BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BETTY S. CHRISTENSEN, Claimant, v. S. L. START & ASSOCIATES, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 2002-525919** **2003-004986** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: November 20, 2007

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 Coeur d'Alene, Idaho, on November 29, 2006. Michael J. Verbillis of Coeur d'Alene represented Claimant. Paul J. Augustine of Boise represented Employer/Surety. Thomas W. Callery of Lewiston represented State of Idaho, Industrial Special Indemnity Fund (ISIF). The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on May 17, 2007, and is now ready for decision.

ISSUES

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

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;

3. Whether and to what extent Claimant is entitled to the following benefits:

   a. Temporary partial and/or temporary total disability benefits (TPD/TTD);
   b. Permanent partial impairment (PPI);
   c. Disability in excess of impairment; and
   d. Attorney fees;

4. Whether Claimant is totally and permanently disabled;

5. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate;

6. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332; and

7. Apportionment under the *Carey* formula.

Claimant did not pursue her claim for temporary partial and/or temporary total disability benefits at hearing or in the post-hearing briefing, and the Referee considers that issue to be waived. Similarly, none of the Defendants seriously challenged Claimant's assertion that she sustained injuries as the result of two work-related accidents, and the issue was not addressed in their briefing. The Referee considers the causation issue to have been waived.

CONTENTIONS OF THE PARTIES

Claimant asserts that she injured her low back, her right great toe, and her right shoulder as a result of two industrial accidents that occurred on December 5 and December 9, 2002. Both

accidents were the result of Claimant's efforts to protect Employer's customers from injury. Claimant sustained permanent impairments as a result of her injuries, which combined with a pre-existing injury to render her totally and permanently disabled. Claimant is entitled to total permanent disability benefits, which the Commission should apportion between Employer/Surety and ISIF as required by the *Carey* formula.

Employer/Surety contends that Claimant was permanently and totally disabled as an odd-lot worker prior to her December 2002 industrial accidents. Claimant's current disability is due not to her industrial injuries, but rather her pre-existing Charcot-Marie-Tooth (CMT) Syndrome, a progressive neurological disease. Alternatively, Employer/Surety argues that if the Commission finds that Claimant is totally and permanently disabled as the result of a combination of her pre-existing CMT and her 2002 industrial injuries, then *Carey* apportionment would place most of the liability for disability benefits on ISIF. Finally, Employer/Surety vociferously disputes Claimant's request for attorney fees, asserting that Employer/Surety has promptly paid for all medical care (some of it more than once), while Claimant has failed to reimburse medical providers with the funds provided by Employer/Surety.

ISIF argues that Claimant was an odd-lot worker prior to her December 2002 injuries. Additionally, ISIF asserts that while Claimant's condition has worsened since her industrial accidents, she has failed to prove the degree, if any, to which her industrial injuries contributed to her current condition. Under either analysis, Claimant's pre-existing impairment did not combine with the injury from her last accident to render her totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Michael Carraher, M.D., Dan Brownell, and Douglas

Crum, CDMS, taken at hearing;

2. Claimant's Exhibits 1 through 18, Employer/Surety's Exhibits A through C, E through I, and L through P, and ISIF Exhibits 1 through 18, all admitted at hearing; together with Employer/Surety Exhibit Q, which was submitted post-hearing by agreement of the parties;[1]

3. The post-hearing depositions of Mark Bengtson, MPT, taken January 3, 2007, and Tom L. Moreland, taken January 30, 2007;

All objections made during the deposition of Mark Bengtson are overruled. 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. Claimant was 47 years of age at the time of hearing. She was single, and the mother of adult children.

EDUCATION

2. Claimant graduated from high school in Post Falls, Idaho, in 1977. In 1988, Claimant completed a course of study at Trend College in Spokane, Washington, where she

[1] The exhibits in this proceeding were voluminous, constituting the equivalent of four four-inch binders. Despite the pleas of the Referee that the parties submit joint exhibits, each party submitted proposed exhibits. On the eve of hearing, counsel for Employer/Surety did remove from his submission a number of proposed exhibits that were duplicative, for which the Referee is grateful. However, in general, the bulk of the exhibits submitted to the Referee were in complete disarray. Most were not in proper chronological order (oldest first, most recent, last). In one submission (Dr. Carraher's records), it was evident that the party submitting them had received them at different times over the lengthy history of the proceeding, but had made no attempt to integrate the multiple submissions. This Referee is abundantly aware that it is extraordinarily time-consuming to sort these records, weed out duplicates, and put them in proper chronological order. Presumably, counsel have staff to assist with this process. Whether or not that is the case, it is incumbent upon counsel to ensure that exhibits submitted to the Commission are complete, minimize unnecessary duplication, are tabbed for easy reference to individual providers, are in good chronological order for each provider, and are secured or bound by some means that ensures they are easy to read and review. Counsel's time spent preparing Referee-friendly exhibits will pay off as time saved when the case comes under advisement.

trained to be a medical secretary and a medical assistant. Claimant received national certification from the American Association of Medical Assistants in 1991.

PRE-INJURY WORK HISTORY

3. Following her graduation from high school, Claimant worked for an electronics manufacturer in Spokane doing assembly work until she left the state in 1978. Claimant returned to Idaho in 1979, and worked for another electronics manufacturer until she was laid off. Claimant and her husband moved to Oregon for two years, and then returned to the North Idaho/Spokane area in the mid 1980s. Upon her return to the area, Claimant directed a large day care center in Spokane.

4. Following her graduation from Trend College, Claimant worked in a variety of medical settings on a temporary basis until she found full-time work with Ironwood Family Practice in 1990. In 1991, Claimant went to work for Group Health Northwest (GHN), where she remained until 1996. While working for GHN, Claimant sustained a series of four industrial injuries to her right foot and ankle, beginning in 1991. All four injuries were accepted and workers' compensation benefits for all four incidents were paid under a 1992 claim. During treatment of the injured foot, Claimant was diagnosed with a degenerative neurological condition. The foot injury, together with Claimant's neurological condition, ultimately led to a separation in 1996 when the employer could not accommodate her physical restrictions.

5. During her last two years at GHN, Claimant also worked weekends at Kootenai Medical Center (KMC) in the emergency department. Claimant quit KMC about the same time she left GHN.

6. In 1997 or 1998, Claimant qualified for disability under Social Security and began receiving benefits.

7. In 1997, Claimant began working part-time for Dr. Carraher. Claimant had worked with Dr. Carraher when he was associated with GHN, and he had been her treating physician for many years. Dr. Carraher was just starting his private practice, and he was able to accommodate Claimant with limited hours, frequent breaks, and opportunities for sedentary work. Initially, Claimant worked sixteen to twenty hours per week for Dr. Carraher, but her work hours were reduced to eight hours per week in 1998. By 2000, Dr. Carraher's practice had become busier, and he could no longer accommodate Claimant's physical limitations and limited work schedule.

8. From May to October 2000, Claimant assisted Coeur d'Alene Hand Therapy in setting up a new office and hiring permanent staff, working an average of slightly more than ten hours per week.

9. Thereafter, Claimant worked for about two months for Dr. Beaton, an ENT whose nurse was out on maternity leave. Claimant worked slightly over ten hours per week on average for Dr. Beaton.

10. In 2001, Claimant went to work for Lakeland Family Medical. This was another start-up practice, where Claimant was able to work limited hours. She remained with Lakeland until February 2002. During her tenure with Lakeland, she averaged fourteen hours per week. In November 2001, Dr. Carraher restricted Claimant to between eight and twelve hours of work per week, one day per week, as a result of her degenerative neurological condition. Claimant's average work hours per week represent more working hours before the restriction and significantly fewer hours after November 2001. When the practice became busier, Claimant could no longer meet the demands of her employer, and left Lakeland Family Medical.

11. As evidenced by a number of reference letters in the record of this proceeding,

Claimant was a valued employee everywhere she worked. Employers were willing to accommodate her limitations because of her skills, and were consistently sorry to see her go when the demands of their practice began to exceed her work capacity.

PRE-EXISTING CONDITIONS

12. Claimant underwent bi-lateral knee surgery in the mid-1970s.

13. In September 1991, while Claimant was working for Group Health Northwest, she tripped while at work and injured her right foot. Claimant sustained additional right foot/ankle injuries in 1992, 1993, and 1994. During the course of treatment of her right foot injuries, Claimant was diagnosed with Charcot-Marie-Tooth Disease (CMT). CMT is a hereditary, progressive neuropathy, characterized by atrophy of the peroneal muscles. It usually affects the nerves in the distal part of the lower extremities, and may progress to weakness in the upper extremities as well. CMT is not always painful, but can be in some patients. Unfortunately, Claimant falls into the latter category.

14. Claimant underwent three surgeries over a period of several years in an attempt to repair the injuries to her right foot that were the result of her work injuries superimposed on her CMT. Ultimately, in the spring of 1996, a triple arthrodesis of her calcaneocuboid joint was performed to stabilize her right foot. Following that surgery, Claimant had an additional surgical procedure to remove the hardware from her fusion that was causing complications. At the conclusion of her treatment in 1996, Sigvard Hansen, M.D., her treating orthopedist at Harborview Medical Center in Seattle, advised that Claimant should be limited to sedentary work "for the rest of her life." ISIF Ex. 9, p. 308. In 1999, Dr. Carraher opined that Claimant would never be able to return to full-time work.

15. Claimant entered into a lump sum settlement agreement regarding her 1992 claim

in August 1997.

16. Following Claimant's CMT diagnosis in 1992, treatment for that condition was provided primarily by Dr. Carraher, and consisted largely of managing Claimant's pain. In Claimant's case, pain management consisted of high doses of narcotic pain relievers, primarily OxyContin (a long-acting narcotic) and Oxycodone (a short-acting narcotic) with hydrocodone as needed for break-through pain. Claimant's medical records are clear that her pain was well controlled with OxyContin, but there were times that Claimant was forced to use Oxycodone instead, which required larger, more frequent dosing to control her pain. Dr. Carraher's prescription practices came under scrutiny by insurers and licensing authorities, and Claimant was referred to a pain management specialist, Andrew Chiu, M.D., who ultimately validated Dr. Carraher's pain management regime for Claimant, including the preferred use of OxyContin over Oxycodone. After some disruption, Claimant's pain management was returned to Dr. Carraher.

17. In December 2001, Dr. Carraher limited Claimant's work to 8-12 hours one day per week because of her CMT.

18. In November 2002, Dr. Carraher was prescribing the following medications related to Claimant's CMT and right foot injury:

Medication	Dose	Frequency
Alprazdam (Xanax); for anxiety	1 mg	1-2 by mouth, at bedtime
Carisoprodol (Soma); muscle relaxer	350 mg	1 by mouth, 3times/day
Hydrocodone APAP; breakthrough pain	7.5/500 mg	1 by mouth, every 4 hours
OxyContin; pain	40 mg	3-4 by mouth, 3 times/day

TIME-OF-INJURY EMPLOYER

19. In November 2002, Claimant started to work for Employer, working with disabled adults as a community support specialist. The position involved helping disabled individuals with social and basic living skills. Because of her physical limitations, Claimant was assigned to clients that did not need assistance in ambulation, transfers, or assists.

20. Claimant sustained injuries in early December while working for Employer. Claimant continued working for Employer through March of 2003, and remained on Employer's payroll until January 31, 2005, when Employer determined that she would be unable to return to her time-of-injury position.

INJURIES

21. On December 5, 2002, Claimant was assisting co-workers in transferring a client from his wheelchair to a seat on Employer's bus. The client started to fall, and Claimant grabbed the client by his gait belt, returning him to his wheelchair and preventing the fall. In doing so, Claimant experienced pain in her shoulders, neck, mid and low back, and right lower extremity. Claimant reported the incident verbally and continued to work, finishing her scheduled workday.

22. On December 9, 2002, Claimant was taking a client to KMC, a popular location to work on client programming needs. As Claimant and her client were entering the medical center, the client became pale and complained of dizziness. Claimant was able to get the client (a very large woman) to a bench to lie down, but in doing so, experienced pain in the same areas that she had injured just days before.

MEDICAL CARE

Claimant's course of treatment for the injuries she received in her two work-related accidents was complex and lengthy. Findings are limited to those necessary to a decision.

23. Claimant first sought medical care for her injuries on December 10, 2002, from Dr. Carraher's physician's assistant. Her initial complaint was low back pain, and the initial diagnosis was a thoracolumbar strain. When Claimant saw Dr. Carraher for a followup on her low back in late December, she also complained that the great toe on her right foot was "floppy." The toe had previously been fused in a neutral position, but was now observed to be "'rubbery' in that it can bend up and down." Claimant's Ex. 2, p. 97. An MRI of Claimant's thoracic and lumbar spine showed degenerative changes at T10-11, L3-4, L4-5, and L5-S1.

24. Claimant was referred to James Dunlap, M.D., for consultation and further treatment of her right great toe. Ultimately, in April 2003, Claimant had surgery to fuse her right great toe at the MTP joint. The fusion failed, and the joint was re-fused in 2005.

25. Claimant was referred to James Lea, M.D., for consultation and further treatment of her low back. Dr. Lea opined that Claimant had sustained a back strain of the thoracic and lumbar spine, and though she had some degenerative changes in her spine, she was not a surgical candidate. Dr. Lea recommended physical therapy.

26. In late February 2003, Claimant reported that she was also experiencing right shoulder pain. Dr. Carraher referred Claimant to Michael H. Kody, M.D., for consultation and further treatment of her right shoulder complaints. In April 2004, Claimant underwent a distal clavicle excision and bursectomy on her right shoulder. She was released from care as it related to her shoulder in late July 2004.

27. Although Employer/Surety initially disputed the causal connection between the December 2002 accident and Claimant's low back, right great toe, and shoulder injuries, they ultimately accepted liability and either paid for Claimant's medical care and prescription drugs or reimbursed Claimant for care and medications for which she claimed to have paid.

28. Dr. Carraher declared Claimant at maximum medical improvement for her work-related injuries on October 21, 2005. At the time that Claimant was determined to be medically stable, the following medications were being prescribed:

Medication	Dose	Frequency
Alprazolam (Xanax); for anxiety	1 mg	1 by mouth, 4 times/day
Carisoprodol (Soma); muscle relaxer	350 mg	1 by mouth, 3-4 times/day
Hydrocodone-APAP; breakthrough pain	7.5/500 mg	1 by mouth, every 4 hours
OxyContin; pain	40 mg	3-4 by mouth, 3 times/day

PERMANENT PARTIAL IMPAIRMENT (PPI)

29. Claimant did not receive an impairment rating for her fused right foot at the time she was released from care in 1996. In 2005, Dr. Carraher rated her impairment from the fusion at 4% whole person.

30. According to Drs. Bozarth and Adams, Claimant was given an impairment rating on her low back of 5% by Drs. Stump and Iverson who performed an IME in October 2003. The record of the IME itself is not a part of the record.

31. Dr. Carraher is the only physician who has given Claimant an impairment rating for the shoulder and low back injuries she suffered as a result of the industrial accidents that are the basis of this proceeding. Dr. Carraher rated Claimant's shoulder impairment at 10% whole person, and her back problems at 5% whole person. He gave no rating for the fusion of the right great toe at the MTP joint, and did not give a rating for Claimant's CMT. The combined value of the three ratings is 18%, whole person, with 4% being apportioned to her pre-existing right foot arthrodesis, and 14% apportioned to the 2002 accidents. Dr. Carraher did not impose any

new restrictions on Claimant as a result of her 2002 injuries, nor did any of the specialists who treated her, including Dr. Dunlap, Dr. Lea, and Dr. Kody.

32. Claimant underwent a panel IME on February 18, 2005, and again on April 6, 2006. Panelists included William Bozarth, M.D., a neurologist, and Warren Adams, M.D., an orthopedist. Drs. Bozarth and Adams opined that all of Claimant's medical conditions were the result of her CMT disease, not her December 2002 industrial injuries. For that reason, they awarded no permanent partial impairment for Claimant's December 2002 injuries.

DISABILITY

33. Two vocational experts provided testimony regarding Claimant's disability. Douglas N. Crum, CDMS, testified at hearing on behalf of Employer/Surety. The testimony of Tom L. Moreland was taken post-hearing on behalf of Claimant.

Tom Moreland

34. Mr. Moreland has worked as a vocational and rehabilitation counselor since approximately 1969. He holds an M.A. from the University of Northern Colorado in Rehabilitation Counseling and Special Education. Starting in 1987, Mr. Moreland has been the owner of a vocational consulting firm, Inland Empire Consultants and Vocational Specialists.

35. Mr. Moreland met with Claimant, reviewed medical records, and examined her earnings records. It was Mr. Moreland's opinion that prior to her 2002 industrial accidents, Claimant was a part-time, sedentary worker. Moreland based his opinion on the sedentary restrictions imposed by Dr. Hansen and the part-time restrictions imposed by Dr. Carraher.

36. Mr. Moreland opined that subsequent to her 2002 industrial accidents, Claimant could perform sedentary work, but not for a full eight-hour workday. Moreland based his opinion on the results of a functional capacity evaluation conducted by Mark Bengtson, MPT,

together with input from Dr. Carraher.

37. Mr. Moreland acknowledged that Claimant was receiving Social Security disability benefits from 1997 or 1998 through the date of the hearing, but that she was able to do some work on an occasional basis, and within the earnings limits of her Social Security benefits, in the years before her 2002 accidents.

38. Mr. Moreland opined that after the 2002 accidents, Claimant could not work on any kind of a sustained basis.

Douglas Crum

39. Douglas Crum has worked in the vocational rehabilitation arena since 1987. He holds certification as a disability management specialist. His experience includes approximately seven years with the Industrial Commission Rehabilitation Division, both as a field consultant and as a manager of a regional office, and thirteen years as a rehabilitation consultant in the private sector. Since 1999, Mr. Crum has been self-employed in the field.

40. Mr. Crum reviewed Claimant's medical and tax records, along with documentation related to her Social Security disability claim. He attempted to meet with her, but his request was denied by Claimant's counsel.

41. Mr. Crum opined that prior to her 2002 industrial injuries, Claimant was limited to sedentary work (per Dr. Hansen), and to part-time work only (per Dr. Carraher). In addition, Mr. Crum noted that in 1997, Dr. Carraher told the Social Security administration that Claimant had limited ability to walk, fatigued easily, had difficulty with prolonged use of her upper extremities, and had a twenty-pound lifting restriction. In 2000, Dr. Carraher advised the Idaho disability determinations office that Claimant had problems with grip strength, could not perform repetitive or prolonged work with her upper extremities, was limited in her ability to both stand

and walk, and that she could work as a medical assistant only on a limited basis and with accommodations. In 2001, Dr. Carraher limited Claimant to working one 8- to 12-hour day per week because she was experiencing increased pain when she worked more hours, which required increased use of pain medications. In summary, Mr. Crum opined that prior to her 2002 injuries, Claimant could work only on a quarter-time basis, and this was confirmed by her earnings records in the years leading up to 2002.

42. Mr. Crum further opined that Claimant did not have any new or additional restrictions placed upon her subsequent to her 2002 industrial injuries. Based on her work history, and her pre-existing limitations, Mr. Crum opined that Claimant was totally and permanently disabled prior to October 2002.

DISCUSSION AND FURTHER FINDINGS

DISABILITY

43. 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.

44. The burden of proof is on the claimant to prove disability in excess of impairment. 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).

45. There are two methods by which a claimant can prove he or she is totally and permanently disabled. A claimant may prove a total and permanent disability by showing that his or her medical impairment together with the nonmedical factors total 100%. When a claimant cannot make the showing required for 100% disability, then a second methodology is available:

> The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001) citing *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work:

> They are simply not regularly employable in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.

Id., 136 Idaho at 584, 38 P.3d at 622.

46. There is no dispute that at the time of hearing, Claimant was totally and permanently disabled. The central issue in this proceeding is not *whether* Claimant is totally and permanently disabled, but rather, *when* she became totally and permanently disabled. Employer/Surety and ISIF both assert that Claimant was an odd-lot worker and totally and permanently disabled *before* her 2002 industrial injuries. Claimant contends that she only became totally and permanently disabled *following* her 2002 industrial injuries.

47. The Referee finds that Claimant was an odd-lot worker and totally and permanently disabled prior to her 2002 industrial injuries. Claimant has failed to establish that her limitations and restrictions after her 2002 accident were substantively more onerous than her limitations and restrictions before her 2002 accident.

48. Despite the difficulties that her CMT and triple arthrodesis posed, Claimant was able to find some work in her field in the subsequent years because she wanted to work, was dogged in her efforts, had excellent skills to offer, had the good luck to find start-up medical practices or temporary fill-in work, and just possibly, because some employers were willing to make accommodations in order to have the benefit of her skills. Did that make them "sympathetic employers"? Possibly. But being a sympathetic employer does not mean that the employee is pathetic or in need of charity, merely that the employer is willing to make accommodations that are out of the ordinary in order to obtain an employee's beneficial services. Those who hired Claimant certainly got the benefit of their bargain. But, as evidenced by her employment history in the years leading up to her work for Employer, the services she could offer an employer were so limited that even the most well-disposed employers had few positions that were suitable. Claimant is the odd-lot worker personified.

Work Was Sedentary

49. Claimant was permanently limited to sedentary work following her triple arthrodesis. Claimant's own vocational expert, Tom Moreland, testified that the job of medical assistant was a light to sedentary position. As described by Claimant and Dr. Carraher, the job required Claimant to be on her feet and walking around the office much of the time she was working—more consistent with light work than sedentary work. As early as 2000, Dr. Carraher opined that Claimant could perform the duties of a medical assistant *only* with limited hours and substantial accommodation. The accommodation provided by Dr. Carraher was that Claimant had sufficient time between patients to sit at a desk and work on charts, and that she could rest when she needed to. Following her 2002 injury, Claimant continued to be limited to sedentary work.

Work Was Less Than Part-Time

50. Claimant never returned to full-time work after Dr. Hansen released her from care in 1996. While Dr. Hansen expected Claimant to return to full-time work, and Dr. Carraher initially anticipated that Claimant would be able to return to something approaching full-time work for him, Claimant was unable to do so. She was working twenty or fewer hours per week when, in November 2001, Dr. Carraher reduced her maximum hours of work per week from twenty to twelve. Following her 2002 injury, Claimant remained subject to the twelve hour per week limitation.

Other Restrictions

51. As early as 1997, Dr. Carraher told the Social Security administration that Claimant had limited ability to walk, fatigued easily, had difficulty with prolonged use of her upper extremities, and had a twenty-pound lifting restriction. In 2000, Dr. Carraher advised the

Idaho disability determinations office that Claimant had problems with grip strength, could not perform repetitive or prolonged work with her upper extremities, was limited in her ability to both stand and walk, and that she could work as a medical assistant only on a limited basis and with accommodations. No additional substantive restrictions or limitations were imposed following her 2002 accident.

Medications

52. In the weeks and months immediately preceding her 2002 accident, Claimant was given prescriptions as listed in finding of fact 18, *infra*. Subsequent to her 2002 injury, Claimant was given prescriptions as listed in finding of fact 28, *infra*. With the exception of the frequency of use of Xanax, the prescriptions are for identical amounts, dosages, and frequency. Claimant testified that while she was taking the same medications before and after December 2002, she was not taking them in the same amounts. The Referee finds the actual prescription records to be the most reliable indicator of Claimant's prescription drug consumption.[2] As to Claimant's increased use of Xanax, nothing in the record relates the increased usage to her industrial injuries.

53. Fundamentally, Claimant's work limitations were the same both before and after her 2002 injuries. Even her own vocational expert could not identify any factors that substantively distinguish her condition before and after the 2002 accident. If Claimant was

[2] Although the issue of continuing medical care was not a stated issue before the Commission at hearing, in light of the requirements of Idaho Code § 72-432, the Referee notes that Employer/Surety's obligation to provide the prescription medications (or their equivalents) identified in findings of fact 18 and 28, ceased on and after October 21, 2005, when Claimant was declared medically stable. Claimant was taking these medications prior to her 2002 accident primarily for her CMT, and she has now returned to her pre-injury condition *vis a vis* her work injuries. Claimant's CMT is progressive, and undoubtedly her condition is worse now than at the time of her 2002 injuries, however, Employer/Surety has no obligation to pay for medication related to her CMT.

totally and permanently disabled at the time of hearing, then she was totally and permanently disabled before her 2002 accident.

ATTORNEY FEES

54. Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides:

> Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney's fees is a factual determination that rests with the commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

55. The record demonstrates that Employer/Surety paid or provided reimbursement for all of Claimant's medical care associated with her injuries, including substantial prescription costs for which they may not have been liable. Given the complexities of sorting out the causation of Claimant's various complaints, Employer/Surety's payments were not unreasonably delayed or discontinued. The Referee finds no basis to award attorney fees to Claimant in this proceeding.

REMAINING ISSUES

56. In light of the finding that Claimant was totally and permanently disabled as an odd-lot worker prior to the accident that gave rise to this proceeding, all other issues are moot.

CONCLUSIONS OF LAW

1. Claimant was totally and permanently disabled under the odd lot doctrine prior to her December 2002 industrial accidents.

2. Employer/Surety is not obligated to continue to pay for Claimant's OxyContin, Hydrocodone, Soma, and Xanax or their generic equivalents after October 21, 2005.

3. Claimant is not entitled to attorney fees.

4. All other issues are moot.

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 November, 2007.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of November, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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djb /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BETTY S. CHRISTENSEN, Claimant, v. S. L. START & ASSOCIATES, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 2002-525919** **2003-004986** **ORDER** Filed: November 20, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 recommendation of the Referee. The Commission specifically notes that the parties presented evidence, argued and briefed a dispute over continuing medication taken by Claimant. Although not specified as an issue for resolution, the parties certainly treated the matter as a dispute. Even though the Referee's comments on this subject are technically dicta, the Commission finds merit in the advisory nature of such recommendation. The Commission concurs with this recommendation. 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 was totally and permanently disabled under the odd lot doctrine prior to her December 2002 industrial accidents.

2. Claimant is not entitled to attorney fees.

3. All other issues are moot.

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

DATED this 20 day of November, 2007.

INDUSTRIAL COMMISSION

/s/_____
James F. Kile, Chairman

_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of November, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

MICHAEL J VERBILLIS
PO BOX 519
COEUR D'ALENE ID 83816-0519

PAUL J AUGUSTINE
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djb /s/_____