

ISSUE

The sole issue between Claimant and ISIF is whether and to what extent ISIF is liable for any benefits to Claimant pursuant to Idaho Code § 72-332.

CONTENTIONS OF THE PARTIES

Claimant contends he was injured at work and required fusions at L3-5. He had sustained prior impairments to his low back, left hand, and left knee, and is entitled to benefits from ISIF. Admissions in ISIF's Answer to Claimant's Complaint preclude ISIF from arguing a contrary position at hearing.

ISIF contends Claimant is not to be believed. His reports to various doctors and testimony at hearing have all been inconsistent with each other. Claimant's brother, who was also his employer, is similarly not credible because of his own inconsistent statements and testimony. Regardless of credibility, the requirements of Idaho Code § 72-332 have not been established by Claimant, and ISIF should bear no liability in this matter.

EVIDENCE CONSIDERED

The record in the instant case consists of:

1. Testimony of Claimant, his brother and employer Monte Waters, and Claimant's wife Jenny Waters;
2. Claimant's exhibits 1 – 21;
3. ISIF's exhibits 1 – 41;
4. Employer's exhibits 1 – 28 admitted by stipulation after hearing; and
5. The post-hearing deposition of Christian Gussner, M.D., with its exhibits.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

FINDINGS OF FACT

1. Claimant worked for his brother as a framer. On October 13, 2000, Claimant was unloading lumber with the lumber deliveryman. The deliveryman dropped his end. Claimant reported back pain. Claimant's actions the rest of that day and in the days immediately thereafter are unclear. Claimant's time records are irreconcilably inconsistent with his statements, testimony, and the statements and testimony of his brother who employed him. He did drive to Idaho Falls and back a few days later.

2. He first sought treatment with J. Edward Perkins, Jr., D.C., ten days later. Claimant visited on three consecutive days, October 23-25, 2000.

3. Claimant first saw Sid J. Garber, M.D., on October 26, 2000. An MRI the next day showed degenerative disk changes including bulges at L3-4 and L4-5. The upper bulge displaced the L3 nerve root.

4. Paul J. Montalbano, M.D., first saw Claimant on November 6, 2000. He recommended prompt surgery. Surgery was performed on November 14, 2000. Dr. Montalbano diagnosed degenerative disease and spondylosis and removed two herniated disks. Three days later, Claimant reported recurrent pain and Dr. Montalbano performed a second surgery on December 13, 2000. On January 16, 2001, Dr. Montalbano opined Claimant could return to his regular job with a temporary 50-pound lifting limit and no expected permanent restrictions after completion of physical therapy.

5. Upon referral by Dr. Montalbano, Claimant began physical therapy on January 18, 2001. Claimant reported and showed steady progress until late February 2001 when he complained of muscle spasms in his low back on the right. Thereafter, he failed to continue to improve. Except for this complaint, Claimant's complaints have generally been

left-sided, sometimes bilateral.

6. X-rays taken April 25, 2001 showed degenerative disk disease with arthritis and prior surgical interventions.

7. On May 3, 2001, Dr. Montalbano opined:

. . . [Claimant] complains of facet type pain for which he underwent a facet injection with no sustained relief. Carl understands the etiology of his pain.

. . . He currently is evaluating the possibility of becoming a Security Officer. At the present time I am releasing Carl to light duty. His restrictions are no heavy lifting over 50 pounds.

8. On June 2, 2001, Dr. Montalbano opined that Claimant's "main symptoms are mechanical back pain."

9. On July 3, 2001, Christian G. Gussner, M.D., evaluated Claimant at Surety's request. He opined Claimant was at MMI with a 13% PPI, and lifting restrictions of 50 pounds occasionally and 25 pounds repetitively, with the usual motion restrictions.

10. On July 23, 2001, Dr. Montalbano opined a 13% whole-person PPI – agreeing with Dr. Gussner – related to the work accident without apportionment.

11. By August 13, 2001, Claimant had moved from Homedale, which is in the much larger Boise labor market, to Midvale. ICRD consultants in both areas found specific jobs available to Claimant. Claimant failed to pursue these options diligently. On October 10, 2001, ICRD consultant Sidni Mordhorst recorded, "[C]laimant is not actively job searching." ICRD reopened Claimant's file more than once over the years since the accident. Each time specific available jobs have been identified and presented to Claimant for follow-up.

12. A bone scan taken December 26, 2001 was negative for active lumbar degeneration.

13. On January 11, 2002, Dr. Montalbano opined Claimant should taper and

discontinue all narcotics and muscle relaxers.

14. On May 30, 2002, Dr. Garber opined Claimant's continuing pain was related to the industrial accident, although Dr. Garber dated that accident at November 23, 2000. He also opined Claimant was not at MMI.

15. On August 12, 2002, Dr. Garber opined Claimant was restricted to frequent lifting of 25 pounds, with the usual post-fusion motion restrictions.

16. Vocational consultant Barbara Nelson evaluated Claimant at Claimant's request. On December 6, 2002, James M. Read, Ph.D., evaluated Claimant at Ms. Nelson's request via a referral from Michael Hajjar, M.D. Dr. Read opined Claimant suffers borderline intellectual functioning with a poor prognosis for obtaining a GED or successful retraining.

17. On April 10, 2003, Barbara Nelson evaluated Claimant's employability potential. With a specific and detailed analysis, she opined Claimant suffered a 79% loss of access within his local job market, and a probable 44% wage loss.

18. On May 12, 2003, Claimant visited Kent Hamilton, PA-C, complaining of an exacerbation of low back pain. Claimant described a "small pop" in his back while turning over in bed. Mr. Hamilton diagnosed a lumbosacral strain with neuropathy. Subsequent studies showed a recurrent L3-4 disc herniation. Dr. Montalbano opined it related to the work injury because the other surgeries made him "prone to recurrent disc herniations."

19. Claimant required a third surgery, including a fusion of L3-4 and L4-5 on August 22, 2003, which was performed by Dr. Hajjar.

20. On December 29, 2003, Dr. Hajjar opined Claimant to be at MMI. No further surgery was recommended although physical therapy "may help him obtain increasing activity tolerance, exercise tolerance and pain tolerance." He imposed a 30-pound lifting limitation.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 5

21. On March 2, 2004, James H. Bates, M.D., opined Claimant was at MMI with a 16% PPI without apportionment. He proposed lifting restrictions of 30 pounds occasionally, 20 pounds frequently, with motion restrictions.

22. On April 12, 2004, ICRD consultant Sidni Mordhorst identified specific jobs available to Claimant in his local labor market.

23. On July 19, 2004, Edwin M. Clark, M.D., evaluated Claimant. He opined Claimant's PPI due to his low back at 25%, due to his left knee at 4%, due to his left hand at 10%, with lifting restrictions of 15 pounds occasionally and motion restrictions.

24. On December 23, 2004, James H. Bates, M.D., discussed PPI evaluation and opined Claimant would be rated at 20% instead of the 16% he had earlier opined.

25. On June 25, 2005, Craig W. Beaver, Ph.D., evaluated Claimant at ISIF's request. He opined Claimant "did not appear to put forth maximum effort."

26. On July 20, 2005, Christian G. Gussner, M.D., evaluated Claimant at ISIF's request. He opined Claimant's PPI due to his low back at 26%, due to his left hand at 7%, and due to his left knee at 0%. He proposed restrictions of lifting 30 pounds occasionally, 20 pounds frequently, and motion restrictions. Foundation for his opinion that Claimant is not totally and permanently *disabled* is lacking.

27. In post-hearing deposition, Dr. Gussner was shown medical records contrary to the history provided by Claimant. Dr. Gussner stated, "It bothers me that I didn't have a reliable history and it's very hard to believe anything that Mr. Waters tells me and a large part of my opinion is based on what he tells me." He opined Claimant's back condition was related 75% to his preexisting back condition and 25% to the industrial accident.

28. On August 2, 2005, a lumbar CT scan was entirely normal for a spine with

post-surgical fusion.

29. On August 18, 2005, vocational rehabilitation consultant Douglas Crum reported to ISIF his evaluation of Claimant. He opined Claimant's prior knee and hand injuries did not hinder Claimant's work or ability to obtain work. He noted the absence of restrictions associated with the knee or hand prior to the October 13, 2000 accident. Without providing a specific quantification of permanent disability, Mr. Crum opined, "[I]f Mr. Waters is totally disabled, his low back condition, combined with his literacy problems, are the reasons."

30. On August 19, 2005, vocational rehabilitation consultant Bill Jordan reported to Surety his evaluation of Claimant. Mr. Jordan considered the Boise labor market in his analysis because Claimant resided in Homedale at the time of the injury and opined as follows: In the Boise labor market Claimant need have no wage loss; Depending upon which doctor's restrictions are used, Claimant's disability due to loss of market access could range from 40% to 100%.

Prior History

31. Claimant was born in 1966. He reported working in the fields with his parents as a child and leaving home about age 13. Documentation shows he has a spotty employment history including many short-term employments – the longest being about three years and most being a few months or less – with significant periods of unemployment. His employment with his brother was "off and on" over the course of several years. His periods of unemployment are inconsistent with a pattern of seasonal layoffs experienced by some construction workers.

32. In December 1987, Claimant sought medical treatment for chronic low back pain with radiation down his left leg which he related to an automobile accident two years earlier. He again sought treatment for low back pain in 1996, 1998 and 1999.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7

33. In 1993, Claimant accidentally shot a nail through his left patella. Within one month he fully recovered and returned to work. Nevertheless, he persisted in nonanatomical complaints. He returned to complain in February 1995 after a 16-month hiatus from knee-related complaints and medical care. He sought medical treatment in 1997 for left knee pain following a work accident at a dairy. Records also make brief reference to a chain saw accident of unknown date, perhaps 1988, involving his left knee. (Claimant cut his right thigh with a power saw in July 2000.)

34. In 1997, he injured his left thumb with a hatchet or ax. Later that year, he ruptured a tendon in his left thumb and required surgery. In 1999, he underwent tendon surgery. Also in 1999, his long finger tendon is first mentioned and required surgery.

35. Claimant applied for, and in 1998, was denied, Social Security disability benefits (SSD). For another SSD application in 1999 he reported “ongoing pain” from a 1987 back injury.

Discussion and Further Findings

36. **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 is totally and permanently disabled. First, a claimant may prove a total and permanent disability if his 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 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).

37. A claimant may satisfy his burden of proof and establish odd-lot disability by

showing that he has attempted other types of employment without success, by showing that he or vocational counselors or employment agencies on his 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. Id.

38. Claimant suffers genuine and substantial back pain caused by the industrial injury. He incurred permanent impairment and has been restricted from lifting above certain weight limits and from various body motions. The limitations imposed have varied among the doctors imposing them and varied within a doctor's own opinions from time to time. However, by any set of limitations of record, Claimant failed to show 100% total and permanent disability. Claimant's expert, Barbara Nelson provided a thoughtful and specific evaluation. Using the more limited labor market around Claimant's current home in Midvale, she identified specific employers with specific suitable jobs which were available and for which Claimant could apply. She did not opine Claimant to be totally and permanently disabled.

39. Considering all medical and non-medical factors, including Claimant's educational level and reading difficulties, Claimant is not 100% disabled.

40. Claimant reported he tried one job after the accident and could not perform it because of back pain. He reported he performed a job search himself. The record shows substantial job search assistance was provided by ICRD and IDVR.

41. However, the record also shows Claimant is committed to being found disabled. He applied for and was denied SSD benefits at least twice before the subject accident and has done so at least twice again since. The record shows a pattern of omissions and inaccurate reporting by Claimant to doctors and others. Claimant lacked effort and good faith in his job search and searches conducted on his behalf. Careful review of the record is replete with

relevant examples of Claimant's manipulation of his history – well beyond those addressed in ISIF's post-hearing brief. Whether a result of faulty memory or other cause is irrelevant; Claimant is not a credible witness. Moreover, his brother's testimony at hearing and in deposition is inconsistent within itself and with available records. Claimant's brother is not a credible witness.

42. Medical records and opinions lack credible basis to the extent they rely upon Claimant's statements of his history. Moreover, the record shows an undue amount of correspondence to doctors by attorneys and other representatives of the parties in order to persuade various doctors to change various opinions or unduly to prevent communication of medical information to attorneys and other representatives on the opposing side. At some point, such excessive intervention tends to undercut the weight to be assigned to any doctor's revised opinion.

43. Claimant failed to show a good faith attempt at any one or all of the following: returning to some work, searching for a job, or pursuing job opportunities found for him by others. He failed to show any such attempts would be futile. Claimant failed to show he qualifies as an odd-lot worker.

44. Having failed to show he is 100% disabled or an odd-lot worker, the first threshold for ISIF liability is unsubstantiated. Further analysis is moot.

CONCLUSIONS OF LAW

1. Claimant failed to show he is totally and permanently disabled by any method of establishing it; and

2. ISIF bears no liability as a result of the August 13, 2000 accident.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED in Boise, Idaho, on this 9TH day of May, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23RD day of MAY, 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:

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db

/S/ _____

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

DATED this 23RD day of MAY, 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 23RD day of MAY, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Richard K. Dredge
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