

3. Whether and to what extent Claimant is entitled to the following benefits:
 - (a) temporary disability (TTD) (March 6 – July 21, 2004);
 - (b) permanent partial impairment (PPI);
 - (c) disability in excess of impairment; and
 - (d) attorney fees; and
4. Whether the Commission should retain jurisdiction.

In part as a result of information obtained by holding the record open, the parties have further agreed that issues involving causation and retention of jurisdiction are withdrawn from controversy and that Claimant's compensable PPI should be rated at 20% of the whole person.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered injury to his respiratory system as a result of chemical inhalation at work. He is entitled to TTD benefits between March 6 and July 21, 2004, because Employer failed to offer reasonable employment and fired him. He has suffered lost wage earning capacity which constitutes a major factor of his permanent disability. Defendants' unreasonable actions should result in the assessment of attorney fees.

Defendants contend Claimant refused a reasonable offer of employment – to return to his old job at his time-of-injury wage – and is not entitled to TTDs. Claimant failed to prove any permanent disability beyond the 20% PPI. Any wage loss is due to that refusal and to his decision to move from Boise to New Meadows. Defendants' actions were not unreasonable.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, supervisor David Korn, and ICRD consultant Bob Reidelberger;
2. Claimant's exhibits 1-17;
3. Defendants' exhibits A-L; and
4. Post-hearing depositions of pulmonologists Joseph Crowley, M.D. (with one exhibit), and Anthony Montanaro, M.D.

FINDINGS OF FACT

1. Claimant worked for Employer from 1990 to March 2004. He suffered a compensable industrial accident on November 25, 2003. He inhaled vapors of a solution containing acetic acid, nitric acid, and hydrofluoric acid.

2. Claimant immediately reported the accident and received treatment. Minor irritation to his eyes, nose, and throat was noted.

3. After the Thanksgiving holiday, Claimant resumed medical treatment. He was taken off his regular job and assigned office tasks temporarily until about February 16, 2004.

4. Pulmonologist Anthony Montanaro, M.D., evaluated Claimant at Defendants' request on January 29, 2004. Dr. Montanaro recommended, "Mr. Lafay is able to work full time but should not be exposed to any area in which he is exposed to potential irritants." Dr. Montanaro's report expressed his opinions about whether Claimant had a preexisting condition and whether the accident temporarily exacerbated a preexisting condition.

5. Claimant was referred to pulmonologist Joseph Crowley, M.D., who first treated Claimant on January 21, 2004. On February 4, 2004, Dr. Crowley recommended:

At work, I would believe it would be in Stacy's best interest if he were able to have his job modified to avoid chemical exposures and chemical fume exposures, or at least to minimize them. Stacy understands that he may not be able to totally avoid fume exposures at his job place but he believes they can be significantly minimized. I do not see any reason to limit Stacy's activities or lifting.

Dr. Crowley further noted, "He can work but should be restricted to regions with minimal chemical fume exposures. . . . minimize chemical exposure." On February 26, 2004, Dr. Crowley completed a Work Release Form allowing Claimant to return to work with a restriction – of "indefinite" duration – to "limit chemical fume exposures."

6. Employer received Dr. Crowley's release on March 1, 2004. After checking informally with the various doctors involved, Employer contacted Claimant on March 3, 2004.

Claimant and Employer interpreted Dr. Crowley's release differently. Claimant felt it precluded him from doing certain tasks and working in certain areas. Employer felt it merely required the use of additional personal protective gear, specifically either one of two types of respirators. Employer informed Claimant that his job activities and physical locations could not be modified.

7. Over the next few days, Employer prepared to return Claimant to his old job, effective Sunday, March 7, 2004. On that date, Claimant attended a meeting with various representatives of Employer. Claimant refused to return to his old job immediately as requested by Employer and requested time to clarify his restrictions with Dr. Crowley.

8. On March 8, 2004, Employer terminated Claimant for refusing to return to work.

9. Defendants paid benefits for time loss to March 6, 2004, and for all medical care related to the accident. Defendants paid no time loss benefits after March 6, 2004.

10. On June 21, 2004, Dr. Crowley opined Claimant was medically stable. In post-hearing deposition, he opined Claimant's condition was basically unchanged after February 4, 2004.

11. On the date of the accident, Claimant's annual base pay was in excess of \$72,000 and with bonuses was over \$77,000.

12. After he separated from Employer, Claimant moved to New Meadows. After a job search, he obtained employment with the Adams County Assessor's office earning \$11.25 per hour.

13. Claimant suffered permanent respiratory injury, rated at 20% of the whole person.

Discussion and Further Findings

14. **Causation and Permanent Impairment.** The record was held open to obtain a methacholine challenge test. The test had been scheduled originally by Dr. Montanaro but could not be performed because of logistical difficulties. Dr. Crowley also suggested Claimant

undergo that test, but the local hospital's regulations prohibited a person with Claimant's clinical picture from taking it. Eventually, a hospital was found that would perform the test on Claimant.

15. A dispute apparently arose between Drs. Crowley and Montanaro about several issues, more prominently about whether Claimant could be diagnosed as suffering from Reactive Airways Dysfunction Syndrome or Reactive Airways Disease – two separate diagnoses. Ultimately, the dispute is irrelevant to a determination of eligibility for benefits.

16. Similarly, a dispute arose about whether Claimant had atopy and whether it caused or predisposed Claimant to the injury suffered from the accident. Surety raised causation and apportionment issues after obtaining Dr. Montanaro's report in which he opined in such a way that these defenses appeared to have merit. However, upon obtaining clarifying testimony from Dr. Montanaro in post-hearing deposition, it became evident that his opinions would not support these legal defenses.

17. Both doctors opined Claimant's pulmonary condition represents a 20% whole person impairment and was caused by the accident.

18. Claimant suffered PPI rated at 20% of the whole person as a result of the industrial accident.

19. **Temporary disability.** If Employer made a reasonable, actual offer of suitable employment which was refused by Claimant, Employer is not liable for TTD benefits beyond the date of refusal. Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986). Here, the dispute revolved around the varying interpretations of Dr. Crowley's language when he released Claimant to return to work. Employer attempted clarification from March 1 until it contacted Claimant on March 3, 2004. Upon further inquiry, Employer's interpretation of Dr. Crowley's language posited that Claimant would be within the restriction if he wore a respirator in addition to the usual protective gear.

20. Claimant's stated reason for his refusal was disingenuous. Employer notified Claimant on March 3 that he was released to work. Employer and Claimant were aware from that conversation that there existed a dispute in interpretation of Dr. Crowley's language. Claimant did not contact Dr. Crowley's office for clarification between March 3 and March 7. He waited until a meeting with Employer on March 7 to request time to contact Dr. Crowley.

21. Before March 7, Employer notified Claimant in writing of procedures, in addition to all prior safety procedures, it was instituting to ameliorate the risk of exposure.

22. Both before and after the accident, Employer made available two types of respirators designed to prevent chemical inhalation.

23. By instituting additional safety procedures and encouraging Claimant to wear a respirator, Employer objectively minimized Claimant's potential for exposure to inhalation of chemical fumes. The offer to return Claimant to his old job under these new conditions made that job suitable under the restriction imposed by Dr. Crowley.

24. On March 7, 2004, Employer offered an actual job, the same one Claimant had performed before the accident. The offer was legitimate. Claimant need only have accepted it and he could have resumed work that very evening.

25. Claimant failed to show he is entitled to TTD benefits for the period in question.

26. **Permanent disability.** Permanent disability is defined and evaluated according to statute. Idaho Code §§ 72-423, 424, 425, 430(1). Some factors are expressly defined by statute and other unexpressed factors may be considered. Idaho Code § 72-430(1). Wage earning capacity may be one factor among others considered. Baldner v. Bennet's, 103 Idaho 458, 649 P.2d 1214 (1982).

27. Here, Claimant's only restriction is to avoid or minimize exposure to chemical fumes. He has not shown that that restriction precludes him from obtaining or working

any jobs. Indeed, post-hearing testimony by medical experts shows he could work at his old job wearing a respirator. Moreover, in briefing, Claimant suggests it is Defendants' burden to show available jobs exist in Claimant's labor market at the same wage. Nonsense. Claimant put at issue his entitlement to permanent disability benefits. It is his burden to set forth *prima facie* evidence that he is disabled and to what extent. Id.

28. Claimant's actual reduction in wage from his old to his new job is the only evidence among all medical and non-medical factors evaluated which might indicate the existence of some amount of permanent disability. In light of his refusal to return to his old job, as well as his decision to relocate to New Meadows, this factor carries little weight.

29. Claimant's suggestion that the New Meadows labor market must be the one evaluated is not persuasive. While the Claimant's residence at the time of hearing is relevant and may be considered the center of his "reasonable geographic area" for labor market analysis, it need not be the sole area analyzed. Davaz v. Priest River Glass Co., Inc., 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994). In Davaz, the claimant moved to a new labor market because he had obtained a job there. Here, Claimant moved because he remained unemployed and it was cheaper to live in New Meadows. In Davaz, the claimant moved from a worse to a better labor market. Here, Claimant moved presumably from a better to a worse labor market. In Davaz, an ICRD consultant testified the claimant was "extremely motivated to find new employment." Here, Claimant refused an offer to return to his old job at his old – and munificent – salary.

30. Regardless of the applicability of Davaz, Claimant failed to provide evidence about either labor market. He failed to show how his restriction reduced his access to either labor market. He showed only that he made more money before the accident and was making less after it.

31. Claimant testified about shortness of breath and other permanent symptoms. These symptoms have not been shown to result in disability in excess of the 20% PPI awarded.

32. The weight of the evidence shows Claimant suffered no disability in excess of permanent impairment. Claimant suffered permanent disability rated at 20% of the whole person, inclusive of permanent impairment.

33. **Attorney fees.** Attorney fees shall be awarded where the Commission finds the conditions of Idaho Code § 72-804 are satisfied. Bradley v. Washington Group International, 141 Idaho 655, 115 P.3d 746 (2005). Employer acted reasonably in providing medical treatment and attempting to coordinate Claimant's return to work. Surety acted reasonably after Claimant's refusal to accept the offer of suitable work. Surety acted reasonably upon the report and opinions of Dr. Montanaro. The legal defenses it asserted were reasonably raised. Upon further clarification from Dr. Montanaro in post-hearing deposition, Surety did not wait for the Commission to issue this Order; it admitted causation and the newly-apparent lack of a basis for apportionment, and it began paying the 20% PPI.

34. If anything, this case is about misunderstandings: Claimant and Dr. Crowley misunderstood each other when they discussed returning to work and avoiding exposure; Dr. Crowley and Dr. Montanaro misunderstood aspects of each other's reports; Dr. Montanaro misunderstood Surety's questions about causation as it applies to Idaho Workers' Compensation Law and, Surety misunderstood that his answers did not so apply; Claimant and Employer misunderstood each other's position about wearing a respirator. These misunderstandings reasonably arose without bad intention on anybody's part. No attorney fees should be awarded.

CONCLUSIONS OF LAW

1. Claimant suffered a compensable accident and PPI rated at 20% of the whole person as a result. Defendants are entitled to credit for PPI amounts paid.

2. Claimant failed to show he is entitled to TTD benefits after March 6, 2004.
3. Claimant failed to show he is entitled to permanent disability in excess of PPI.
4. Claimant failed to show he is entitled to an award of attorney fees.

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 30TH day of March, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21ST day of APRIL, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS 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

E. Scott Harmon
P.O. Box 6358
Boise, ID 83707

db

/S/ _____

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

DATED this 21ST day of APRIL, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Thomas E. Limbaugh, Chairman

/S/ _____
James F. Kile, Commissioner

Dissent without comment.

R. D. Maynard, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 21ST day of APRIL, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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

E. Scott Harmon
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