

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARY ETTA WILLIAMS,)	
)	
Claimant,)	IC 2002-502077
)	
v.)	
)	
STATE OF IDAHO, INDUSTRIAL)	FINDINGS OF FACT,
SPECIAL INDEMNITY FUND,)	CONCLUSIONS OF LAW,
)	AND RECOMMENDATION
Defendant.)	
_____)	Filed: June 3, 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 Pocatello on May 12, 2009. Claimant, Mary Etta Williams, was present in person and represented by Fred J. Lewis of Pocatello. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF) was represented by Paul B. Rippel of Idaho Falls. Employer settled with Claimant prior to hearing. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on January 19, 2010.

ISSUES

The issues to be decided by the Commission are:

1. The extent of Claimant’s permanent partial impairment.
2. The extent of Claimant’s permanent disability in excess of impairment, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise.
3. Whether the ISIF is liable pursuant to Idaho Code § 72-332.
4. Apportionment, if any, pursuant to 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 she is totally and permanently disabled, noting that all vocational experts who have testified in this matter have concluded that she is unemployable. Claimant asserts she suffers 25% impairment of the whole person due to her 2002 industrial accident, plus an additional 10% whole person impairment due to a pre-existing back injury. Claimant asserts that her pre-existing physical impairment was manifest, hindered her in obtaining employment, and has combined with her 2002 industrial injury to render her totally and permanently disabled. Claimant relies upon vocational experts Kathy Gammon and Douglas Crum.

The ISIF argues that it bears no liability because Claimant's pre-existing impairment was not a hindrance or obstacle to employment and her 2002 accident alone rendered her totally and permanently disabled. It relies upon vocational expert Nancy Collins.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken August 30, 2007;
3. The testimony of Claimant, Karen Vesterling, and Annette Childs taken at the May 12, 2009 hearing;
4. Claimant's Exhibits 1 through 17 and Defendant's Exhibits 1 through 5, admitted at the hearing;
5. The post-hearing deposition of Kathy Gammon, M.S., CRC, MPT, taken by Claimant on May 22, 2009;
6. The post-hearing deposition of Douglas N. Crum, C.D.M.S., taken by Claimant on June 2, 2009; and
7. The post-hearing deposition of Nancy J. Collins, Ph.D., taken by Defendant on June 2, 2009.

All objections posed during Kathy Gammon's deposition are sustained, and Defendant's motion to strike on page 17 thereof is granted. All objections posed during Douglas Crum's deposition are overruled except for the objections at pages 22, 46, and 48 thereof, which are sustained. All objections posed during Nancy Collins's deposition are overruled.

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 Alabama in 1941. She is right-handed. She was 68 years old and resided in Inkom, near Pocatello, at the time of the hearing. Claimant moved to Pocatello when she was 10 years old, then returned to Alabama, where she graduated from high school. Thereafter she returned to Pocatello, where she married and raised her family.

2. After returning to Pocatello, Claimant worked in housekeeping, babysitting, and hotel cleaning. She later worked at Craft Foods for several years. She simultaneously took classes at Idaho State University (ISU) and received a secretary certificate in 1961. She earned over 100 credit hours at ISU, but did not graduate. Claimant worked as a teacher's aide at an elementary school. In approximately 1978, she became a licensed social worker. She was hired by the Idaho Department of Health & Welfare (Department) in Pocatello as a social worker. Her duties included child and adult protection reviews and training foster home and daycare providers. Claimant later became a member of the Department's mental health team, where she remained until after her industrial accident.

3. In January 1999, Claimant tripped in her home and fell. She sustained an L1 vertebral burst fracture and spinal cord injury and was paralyzed from the waist down for several days. Claimant was hospitalized in Pocatello and then in Salt Lake for an extended period. She was unable to work for six months. She has experienced chronic back and leg pain since her vertebral fracture.

4. After six months she returned to her job at the Department. She took prescription medications for her chronic back and leg pain to be able to function and complete her work duties. She adopted several compensatory strategies to allow her to continue working. She learned to eat very early in the morning so she could take her pain medications and be functional for work. The Department approved a later working schedule, and Claimant usually worked from 10:00 a.m. until approximately 7:00 p.m. She left her office about 4:00 p.m. each day to distribute medications to clients and observe clients in their homes. Some clients' residences were accessible only by stairs and Claimant's leg and back pain made it difficult for her to negotiate stairs. On one occasion the elevator was not working at the apartment complex where a client lived and Claimant had to crawl up to the sixth floor to deliver the client's medications. Upon returning to her office after delivering medications, Claimant would lie down on a couch for 15 to 20 minutes to ease her back pain before continuing her work activities. In spite of these challenges, Claimant always carried a full caseload. She was recognized for her professional expertise and consistently received outstanding performance evaluations.

5. On January 23, 2002, while working for the Department, Claimant slipped on a patch of ice and landed on her back, neck, and head. She finished her shift and then went to the hospital for treatment. X-rays and an MRI revealed herniated discs at C4-5 and C5-6. Surgery was recommended. Claimant was instructed to stay off work until surgery; however, her Department mental health team was short-staffed so she worked up until the night prior to her scheduled surgery.

6. On March 28, 2002, neurosurgeon Scott Huneycutt, M.D., performed a cervical discectomy and interbody allograft fusion with instrumentation at C4-5 and C5-6. Unfortunately, the surgery was unsuccessful and Claimant's arm, hand, and neck pain and numbness increased. She was determined to be medically stable on August 28, 2002, and attempted to return to work in September 2002, but was unable to tolerate the ongoing pain. She was later diagnosed with cervical neuropathy and Dr. Huneycutt directed her not to return to work.

7. At hearing Claimant testified that she is unable to tolerate sleeping in a bed. She has slept in a recliner chair since her 1999 L1 fracture. Since shortly after her cervical surgery, she has slept in an office chair with lumbar pads and a neck pillow for support. Claimant believes she cannot work due to ongoing pain in her back, neck, arms, and hands. She is especially limited by chronic pain in her dominant right hand. She testified that she could still work at the Department if she had only the cervical injury. Claimant believes that even if she could not use her right hand productively, she could still dictate her reports and invent other compensatory strategies to use her left hand to accomplish her former duties at the Department.

8. Having observed Claimant at hearing and compared her testimony to other evidence in the record, the Referee finds that Claimant is a highly credible witness. Her work history demonstrates a stoic determination and an exemplary work ethic.

DISCUSSION AND FURTHER FINDINGS

9. 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).

10. **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).

11. In June 2008, Bradley Melville, M.D., rated Claimant's impairment at 10% of the whole person due to her L1 compression fracture and 25% of the whole person due to her cervical impairment from her 2002 industrial accident. No party contests these ratings. The Referee concludes that Claimant suffered a pre-existing permanent impairment of 10% of the whole person and an additional impairment due to her 2002 industrial accident of 25% of the whole person.

12. **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. 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).

13. There are two methods by which a claimant can demonstrate she is totally and permanently disabled. First, a claimant may prove total and permanent disability if her medical impairment, together with the pertinent nonmedical factors, totals 100%. If, however, the claimant fails to prove 100% disability, he or she can still demonstrate total disability by fitting within the definition of an odd-lot worker. Boley v. State, Industrial Special Indemnity Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997).

14. Claimant herein asserts that she is 100% permanently disabled and that she is also totally and permanently disabled pursuant to the odd-lot doctrine.

15. All of the vocational experts in this case, including Defendant's vocational expert, have concluded that Claimant is totally and permanently disabled. Based on Claimant's total impairment rating of 35% of the whole person and her permanent physical restrictions, and considering her non-medical factors, including her age of 62 at the time of the accident, education, and inability to return to any of her previous occupations, Claimant's ability to engage in regular gainful activity has been eliminated. The Referee concludes Claimant has established a permanent disability of 100%, inclusive of her 35% whole person impairment.

16. **ISIF liability.** The next issue is whether the ISIF bears any liability. Idaho Code § 72-332(1) 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.

17. Idaho Code § 72-332(2) provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section the impairment must be a permanent condition, whether congenital or due to injury or disease, of such

seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This is interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury does not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute a hindrance or obstacle to obtaining employment.

18. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was indeed 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.

19. Pre-existing, manifest impairment. The pre-existing physical impairment at issue herein is the condition of Claimant's back. Abundant medical records establish that her L1 burst fracture, with resulting back and leg pain, was existing and manifest prior to her 2002 industrial accident. The first and second prongs of the Dumaw test have been met.

20. Hindrance or obstacle. The ISIF disputes whether Claimant's prior back injury was a subjective hindrance or obstacle to employment or reemployment if Claimant had become unemployed. Claimant testified that prior to her 2002 industrial injury she could perform all of her job duties at the Department. However, the record clearly establishes that she had to develop significant compensatory strategies to do so. Claimant's pre-existing back and leg pain restricted her use of stairs, limited her capacity for prolonged sitting and walking, and compelled her to alter her work hours. Claimant was aided by students at ISU who assisted in deliveries to clients in residences accessible only by stairs.

21. Claimant's vocational experts, Douglas Crum and Kathy Gammon, testified that Claimant's limitations from her prior back injury very well could have constituted a hindrance or

obstacle to Claimant obtaining employment. Both Crum and Gammon testified that some potential employers would have been reluctant to hire Claimant prior to her 2002 industrial injury, due to her pre-existing back injury and her need for an altered work schedule.

22. Claimant's ability to work was clearly impacted by her pre-existing back injury. The Referee finds that her pre-existing back injury constituted a hindrance to her employment. The third prong of the Dumaw test has been met.

23. Combination. Finally, to satisfy the "combines" element, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

24. In the present case, the ISIF asserts that the requisite combining is absent because Claimant is totally and permanently disabled due to the effects alone of her 2002 industrial accident.

25. Defendant's vocational expert, Nancy Collins, Ph.D., testified that Claimant's cervical injuries alone would preclude her from employment. Dr. Collins opined that it would be unlikely any employer would hire Claimant because of her dominant right hand limitations resulting from her 2002 industrial accident. Psychiatrist Eric Roberts, M.D., restricted Claimant to occasional fine manipulation, which would include writing and keyboarding. On cross-examination Dr. Collins admitted that Claimant's right hand is partially functional and that no physician or physical therapist has entirely restricted Claimant from keyboarding or writing. Dr. Collins also based her opinion in part on Claimant's restriction from driving due to her cervical condition. However Dr. Collins acknowledged that this would not preclude Claimant from arranging for a ride to work.

26. The functional capacity evaluation performed by Sharik Peck, P.T., in January 2003 establishes that Claimant can frequently grip up to three pounds with her right hand and 13 pounds with her left hand. Claimant testified that considering only her cervical injuries from her 2002 industrial accident, she could have performed her duties at the Department by dictating her case reports. Dr. Collins acknowledged the availability of one-handed computer keyboards and voice recognition computer software.

27. Douglas Crum opined that Claimant would have been employable considering only her industrially-caused cervical condition. Kathy Gammon testified of accommodations readily available for one-handed workers, including one-handed computer keyboards and voice command computer operating systems. Crum opined that considering solely Claimant's cervical condition, she would still have had access to that portion of the labor market requiring sitting, standing, walking, and bending and would have been employable in light clerical and receptionist positions.

28. The Referee finds the opinions of Crum and Gammon more persuasive than that of Nancy Collins on this issue and concludes that Claimant's industrial accident alone, with its resulting cervical injuries, although severely disabling, did not render Claimant totally and permanently disabled.

29. After Claimant's functional capacity evaluation in January 2003, Mr. Peck and physiatrist Dr. Roberts concluded that Claimant could not work safely at any exertional level due to the severe limitations of her right arm, neck, trunk, low back, hips, and lower extremities. The most limiting restrictions imposed by Dr. Roberts were limitations on Claimant's ability to use her dominant right hand and her need to spend at least two hours reclining during each eight hour shift. Dr. Roberts noted that Claimant was restricted to standing one-half hour consecutively, with one-half hour standing in a total work day; sitting one-half hour consecutively, with two hours of sitting in a total work day; and walking one-half hour consecutively, with one-half hour

walking in a total work day. He concluded Claimant did “not appear to have any real potential for rehabilitation due to the combined effects of her many functional deficits.” Claimant’s Exhibit 8, p. 223. Crum testified that the combined limitations resulting from Claimant’s back condition and her industrial accident rendered her totally and permanently disabled.

30. The Referee is not persuaded that Claimant’s 2002 industrial accident alone rendered her totally and permanently disabled. Rather, the weight of the evidence establishes that Claimant’s 2002 industrial accident combined with her pre-existing impairment to render her totally and permanently disabled. The final prong of the Dumaw test has been satisfied. Claimant has proven the ISIF’s liability pursuant to Idaho Code § 72-332.

31. **Carey apportionment.** The Idaho Supreme Court has adopted a formula dividing liability between the ISIF and the employer/surety at the time of the industrial accident in question. The formula provides for the apportionment of non-medical disability factors by prorating the non-medical portion of disability between the ISIF and the employer/surety in proportion to their respective percentages of responsibility for the physical impairment. Carey v. Clearwater County Road Department, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984). Conditions arising after the injury, but prior to a disability determination, that are not work-related are not the obligation of the ISIF. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

32. As noted above, Claimant’s permanent impairment from the 2002 industrial injury is 25% of the whole person and her pre-existing back impairment is 10% of the whole person, for a total permanent impairment of 35%. Thus, 10/35^{ths} of Claimant’s impairment pre-existed her 2002 industrial accident. By application of the Carey formula, the ISIF is responsible for the pre-existing medical portion of 10% impairment and for 10/35^{ths}, or approximately 28.57%, of the nonmedical portion of Claimant’s permanent disability. The ISIF is responsible for payment of full statutory benefits commencing approximately 357.15 weeks after August 28, 2002, the date Claimant became medically stable.

CONCLUSIONS OF LAW

1. Claimant has proven she suffers permanent impairment of 35% of the whole person, including 25% whole person impairment attributable to her 2002 industrial accident and 10% whole person impairment attributable to her pre-existing back condition.
2. Claimant has proven that she is 100% totally and permanently disabled.
3. Claimant has proven that the ISIF is liable pursuant to Idaho Code § 72-332.
4. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: the ISIF is responsible for payment of full statutory benefits commencing approximately 357.15 weeks after August 28, 2002, the date Claimant became medically stable.

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 26th day of May, 2010.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd 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:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

sc

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARY ETTA WILLIAMS,)
)
 Claimant,)
)
 v.)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendant.)
 _____)

IC 2002-502077

ORDER

Filed: June 3, 2010

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. Claimant has proven she suffers permanent impairment of 35% of the whole person, including 25% whole person impairment attributable to her 2002 industrial accident and 10% whole person impairment attributable to her pre-existing back condition.
2. Claimant has proven that she is 100% totally and permanently disabled.
3. Claimant has proven that the ISIF is liable pursuant to Idaho Code § 72-332.
4. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: the ISIF is responsible for payment of full statutory benefits commencing approximately 357.15 weeks after August 28, 2002, the date Claimant became medically stable.

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

DATED this 3rd day of June, 2010.

INDUSTRIAL COMMISSION

/s/
R.D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

sc

/s/