuse of her left hand, because of her multiple right hand surgeries. He noted that her left thumb was deteriorating and she could not pinch with her left thumb.

32. Blanchard evaluated a number of positions for Ms. Whitaker. He initially believed she might be able to work as a teacher's aide, substitute teacher, tutor, front desk clerk, light housekeeper, jewelry counter cashier, retail store associate, customer service representative or home care aide. However, upon further consideration, Blanchard testified that Ms. Whitaker probably could not work as a teacher's aide, because of her bilateral thumb problems. He noted that openings for a substitute teacher would be very competitive and she had no prior teaching experience. He further acknowledged that she could not have done housekeeping and assisted living care, because she was so petite—weighing only about 90 pounds at the time she reached medical stability. He affirmed that cashiering would require at least one, if not two, good hands and that a front desk clerk position would require at least one good hand. He acknowledged that there were likely as many as 50 applicants for every available job position that he had listed and that many applicants had college degrees. In spite of Blanchard's assistance and encouragement, Ms. Whitaker never obtained even a single job interview. Blanchard expressly testified that he was not aware of any employer—not even a part-time employer—that would give a worker a one-half hour break after every one-half hour of work as required by the restrictions specified by Dr. Gross.

33. Douglas Crum testified as Defendants' vocational rehabilitation expert, that Ms. Whitaker had no reliable access to jobs in her labor market and was totally and permanently disabled from competitive gainful employment. He noted that she had worked only approximately five months between 1999 and 2009. He further noted that her lifting restrictions limited her to sedentary employment. Ms. Whitaker's residual pain and limitations in her dominant right hand figured prominently in Crum's conclusions. He testified that Ms. Whitaker's limitations arising solely from her right hand were sufficient to render her unemployable. He

opined that requiring a 30-minute rest break after 30 minutes of work would be a very difficult restriction for a potential employer to accommodate and that he had not “seen an employer that could accommodate somebody like that.” Crum Deposition, p. 42, ll. 5-7.

34. Crum testified that Ms. Whitaker did not have the physical capacity to perform light packaging, fast-paced food preparation and customer service, retail sales or janitorial or custodial work. He testified that she did not have appreciable computer skills and could not tolerate the repetitive motions required to perform bill collecting, cashiering, retail sales management, front desk clerk, housekeeper, assisted living facility housekeeper, or home health care work.

35. Crum testified that Ms. Whitaker was not competitive for teacher’s aide or tutoring positions. He noted that her age of 64 at the time she became medically stable, and the fact that she had been off work for six years, would generally make finding employment difficult. He believed that attempts to find employment would have been futile and testified that Ms. Whitaker was totally and permanently disabled at the time of her deposition. His opinion is comprehensive, well-supported by the record, and persuasive.

36. Based on Ms. Whitaker’s impairment rating of 35% of the whole person, her extensive permanent physical restrictions, and considering her non-medical factors, including her age of 59 at the time of the accident, education, and inability to return to her previous positions, Ms. Whitaker’s ability to engage in regular gainful activity was eliminated. The Referee concludes that Ms. Whitaker suffered a permanent disability of 100%, inclusive of her 35% whole person impairment.

37. **Idaho Code § 72-406 apportionment.** Apportionment for a pre-existing or subsequent condition, pursuant to Idaho Code § 72-406, is moot.

CONCLUSIONS OF LAW

1. Defendants have proven that Martha Whitaker was 100% totally and permanently disabled on the date she reached maximum medical improvement. Pursuant to Idaho Code § 72-431, her estate is entitled to no further income benefits.

2. Apportionment pursuant to Idaho Code § 72-406 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 30th day of August, 2011.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2011, 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:

DELWIN W ROBERTS
1495 E 17TH ST
IDAHO FALLS ID 83404-6236

ALAN K HULL
PO BOX 7426
BOISE ID 83707-1426

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

In the Matter of:)
)
MARTHA WHITAKER,)
)
Decedent,)
_____)
)
JOHN MACKIN, Personal Representative)
of Decedent's Estate/Successor in Interest,)
)
Claimant,)
)
v.)
)
HANCOCK FABRICS, INC.,)
)
Employer,)
)
and)
)
AMERICAN HOME ASSURANCE)
COMPANY,)
)
Surety,)
)
Defendants.)
_____)

IC 2004-004552

ORDER

FILED 09/09/2011

Pursuant to Idaho Code § 72-717, Referee Alan 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. Defendants have proven that Martha Whitaker was 100% totally and permanently disabled on the date she reached maximum medical improvement. Pursuant to Idaho Code § 72-431, her estate is entitled to no further income benefits.

2. Apportionment pursuant to Idaho Code § 72-406 is moot.

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

DATED this 9th day of September, 2011.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DELWIN W ROBERTS
1495 E 17TH ST
IDAHO FALLS ID 83404

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

djb

/s/