BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROCKLAND STODDART, Claimant, v. SOS STAFFING SERVICES, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	)	**IC 03-001033** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed March 15, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Idaho Falls, Idaho, on October 13, 2005. Claimant was present and represented by Delwin W. Roberts of Idaho Falls. Glenna M. Christensen of Boise represented Employer/Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken but the parties submitted post-hearing briefs and this matter came under advisement on January 27, 2006.

ISSUES

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

1. Whether Claimant is entitled to retraining benefits;

2. If not, whether Claimant is entitled to permanent partial disability (PPD) benefits and the extent thereof; and,

3. Whether Claimant is entitled to an award of attorney fees for Surety's wrongful denial of retraining benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that he is in need of retraining to restore his loss of earning capacity following an industrial accident that fractured both of his heels. In the alternative, he requests that the Commission award him PPD in excess of his 12% whole person permanent partial impairment (PPI) of 28% of the whole person to compensate for his wage loss. Claimant also requests an award of attorney fees for having to go to hearing over the retraining issue when both vocational experts involved in this matter have recommended retraining.

Defendants contend that Claimant's retraining "plan" is too open-ended in that he has expressed interest in retraining in several different areas and he can re-enter the labor market at a wage comparable to his time-of-injury wage in any event. They further contend that Claimant has no disability in excess of his impairment and that they have acted reasonably in denying retraining as Claimant has not presented any clear-cut retraining program.

Claimant counters that Defendants expect too much of a proposed retraining program. Claimant is working with the Idaho Division of Vocational Rehabilitation (IDVR) to further identify his vocational interests and abilities and after he has completed that preliminary program he will be in a better position to fine-tune his vocational goals.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Industrial Commission Rehabilitation Division (ICRD) consultant James D. Wolford, and IDVR consultant Sheila Sakizzie taken at the hearing;

2. Claimant's Exhibits 1-8 admitted at the hearing; and,

3. Defendants' Exhibits A-C admitted at the hearing.

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 48 years of age and resided in Idaho Falls at the time of the hearing. His work history has generally consisted of menial heavy labor jobs.

2. Employer is a temporary placement agency. At the time of his January 13, 2003, accident and injury, Claimant was placed at Corporate Express where he was pulling a cardboard tote backwards when he stumbled and fell 12-14 feet. He landed on his feet and suffered severe bilateral calcaneus fractures.

3. Claimant presented to Eastern Idaho Regional Medical Center and came under the care of Casey I. Huntsman, M.D., an orthopedic surgeon. On January 29, 2003, Dr. Huntsman inserted a pin in Claimant's right calcaneus to restore some of Bohler's angle. The right calcaneus was too damaged to consider further surgical intervention at that time.

4. Claimant's left foot continued to improve; his right foot did not. On August 14, 2003, Dr. Huntsman performed a right subtalar fusion and plantar spur excision.

5. After Claimant completed a course of physical therapy, on January 27, 2004, Dr. Huntsman issued a 17% whole person PPI rating and returned Claimant to work with the following restrictions: may walk and stand up to 8 hours a day with a fifteen minute break at two hour intervals when walking; may lift up to 50 pounds; no repetitive bending, twisting, lifting, stooping, squatting, reaching, climbing, kneeling, and pulling or pushing.

6. On June 15, 2004, Dr. Huntsman began to question whether Claimant's fusion was solid and ordered a CT scan that revealed a nonunion that Dr. Huntsman described as

"tolerable." He did not think further surgery would be beneficial primarily due to Claimant's smoking.

7. On August 30, 2004, David C. Simon, M.D., a physiatrist, saw Claimant at Surety's request. Dr. Simon concluded that Claimant's persistent right ankle pain was due to the incomplete fusion. Dr. Simon agreed with Dr. Huntsman that unless Claimant's pain is severe, surgery was not presently required and the fusion could become solid in time. Short of surgery, Dr. Simon could think of nothing that would cure Claimant's pain. He recommended continued use of anti-inflammatories and, perhaps, foot orthotics. Dr. Simon had nothing to offer Claimant by way of treatment and recommended he follow up with Dr. Huntsman. He did not address Dr. Huntsman's PPI rating or restrictions.

8. On November 4, 2004, Dr. Huntsman inexplicably revised his PPI rating downward from 17% to 12% for both calcaneus fractures. He did not alter the restrictions given on January 27, 2004.

9. The last record from Dr. Huntsman dated April 14, 2005, indicates that Claimant was still experiencing right foot pain but that his left foot was "doing quite well." He recommended that Claimant see a pain specialist. Significantly, he modified his earlier restrictions to include not walking more than one hour at a time without a 15-minute break in between.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-450 provides:

> **Retraining. --** Following a hearing on the motion of the employer, employee, or the commission, if the commission deems a permanently disabled employee, after the period of recovery, is receptive to and in need of retraining in another field, skill or vocation in order to restore his earning capacity, the commission may authorize or order such retraining and during the period of retraining or any extension thereof, the employer shall continue to pay the disabled employee, as a

> subsistence benefit, temporary total or temporary partial disability benefits as the case may be. The period of retraining shall be fixed by the commission but shall not exceed fifty-two (52) weeks unless the commission, following application and hearing, deems it advisable to extend the period of retraining, in which case the increased period shall not exceed fifty-two (52) weeks. An employer and employee may mutually agree to a retraining program without the necessity of a hearing before the commission.

10. Claimant has worked with both ICRD and IDVR regarding return to work and retraining issues. ICRD consultant Dan Wolford prepared case notes and testified at the hearing. He opened his file on Claimant in January 2003 at Surety's request. During the course of his involvement, Mr. Wolford identified various jobs and job leads that he believed fit within Claimant's physical restrictions as assigned by Dr. Huntsman. Claimant was also participating in the Work First program wherein he was required to submit 10 employment applications a day. Claimant was also enrolled in courses directed toward preparing him to take college entrance tests. Mr. Wolford closed his file in January 2005 when it became apparent to him that Claimant was more interested in his schooling than he was in returning to work.

11. Claimant became involved with IDVR consultant Sheila Sakizzie in August of 2005. Ms. Sakizzie determined that Claimant had a disability that interfered with his employment and accepted him into her program. She prepared an Individual Plan for Employment and testified at hearing. Ms. Sakizzie assisted Claimant in obtaining bi-focal glasses and audiology testing for his right ear hearing problem. She also arranged for him to take the Test of Adult Basic Education to determine his reading, writing, and math levels. Once his strengths and weaknesses were identified, Claimant enrolled in some classes to attempt to improve his academic weaknesses. Ms. Sakizzie testified that, at this point, she could only develop a provisional retraining plan pending Claimant's success in his adult education classes.

12. Ms. Sakizzie testified as follows regarding how the IDVR develops a retraining plan:

> Q. (By Mr. Roberts): Then do you, do you form an opinion then as to the probability of success in retraining before you – as you lay out your plan?
>
> A. Yeah. I generally will not; and this is actually - - like I said, it's sort of a provisional plan because, as it states here, we're still in the process of this comprehensive assessment because this is an individual who, from everything that's been expressed to me, has been very focused on retraining. We have been evaluating his ability as far as vision, hearing, and academic skills to succeed in training.
>
> He was very anxious to start school this academic calendar year, and I expressed two concerns about that. I'm convinced at this point that he has the academic ability to succeed in that if he so chooses; however, before I will really write a plan saying that a person's going to go to school for a certain length of time and vocational rehabilitation is going to assist with that, I have to be able to show where the money for living during that period of time is going to come from.
>
> Voc rehab does not assist with basic living expenses. We can assist with the additional expenses incurred by a training program to certain limits; but we cannot pay for basic rent, utilities, food, any of those kind of basic living expenses. If you would need to pay for it whether or not you were in retraining, then we don't touch it.
>
> So I've explained to Mr. Stoddart that until I know where the funds are coming from for those kind of things, I can't write a plan for any sort of a long-term training program.
>
> He's shown me where funds were going to come from for him to live through the semester; and so we've written a provisional plan to assist with one semester of schooling at Idaho State University, which is –
>
> . . .
>
> Q. And, and a major unanswered question is whether he'll be able to have the sustenance to – in order to continue his educational pursuit?
>
> A. Precisely.
>
> . . .
>
> Q. Okay. Fair enough.
>
> Does the – does his outcome from the classes, the preliminary class that he's taking right now, will that help you to better assess, you know, what the – the viability of his future academic pursuits?
>
> A. It could. The first semester often does tell us a lot because frequently people that have said they would like to go to college, when they get in, see what it's really like, are less convinced that that's what they want to do.

> So often that is a point at which clients come back to me and say I want to rethink this.
>
> **My plan at this point was to meet with Mr. Stoddart hopefully toward the end of the semester, evaluate how things have gone;[1] and we really couldn't provide any further services at this point until we complete this comprehensive assessment process in which he identifies, with my assistance, a specific vocational goal of what he is planning to do, what it's going to take to get there, and what resources he has to achieve that.**

Hearing Transcript, pp. 103-107. (Emphasis added).

13. Mr. Wolford testified that in light of Dr. Huntsman's additional restriction of no standing longer than one hour without a 15-minute break, he does not believe Claimant can re-enter the work force at his time-of-injury wage without some type of retraining.

14. Claimant is caught in a "Catch 22". He cannot continue in the retraining he has started with the assistance of IDVR without being able to demonstrate he will be able to meet his basic needs of daily living; i.e., retraining (subsistence) benefits from Surety and, thus, will never be able to hone in on the exact type of retraining for which he is best suited (if any). Claimant testified that he is unable to support himself without retraining benefits. The Referee finds, and Defendants do not dispute, that Claimant is receptive to retraining. The Referee further finds that Ms. Sakizzie's approach regarding allowing Claimant to complete some core adult education classes in order to better determine his interests and capabilities is reasonable. Therefore, the Referee finds that Claimant has established his entitlement to retraining benefits even though he is presently unable to identify an exact retraining program. However, because Claimant may ultimately be found to be unsuited for any type of retraining, the Referee recommends that the Commission retain jurisdiction in this matter to allow the parties and the Commission the ability

[1] At the time of the hearing, Claimant was at midterm and Ms. Sakizzie did not know if there were any grades available to review.

to monitor Claimant's progress in the event he is preliminarily able to identify a particular program and demonstrates he is capable of succeeding therein or, if he is not.

15. Based on the foregoing, the issue of disability in excess of impairment is reserved pending the outcome of retraining.

16. Claimant requests an award of attorney fees for Surety's failure to authorize retraining when both Mr. Wolford and Ms. Sakizzie recommended retraining. However, there were legitimate issues presented in this case regarding just what type of retraining Claimant was interested in (he expressed interest in different areas at different times) and whether Claimant has the academic ability to succeed in a program. The Referee finds that Surety has not acted unreasonably in this case and an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

1. Claimant is entitled to retraining benefits in the form of temporary total or temporary partial disability benefits pursuant to Idaho Code § 72-450 during the time he is working with IDVR to establish a retraining program not to exceed 52 weeks without further order of the Commission.

2. The Referee recommends that the Commission retain jurisdiction to allow for the monitoring of Claimant's progress, or lack thereof, in any retraining program deemed reasonable by IDVR, and any party may request the Commission's assistance or further direction at any time during Claimant's retraining.

3. The issue of Claimant's entitlement to PPD benefits, if any, is reserved.

4. Claimant is not entitled to an award of attorney fees.

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 __28th ___ day of ___February___, 2006.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th __ day of __March__, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DELWIN W ROBERTS
1495 E 17TH ST
IDAHO FALLS ID 83404-6236

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

____/s/_____

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ROCKLAND STODDART, Claimant, v. SOS STAFFING SERVICES, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	)	**IC 03-001033** **ORDER** Filed March 15, 2006

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his 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 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 is entitled to retraining benefits in the form of temporary total or temporary partial disability benefits pursuant to Idaho Code § 72-450 during the time he is working with Idaho Division of Vocational Rehabilitation to establish a retraining program not to exceed 52 weeks without further order of the Commission.

2. The Commission will retain jurisdiction to allow for the monitoring of Claimant’s progress, or lack thereof, in any retraining program deemed reasonable by IDVR, and any party

may request the Commission's assistance or further direction at any time during Claimant's retraining.

3. The issue of Claimant's entitlement to permanent partial disability benefits, if any, is reserved.

4. Claimant is not entitled to an award of attorney fees.

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

DATED this __15th ___ day of ___March____, 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 __15th ___ day of __March___, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DELWIN W ROBERTS
1495 E 17TH ST
IDAHO FALLS ID 83404-6236

GLENNA M CHRISTENSEN
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___/s/_____

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