

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ELIZABETH J. MCCABE, )  
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 Claimant, )  
 )  
 v. )  
 )  
 JO-ANN STORES, INC., )  
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 Employer, )  
 )  
 and )  
 )  
 LIBERTY MUTUAL FIRE INSURANCE )  
 COMPANY, )  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 04-511953  
04-012825  
04-524200**

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

Filed: September 15, 2006

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on April 11, 2006. Emil F. Pike of Twin Falls represented Claimant. Kent W. Day of Boise represented Defendants. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on August 29, 2006, and is now ready for decision.

**ISSUES**

By agreement of the parties at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care;

- b. Disability in excess of impairment; and
- c. Attorney fees.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that as a result of industrial accidents on May 16, June 2, and October 23, 2004, she sustained injuries to her cervical, thoracic, and lumbar spine and her left shoulder. Although she has been released from treatment, her symptoms return when she tries to work. She seeks additional medical care, in particular, a consultation with an orthopedic physician of her own choosing. She also asserts that her permanent impairments, together with her age, education, and work experience have resulted in a loss of access to the labor market and a loss of earning capacity such that she is entitled to disability benefits in excess of her impairment. Claimant did not argue entitlement to attorney fees in her post-hearing briefing. The Referee considers the issue of attorney fees waived subsequent to the hearing.

Defendants assert that Claimant reached maximum medical improvement from her cervical, thoracic and lumbar sprains/strains and was released from further care with restrictions and a permanent impairment rating. Claimant provided no medical evidence that any physician has recommended additional diagnostic testing or treatment for Claimant. Neither is she entitled to a second opinion with a physician of her own choosing at Defendants' expense. As to her claim for disability in excess of her impairment, Defendants contend that Claimant has made no attempt to seek work other than her farm, and has declined the assistance of the Industrial Commission Rehabilitation Division (ICRD) in seeking alternative employment.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant and David M. Duhaime, ICRD Rehabilitation Consultant, offered at hearing;
  2. Claimant's Exhibits 1 through 7 admitted at hearing;
  3. Defendants' Exhibits A through P admitted at hearing, with the exception of pages 5-7, 9-11, 18-19, 21-44, and 173;<sup>1</sup> and
  4. The post-hearing deposition of Michael T. Phillips, M.D., an orthopedic surgeon.
- After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

1. At the time of hearing, Claimant was 52 years of age. She resided in Filer, Idaho, with four of her seven children, ages 12, 14, 16, and 18.
2. Claimant graduated from high school in Council, Idaho, in 1972. Claimant attended Treasure Valley Community College in Ontario, Oregon and the College of Southern Idaho in Twin Falls. At one time she was only a few credits away from getting her degree, but it is unknown what would be required at this time for her to finish her degree.
3. Claimant worked in fish hatcheries, day care, farming, and various food processing facilities before going to work part-time for Employer. Almost all of Claimant's work prior to going to work for Employer involved heavy labor. In addition to her work for Employer, Claimant earned income from her small farm, which included wool production, and lamb sales, a cow-calf operation, and selling vegetables and hand-made soaps at local farmers'

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<sup>1</sup> The excluded pages include extraneous medical records that are not only irrelevant, but are intensely personal in nature, and never should have been made a part of the record in this matter. As noted by this Commission in *Ague vs. Idaho Housing and Finance Association*, 2005 IIC 0694, "[i]t is incumbent upon the party tendering proposed exhibits to review them for relevancy. It is incumbent upon the opposing party to identify and object to tendered exhibits that are clearly beyond the pale in a particular case."

markets.

4. Claimant went to work for Employer in September 2003, earning \$6.00 per hour and working between 18 and 22 hours per week. In 2003, Claimant earned \$6,893.00 in wages from Employer. The same year, she earned approximately \$11,000 in her farming and livestock pursuits. In 2004, Claimant's W-2 wages from Employer were \$4,384.65, and she estimated that she made about \$10,000 on her agricultural businesses. Information on Claimant's 2005 earnings was not available at the time of hearing. At the time of her injury, Claimant was earning \$6.21 per hour.

5. Following her first industrial accident, Claimant sought care from an individual named Brenda Grogan. Ms. Grogan holds herself out as a massage therapist and licensed practical nurse. It is unclear what treatment Ms. Grogan provided, but she diagnosed Claimant with a back strain and recommended a five-pound lifting restriction for a period of ten days.

6. On May 28, Claimant went to see her family physician, Dan L. Nofziger, M.D., complaining of low back pain. Claimant had some tenderness in her lumbar spine with no radicular symptoms. Dr. Nofziger diagnosed acute lumbar strain and took Claimant off work until June 2. On June 3, Dr. Nofziger continued Claimant off work until further notice.

7. Claimant returned to Dr. Nofziger on June 11, this time complaining of pain in her upper back, intrascapular region, and left shoulder.<sup>2</sup> Dr. Nofziger diagnosed acute thoracic strain, and continued Claimant off work until June 24. Lumbar x-rays taken June 9 showed degenerative disc disease at L4-L5.

8. Employer referred Claimant to Douglas Stagg, M.D., who first saw Claimant on June 15. On exam, Claimant exhibited some tenderness at the base of her neck on the left side as

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<sup>2</sup> Though not apparent from Dr. Nofziger's records, Claimant had a second work-related incident on June 2, to which she attributed her new pain complaints.

well as some tenderness down into the left rhomboid and in the posterior aspect of the left shoulder. Claimant had full range of motion of her neck, back, and left shoulder. Dr. Stagg diagnosed left neck, shoulder and upper back strains. He prescribed Aleve, and cleared her to return to her regular job. He also considered that Claimant might benefit from some physical therapy and a home exercise program for her left shoulder, neck, and upper back. Claimant returned June 17 and advised that two hours' work the previous day resulted in recurrence of her symptoms. Dr. Stagg prescribed six sessions of physical therapy, and imposed restrictions on lifting, pushing or pulling over ten pounds, and no overhead reaching with left arm.

8. Claimant started physical therapy June 18. When she returned to Dr. Stagg on June 23, she reported that her upper back had improved, and she only experienced discomfort in her neck if she turned to the left. She continued to have mild discomfort in her left shoulder. Dr. Stagg continued her physical therapy and her work restrictions.

9. Claimant saw Dr. Nofziger on July 24. The chart note reflects that Claimant had recovered from her lumbar and thoracic complaints and had returned to work. On this visit, Claimant was complaining of cervical pain. Dr. Nofziger noted tenderness in the area of Claimant's trapezius ridge. He recommended that she find other work that did not require lifting and working over-head, as this would continue to aggravate her back and her pre-existing degenerative condition.

10. Claimant saw Dr. Stagg on June 28, July 1, July 7, July 21, and July 23. Dr. Stagg returned to her to work without restrictions on June 28 and advised her to continue her home exercises and use Aleve as necessary for pain. On subsequent visits, Claimant reported that every time she worked, her left neck and shoulder pain returned. Dr. Stagg authorized two more physical therapy sessions, continued Claimant on unrestricted work, and advised her to

continue with her home exercises and Aleve. On July 21, he released her from further care except as needed. When Claimant returned again two days later, Dr. Stagg noted that Claimant was reluctant to take anti-inflammatories, but strongly recommended that she do so, along with using ice, massage, and her home stretching exercises.

11. Claimant had a mild flare of her left neck, shoulder, and upper back symptoms in September, and missed a day of work. Employer insisted that she have a doctor's excuse for her missed work. Once again, Dr. Stagg recommended Aleve twice a day, and that Claimant continue with her home exercises. He excused her from work for the day she missed but returned her to work without restriction, noting that this was her "final visit."<sup>3</sup>

12. On October 23, Claimant had another incident at work that resulted in injury. She saw Dr. Stagg on October 24 reporting pain in her mid thoracic area upward into her upper back and to the base of her neck. Dr. Stagg opined that this appeared to be a new injury, as her complaints were primarily as to her mid-back and not her upper back, neck and left shoulder. He diagnosed mid and upper back and neck strains, and prescribed ice, and stretching exercises. He also advised Aleve twice a day and Tylenol if needed during the day. He returned her to work with a ten-pound restriction on lifting, pushing or pulling. Claimant was much improved by October 29. Dr. Stagg continued her weight-related work restrictions and adding bending, twisting and overhead work restrictions. On November 23, he released her from care.

13. Claimant returned December 2, reporting that every day she worked she became more symptomatic. On exam she was moving well, had full range of motion, exhibited no tenderness, and had no motor or sensory deficits. Dr. Stagg allowed Claimant three visits to a chiropractor, and suggested an independent medical evaluation (IME) if the chiropractic care did

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<sup>3</sup> This was Claimant's third "final visit," having been initially released from treatment on July 21.

not help.

14. On December 16, Claimant returned to Dr. Stagg. She reported definite improvement but still complained of intermittent discomfort. Dr. Stagg ordered lumbar and thoracic spine x-rays, which showed no acute injury and mild degenerative changes. He authorized three more chiropractic treatments and stressed the importance of doing her home exercises, and using Aleve and Tylenol for pain control.

15. Claimant's last recorded visit to Dr. Stagg was January 18, 2005. Claimant's primary complaint was low back pain with some discomfort in her neck and shoulders. Her mid-back was better. Although Claimant had never reported any radicular symptoms, she now reported intermittent discomfort and numbness in her legs. There was no evidence of neurologic involvement on exam.

16. Claimant quit her job with Employer in January 2005 because she "was hurting all the time." Tr., p. 27.

17. Surety referred Claimant to Dr. Phillips for an IME. Dr. Phillips saw Claimant on August 29, 2005. Dr. Phillips confirmed the diagnoses of lumbar, thoracic, and cervical sprain/strain and the existence of degenerative changes in the lumbar and thoracic spine that pre-existed the industrial injuries. Dr. Phillips found Claimant's lumbar and thoracic conditions medically stable but ordered cervical x-rays before opining further on her cervical condition. Based on her lumbar and thoracic conditions, Dr. Phillips rated Claimant's permanent impairment at 5% of the whole person. Claimant had additional cervical imaging done on October 21. By letter dated November 1, Dr. Phillips advised that there was no acute injury to Claimant's cervical spine and that her condition was stable. He awarded an additional 2% permanent partial impairment for Claimant's cervical pathology, and opined that no further

treatment was necessary for any of Claimant's industrial injuries. By letter dated November 16, Dr. Phillips set out permanent physical restrictions for Claimant. These included avoidance of prolonged overhead work activity, only occasional bending, stooping and twisting, and no lifting in excess of twenty-five pounds.

18. Surety referred Claimant to ICRD in November 2005 for return to work services. Consultant David Duhaime was assigned to Claimant's case. Mr. Duhaime met with Claimant on December 6, and subsequently spoke with her by phone on several occasions. She was working on her farm, and did not express interest in seeking other work until she received additional medical care. Mr. Duhaime closed Claimant's ICRD file in February because Claimant continued to work for herself on her farm. Consultant Duhaime noted, "[s]he is probably earning a wage equal to what she was earning at time-of-injury, although the flow of income would be much more intermittent than a steady paycheck from an employer." Defendants' Ex. N., p. 199.

19. Mr. Duhaime's case file included a labor market analysis based on Claimant's physical restrictions and her previous work experience. Mr. Duhaime opined that Claimant could return to her time-of-injury position with only minimal modification, but also noted that there were a number of other positions for which she was qualified that were within her restrictions and which would provide wages equal to or greater than what she was making at the time of injury. Mr. Duhaime reiterated at hearing that Claimant was employable in a number of occupations that were often available in Claimant's labor market.

## **DISCUSSION AND FURTHER FINDINGS**

### ***MEDICAL CARE***

20. An employer shall provide for an injured employee such reasonable medical,

surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

The Referee finds that Claimant is not entitled to additional medical care, in particular, a second opinion from an orthopedic specialist of her choosing. Claimant has presented no medical evidence that she needs additional treatment. No physician has opined that Claimant is in need of additional medical care. Idaho Code § 72-432 does not require that Defendants provide Claimant the opportunity to seek a second opinion at Defendants' expense. Claimant was certainly at liberty to seek a second opinion, with the possibility that the cost might ultimately be compensable if it were determined that additional treatment were necessary. Claimant did not avail herself of this opportunity.

#### ***DISABILITY IN EXCESS OF IMPAIRMENT***

21. The definition of "disability" under the Idaho workers' compensation law is:

. . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). 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. A 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. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

The burden of proving disability in excess of impairment rests with the claimant. Expert testimony is not required. The test is not whether the claimant is able to work at some employment, but whether a physical impairment, together with non-medical factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho*, 110 Idaho 32, 714 P.2d. 1 (1986).

22. Claimant has failed to carry her burden of proving that she has sustained disability in excess of her undisputed 7% whole person impairment. Claimant testified at hearing that she now had to depend on her children to do the farm work because it hurt her too much. She testified that she has given up her craft business and put her wool business on hold. She testified that the condition of her property had deteriorated as a result of her inability to do the work she used to do before her industrial injuries. Whether Claimant can continue to work her farm for a profit is not determinative of whether she has sustained a loss of access to the labor market. Claimant has chosen not to seek work, and has opted to continue with the farm operation as her sole source of income despite the assistance offered by ICRD and Mr. Duhaime to find Claimant employment that was less physically demanding and more remunerative.

The only meaningful evidence in the record as to disability in excess of impairment is that presented by Mr. Duhaime in his report and at hearing. That uncontroverted evidence identifies a number of jobs, including her time of injury position, that are regularly available in Claimant's labor market, are within her limitations, and pay as much as or more than she was earning at her job and on the farm prior to her injuries. Claimant's professed disinterest in seeking other employment leaves the record devoid of any evidence to the contrary.

### **CONCLUSIONS OF LAW**

1. Claimant is not entitled to additional medical care, in particular, a second opinion by an orthopedic specialist of her own choosing.
2. Claimant has failed to carry her burden of proving that she has sustained disability in excess of her undisputed 7% whole person impairment.
3. Claimant's request for attorney fees pursuant to Idaho Code §72-804 is deemed waived, as it was not argued at hearing or in the briefing.

### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 5 day of September, 2006.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Rinda Just, Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15 day of September, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

EMIL F PIKE JR  
PO BOX 302  
TWIN FALLS ID 83303-0302

KENT W DAY  
PO BOX 6358  
BOISE ID 83707-6358

djb

/s/ \_\_\_\_\_



3. Claimant's request for attorney fees pursuant to Idaho Code §72-804 is deemed waived, as it was not argued at hearing or in the briefing.

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

DATED this 15 day of September, 2006.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Thomas E. Limbaugh, Chairman

/s/ \_\_\_\_\_  
James F. Kile, Commissioner

/s/ \_\_\_\_\_  
R.D. Maynard, Commissioner

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15 day of September, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

EMIL F PIKE JR  
PO BOX 302  
TWIN FALLS ID 83303-0302

KENT W DAY  
PO BOX 6358  
BOISE ID 83707-6358

djb

/s/ \_\_\_\_\_