

CONTENTIONS OF THE PARTIES

Claimant contends he sustained work-related back injuries while working as a maintenance repairman for Employer. He asserts he is now totally and permanently disabled pursuant to the odd-lot doctrine.

Defendants agree Claimant had work-related accidents. However, Defendants argue Claimant is not totally and permanently disabled; rather, he could find work if he would enlarge his geographic labor market area.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant;
2. Claimant's Exhibits 1 through 25 admitted at hearing;
3. Defendants' Exhibits A and B admitted at hearing; and,
4. Post-hearing depositions of vocational rehabilitation consultants, Douglas Crum and Nancy Collins, Ph.D.

Objections in Mr. Crum's deposition are overruled. After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant suffered a compensable back injury in 1994 which required surgery. He continued to work and suffered additional back injuries. He underwent a second surgery in 1995. In October 2001, a surgeon fused his back from T12 to L5.

2. At the time of hearing, Claimant was 57 years of age and living in Riggins, Idaho. He has a G.E.D. Claimant was honorably discharged after he served in the military during the

Vietnam War. He has worked as a dealer in a casino, gas station worker, hard rock miner, carpenter, and a “shade tree” mechanic. Also, Claimant and his wife had a newspaper route.

3. Beginning in or around 1993, Claimant worked as a maintenance repairman for Employer as assistant to the licensed operator of the wastewater treatment plant.

4. After his industrial accident and injury in 1994, he underwent surgery. The surgeon, John Havlina, M.D., did not impose specific restrictions, but counseled Claimant to get away from physical labor. Claimant’s job usually involved medium or heavy physical labor.

5. In 1995, after his second back surgery, Claimant worked only four days per week so he would have more time to rest his back. By 1999, after a major remodel of Employer’s water and wastewater system, he was unable to tolerate the demands of the job.

6. In a March 26, 2000, clinic note, Jens R. Chapman, M.D., of the University of Washington Hospital, opined:

In terms of employability of the patient and future job prospects, I feel that this patient is permanently disabled from any job category beyond light duty. I would see him to be permanently reclassified as light duty, with lifting restriction arbitrarily at this point set at 30 lb. lifting, pushing, pulling, carrying. This patient should avoid standing or walking or sitting for more than half an hour to an hour at a time. He should similarly be able to avoid stooping or working above shoulder girdle height or climbing ladders.

The record does not show that Dr. Chapman ever removed or changed these restrictions.

Ultimately, in October 2001, Dr. Chapman fused Claimant’s entire lumbar spine, T12 to L5.

7. Timothy E. Doerr, M.D., handled Claimant’s follow-up care. Dr. Doerr found Claimant medically stable on February 6, 2003. He imposed restrictions including 30 pounds lifting and no repetitive bending, twisting, stooping or crouching. Dr. Doerr rated Claimant’s PPI at 40% of the whole person. Dr. Doerr further opined Claimant needed continuing care to ensure that the fusion does not fail.

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8. Claimant continued to do physical therapy. He has “learn[ed] gradually to be a lot more careful.” Nonetheless, Claimant suffers from increasing symptoms which are significantly worsened by prolonged standing, walking, or driving. His wife now does much of the driving.

9. Dr. Chapman warned Claimant that unless Claimant was “real careful” the fusion would have to be surgically extended below L5.

10. Claimant has not worked since he left Employer. He is well acquainted with Riggins and nearby employers. He has “put the word out” throughout Riggins’ small population and followed up on potential job leads. He formally applied for a position as a night auditor at a local motel. At hearing, Claimant was hopeful about a shuttle driving job with a rafting company; it involves transporting passengers to and from the river. The job is seasonal and amounts to about four hours per day.

11. In a December 2, 2003, disability evaluation, Larry. D. Harries, M.D., opined:

It is my feeling that this gentleman would be employable to a job requiring him to not lift anything more than 20-30 pounds, that did not require any bending or twisting. He would have no trouble riding in a car if he was able to get out and walk around every 30-40 minutes to relieve the discomfort in his lower back or tailbone area. He has no trouble speaking or hearing. He has no trouble carrying objects with his extremities as long as it weighs under 20 pounds and is not repetitive [sic].

12. Vocational rehabilitation consultant, Douglas Crum, evaluated Claimant on March 1, 2005. He opined Claimant was unable to work as a raft shuttle driver and that even a job as a hotel desk clerk “would be quite a stretch.” He opined a commute to Grangeville or New Meadows or McCall was “not financially realistic to expect” because the wage Claimant might earn would require him “to work over 6 hours per day just to cover the cost of the commute.” In sum, Mr. Crum opined Claimant is “totally and permanently disabled as a result

of the subject industrial injury.”

13. Vocational rehabilitation consultant, Nancy Collins, Ph.D., evaluated Claimant and issued written reports in 2000, 2002, 2004, and March 23, 2005. She opined Claimant unable to obtain more than a seasonal job if his labor market were restricted to the Riggins area. If the labor market were geographically expanded, his disability remained around 70 to 80 percent.

DISCUSSION AND FURTHER FINDINGS

14. **Permanent disability.** Permanent disability and its evaluation is defined by statute. Idaho Code §§ 72-423, -425, -430. There are two methods by which a claimant can demonstrate he or she is totally and permanently disabled. First, a claimant may prove a total and permanent disability if his or her medical impairment together with the pertinent nonmedical factors totals 100%. If the claimant has met this burden, then total and permanent disability has been established. If, however, the claimant has proven something less than 100% disability, he or she can still demonstrate total disability by fitting within the definition of an odd-lot worker. Boley v. ISIF, 130 Idaho 278, 939 P.2d 854 (1997).

15. Here, Dr. Doerr gave Claimant a 40% PPI rating. That rating is uncontested. Both vocational rehabilitation consultants agreed Claimant’s disability was high. The difference between their opinions was largely based upon whether Claimant’s labor market extended geographically beyond Riggins into Grangeville and McCall. Claimant resides in a tiny rural town with a very high unemployment rate. The Riggins labor market is small and currently economically depressed.

16. The medical evidence supports Claimant’s testimony about his inability to tolerate significant driving. Mr. Crum’s analysis of the economic infeasibility of considering

an expanded geographical labor market is persuasive. Claimant's realistic labor market does not include Grangeville or McCall. *See, Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989).

17. Even if the larger labor market were considered, Claimant's disability would be rated around 90%. Considering the more realistic labor market in the area of Riggins, Claimant's permanent disability is 100%

18. A claimant may satisfy his or her burden of proof and establish odd-lot disability by showing that he or she has attempted other types of employment without success, by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley, supra*.

19. Although not necessary to the decision, the odd-lot analysis is included. Claimant, during his work-life, has shown himself to be conscientious and hardworking. Indeed, his willingness to continue performing hard work after his first surgery contributed to the ultimate need for the back fusion. Claimant is a known entity in Riggins and he knows Riggins and its people. His job search, although largely informal, was reasonable. A more formal process is unlikely to have enhanced his chances in that community. Yet no jobs have surfaced. The record shows Claimant's efforts to find suitable work would, unfortunately, be futile. Further efforts will be futile because of Claimant's inability to travel and the lack of available sedentary positions in Riggins. Claimant satisfied both the second and third criteria for establishing himself totally and permanently disabled as an odd-lot worker.

CONCLUSION OF LAW

Claimant is totally and permanently disabled.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusion of Law as its own and issue an appropriate final order.

DATED this 31st day of August, 2005.

INDUSTRIAL COMMISSION

/s/ _____
Douglas A. Donohue, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Richard S. Owen
P.O. Box 278
Nampa, ID 83653

Todd J. Wilcox
P.O. Box 947
McCall, ID 83638

db /s/ _____

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