BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NIKKI ZUFELT, Claimant, v. JOHNNY CARINO'S ITALIAN KITCHEN, aka FIRED UP, Employer, and CNA COMMERCIAL INSURANCE COMPANY, Surety, Defendants.	)	**IC 02-002451** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed August 15, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Idaho Falls, Idaho, on April 15, 2005. Claimant was present and represented by Brad D. Parkinson of Idaho Falls. Glenna M. Christensen of Boise represented Employer/Surety. Oral and documentary evidence was presented. The parties took no post-hearing depositions but submitted post-hearing briefs. This matter came under advisement on July 19, 2005, and is now ready for a decision.

ISSUES

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

1. Whether and to what extent Claimant is entitled to total temporary and/or total partial disability (TTD/TPD) benefits;

2. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits in excess of her non-contested permanent partial impairment (PPI); and,

3. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Defendants' unreasonable denial of certain TTD/TPD benefits.

CONTENTIONS OF THE PARTIES

Claimant contends she is entitled to 40% whole person PPD inclusive of her uncontested 8% whole person PPI based on loss of access to her pre-injury labor market and loss of wage earning capacity. At the time of her industrial shoulder injury, Claimant was employed as a "chef" at Employer's restaurant and was learning their entire operation. At the time of her injury, she also provided in-home nursing care to a lady who suffered from cerebral palsy. Since her shoulder injury, she is restricted from restaurant work and nursing care; the only two occupations at which she has been gainfully employed. Further, she is owed a period of TTD/TPD benefits because even though at one point, she was declared to be at maximum medical improvement (MMI), she returned to her physician still complaining of shoulder pain and still subject to physical restrictions with which Employer failed to comply. Finally, she should be awarded attorney fees for Surety's unreasonable refusal to reinstate those benefits.

Defendants contend that Claimant is not entitled to any disability above her impairment because she is making almost as much money at her present job as she was making at her time-of-injury employment, and she has benefits now that she did not have before. Further, she quit her time-of-injury job for reasons unrelated to her injury, and admitted that she would still be a caretaker for her time-of-injury patient had the patient not died. Finally, Defendants deny that they acted unreasonably in denying additional TTD/TPD benefits after Claimant was declared to be medically stable.

Claimant responds that she quit her job with Employer because she was unable to continue working with her restrictions, and because of a hostile work environment. After her termination, Employer failed to provide suitable work within her restrictions and, therefore, she is entitled to additional TTD/TPD benefits until she was declared MMI. Regarding PPD, Claimant has permanent restrictions precluding her from returning to work in culinary arts or nursing. Finally, Claimant's testimony that she was making more on TTD/TPD benefits than she is making now working full-time is proof certain of a loss of wage earning capacity.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony presented at hearing;
2. Claimant's Exhibits 1-7 admitted at hearing; and,
3. Defendants' Exhibits A-I admitted at hearing.

Preliminary matters:

At hearing, Defendants objected to treating Claimant's entitlement to TTD/TPD benefits and attorney fees as issues ripe for decision because Claimant had failed to respond to discovery requests regarding the factual bases supporting Claimant's assertions in that regard. The Referee reserved ruling on Defendants' objection in order to allow the parties an opportunity to address the objection further in their post-hearing briefs. Defendants argue that in response to their interrogatory requesting a factual basis for Claimant's claim for TTD/TPD benefits and attorney fees, Claimant responded that the matter was under investigation and the answer would be supplemented prior to hearing. Claimant concedes that the answer was not supplemented but that Defendants had all the necessary information regarding additional TTD/TPD benefits in

their possession in any event, and the request for attorney fees is based solely on Surety's failure to pay the additional benefits.

In reviewing the record, it is not entirely clear exactly why Claimant quit her job with Employer; was it due to her perceived inability to physically do her work or was it due to a claim she filed for sexual discrimination and a hostile work environment, or a combination of both? Further, the medical records from when Claimant was first found to be at MMI by Dr. West on June 13, 2002, do not reveal that she was ever taken off work again, although the records do indicate that Claimant continued to have shoulder problems. On December 2, 2003, Dr. West opined, without explanation, that Claimant was again at MMI effective November 14, 2003. While Drs. West and Wathne have indicated at times that Claimant was not at MMI between November 14, 2002, and November 14, 2003, after she was initially found to be at MMI, they also released her to return to work with certain restrictions. Because the record is unclear regarding the intent and meaning of the medical records between November 14, 2002, and November 14, 2003, the Referee finds that Defendants had a right to know the factual basis or bases for Claimant's claim for additional TTD/TPD benefits and attorney fees. While Defendants had available to them a motion to compel discovery responses, nonetheless, Claimant had the duty to seasonably supplement her responses and, in fact, indicated that she would. Based thereon, the Referee grants Defendants' objection to the consideration of additional TTD/TPD benefits and attorney fees as issues herein.

Defendants, in their post-hearing brief, object to certain attachments to Claimant's initial post-hearing brief. Specifically, they object to Exhibit A, a letter dated December 9, 2003, from Claimant's counsel to a claims adjuster for Surety regarding, *inter alia*, TTD/TPD benefits; a letter dated January 5, 2004, from Claimant's counsel to a claims adjuster for Surety regarding

allegedly unpaid TTD/TPD benefits; and, a document that was admitted into evidence containing various handwritten notations that were absent from the admitted document. Defendants' objections are well taken and the above-mentioned documents and handwritten notations will not be considered part of the record.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 25 years of age at the time of the hearing and resided in Shelley, Idaho. She graduated from high school in 1997 with a 3.2 GPA. She has taken some vocational courses in massage therapy and photography. Her work experience has been primarily in culinary arts and nursing assistance.

2. Claimant had worked at Employer's Idaho Falls restaurant for about a year prior to her accident on February 8, 2002. Her duties encompassed everything from handling freight to food preparation work to sous-chef. She was earning $8.75 an hour. At the same time she worked for Employer, she also cared for an individual with cerebral palsy earning $7.25 an hour. She worked about 80 hours a week.

3. On February 8, 2002, Claimant slipped on a wet, greasy floor and fell on the back of her right shoulder. She presented to a local emergency room the evening of her accident complaining of right shoulder pain. She was examined and diagnosed with right shoulder contusion/strain. She was prescribed Motrin and referred to Gregory G. West, M.D.

4. Claimant first saw Dr. West, an orthopedic surgeon, on February 14, 2002. Dr. West suspected a right shoulder impingement process. He gave her an injection and kept her off work.

5. Dr. West continued to treat Claimant conservatively and eventually returned her to full duty work (limited only to no overhead work) with no PPI on June 13, 2002.

6. Prior to Claimant's injury, she had filed a sexual discrimination complaint against Employer. After that claim was settled, Claimant continued to have problems stemming from her filing the sexual discrimination complaint. Claimant terminated her employment with Employer the second week of October 2002, due to what she considered to be a hostile work environment and because she did not feel physically capable of performing her work and needed to see a doctor again regarding her shoulder.

7. Claimant returned to Dr. West on November 14, 2002, complaining of increased shoulder pain with overhead reaching that had not improved even after she terminated her employment. Repeat x-rays were negative. He diagnosed ongoing impingement syndrome with some associated suprascapular bursitis. Dr. West gave Claimant injections and opined her pain syndrome was a continuation of that experienced following her accident. He did not take Claimant off work and indicated that he would order an MRI.

8. Claimant returned to Dr. West on December 2, 2002, at which time he re-injected her. He did not restrict her from working. She returned on March 18, 2003, at which time Dr. West declared Claimant to be at MMI and issued a 7% upper extremity PPI rating and restricted her from overhead work. He also recommended three physical therapy visits. Claimant returned to Dr. West on June 3, 2003, complaining of continued shoulder pain. Dr. West ordered a cervical spine MRI that he expected to be normal (it was) leading to the conclusion that Claimant was suffering from scapular bursitis that would not progress or cause further problems.

9. On September 2, 2003, Richard A. Wathne, M.D., an orthopedic surgeon, saw Claimant at Defendants' request after Dr. West recommended arthroscopic surgery. X-rays and a cervical MRI were interpreted to be within normal limits. After his examination of Claimant, Dr. Wathne diagnosed chronic right shoulder scapulothoracic bursitis and chronic right trapezial inflammation with underlying diskonesis, all work-related. He opined that treatment to date had been appropriate and that " . . . conservative management is now exhausted." Defendants' Exhibit C, p. 9. As for further work-up, Dr. Wathne recommended a CT scan of both scapulae to evaluate for irregularities in the scapulothoracic articulation. In the event Claimant remained symptomatic, Dr. Wathne would recommend an open excision of the bursa with probable resection of the superomedial angle of the scapula. He agreed with Dr. West's 7% PPI and would defer assigning permanent restrictions until after surgery in the event Claimant chose that option, but would not expect any in that the surgery is usually successful.

10. Claimant returned to Dr. West on October 16, 2003. By that time, he had had the opportunity to review Dr. Wathne's IME report. Dr. West was in agreement with Dr. Wathne but informed Claimant that he was not familiar with the surgical procedure Dr. Wathne recommended. As Claimant had just begun a new job, did not want to take time off for surgery, and did not want to return to Dr. Wathne, Dr. West informed Claimant that he would attempt to locate a physician capable of performing the procedure. He continued Claimant's restrictions of no overhead work or lifting more than ten pounds.

11. Claimant next saw Dr. West on December 2, 2003. He noted that her concerns at that time " . . . are predominately procedural." Defendants' Exhibit F, p. 23. Claimant's attorney had written Dr. West regarding the date of medical stability. In that regard, Dr. West noted: "Therefore, on today's examination, Nikki and I have agreed that she can be considered at

maximum medical improvement and we will base that date on the 14th of November of 2003." *Id*. It cannot be determined from his office note how Claimant and Dr. West "agreed" on that date.

12. Claimant's last visit with Dr. West was on January 20, 2004, at which time he referred her to Jeffrey G. Hessing, M.D., an orthopedic surgeon practicing in Boise.

13. Claimant first saw Dr. Hessing on March 17, 2004. Dr. Hessing disagreed that Claimant's shoulder problem was scapulothoracic in origin, but rather believed it to be a rotator cuff impingement syndrome. He ordered an MRI and requested Claimant's medical records.

14. Claimant returned on April 2, 2004, to review her MRI that revealed subacromial impingement syndrome. On April 29, 2004, Dr. Hessing performed an arthroscopy of Claimant's right shoulder with subacromial decompression with labral debridement. Although frayed, there was no tear in Claimant's right rotator cuff.

15. Postoperatively, Claimant participated in physical therapy. On June 16, 2004, Dr. Hessing released her to light duty work. On September 1, 2004, Dr. Hessing found Claimant to be at MMI and rated her at 8% upper extremity PPI.[1] On November 11, 2004, Dr. Hessing permanently limited Claimant to lifting no more than 50 pounds with her right arm. Claimant returned to Dr. Hessing on February 9, 2005, still complaining of pain and weakness in her right shoulder joint. Dr. Hessing attributed Claimant's continued symptomatology to residual inflammatory changes in her rotator cuff and weakness in her shoulder girdle musculature. She declined injections or more aggressive physical therapy.

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

[1] The 8% represents an additional 1% for the surgery added to Dr. West's 7% upper extremity PPI.

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, 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 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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).

16. Claimant contends she is unable to return to work in the restaurant and nursing care fields due primarily to her inability to work above shoulder-level on the right and her

inability to lift over 50 pounds. Her permanent restrictions imposed by Dr. Hessing are no lifting over 50 pounds and no repetitive overhead lifting or reaching. She claims she can no longer work the 80 hours she was working at the time of injury, and, has consequently suffered a significant wage loss. However, she testified at hearing that she would still be caring for her cerebral palsy patient but for her death.

17. Claimant retained Nancy J. Collins, Ph.D., to assist her with vocational issues. Dr. Collins authored a report dated April 4, 2004, as a result of her personal interview with Claimant on March 29, 2004. Dr. Collins noted Claimant to have been a skilled worker as a kitchen supervisor and cook, while her other pre-injury employment was semi-skilled to unskilled. She also noted that Claimant had performed light to heavy work over her work life and is now limited to light/medium level work with additional limitations for reaching above shoulder height. Dr. Collins opined that in utilizing pre- and post-injury transferable skills comparisons, Claimant has suffered an estimated loss of access to her labor market of 50% - 60%. She notes that Claimant was earning $8.75 an hour at Employer's and $7.25 at her nurse's aid job at the time of her injury, and it was the norm for her to work two full-time jobs. Dr. Collins does not believe Claimant is currently capable of performing either of her time-of-injury jobs due to the lifting and reaching requirements of both. Claimant is presently employed as a stock room and customer service supervisor for Ross Dress for Less, a retail clothing store in Idaho Falls. She started in September 2004 at $6.50 an hour and was making $8.00 an hour plus benefits at the time of the hearing. Dr. Collins placed Claimant's loss of earning capacity at about 20%. Based on Claimant's loss of access to the labor market and loss of earning capacity, Dr. Collins estimated Claimant's PPD to be 40%, inclusive of her 8% PPI.

18. The Referee observed at hearing that Claimant was articulate, personable, bright, and motivated to succeed at whatever endeavor she undertook. She is certainly not afraid to work as is evidenced by the 80 hours she was working a week. The fact that she had advanced to the position of supervisor and had received raises of $1.50 an hour in the relatively short period of time at her current employer is good evidence that she is a valuable employee. She testified that she likes her job and has no intention of quitting. She has not looked for additional part-time work. Dr. Collins stated in her report that Claimant should continue to work in the retail industry. Claimant's current employment provides benefits, i.e., vacation and sick leave with pay, that she did not receive at Employer's.

19. Under Idaho's statutory scheme, PPD is evaluated by assessing the effect PPI and pertinent non-medical factors have on a claimant's **actual and presumed** and **present and future** ability to engage in **gainful** activity. The Referee cannot ignore the fact that Claimant is currently gainfully employed in an industry that affords her ample opportunity to advance. She likes her job, has no plans to leave it, and there is no reason to believe she will not continue to receive pay raises. *See, Paz v. Crookham Company*, 2002 IIC 0166 (March 31, 2005), and *Kolar v. JUB Engineers*, IC 01-013706 (April 11, 2005). However, because of her lifting and reaching restrictions, Claimant has incurred PPD primarily due to loss of access to certain portions of the labor market that were available to her pre-injury.

20. After considering the factors enumerated in Idaho Code §§ 72-425 and 430, the Referee finds that Claimant has incurred whole person PPD of 30% inclusive of her 8% PPI.

CONCLUSION OF LAW

1. Claimant has proven her entitlement to PPD benefits of 30% of the whole person inclusive of her 8% PPI.

RECOMMENDATION

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

DATED this _8th __ day of August, 2005.

INDUSTRIAL COMMISSION

_/s/_____
Michael E. Powers, Referee

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th __ day of ___August___, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRAD D PARKINSON
PO BOX 1645
IDAHO FALLS ID 83403-1645

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

__/s/_____

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