

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

DAVID S. GEORGIADES, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 IDAHO DEPARTMENT OF )  
 ENVIRONMENTAL QUALITY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 02-013881**

**FINDINGS OF FACT,  
CONCLUSION OF LAW,  
AND RECOMMENDATION**

Filed July 7, 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 Boise on December 20, 2005. Claimant was present and represented by Wm. Breck Seiniger, Jr., of Boise. Gardner W. Skinner, also of Boise, represented Employer/Surety. Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition and the submission of post-hearing briefs. This matter came under advisement on May 4, 2006, and is now ready for decision.

**ISSUE**

Pursuant to an Order Granting Motion to Bifurcate, filed April 19, 2005, the sole issue to be decided is whether Claimant’s claim is barred by Idaho Code § 72-451.<sup>1</sup>

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<sup>1</sup> Claimant argues for the first time in his opening brief that Idaho Code § 72-451 is unconstitutional. The Referee will not consider that issue as the Commission has no jurisdiction over constitutional issues, *See, Tupper v. State Farm Ins.*, 131 Idaho 724, 729, 963 P.2d 1161, 1166 (1998), and because the constitutional challenge raised by Claimant was recently decided in *Luttrell v. Clearwater County Sheriff’s Office*, 140 Idaho 581, 97 P.3d 448 (2004).

## **CONTENTIONS OF THE PARTIES**

Claimant contends that he suffered severe stress, shock, and fear that resulted in a diagnosis of Post Traumatic Stress Disorder (PTSD) with physical injuries as the result of being in the vicinity of the Pentagon in Washington, D.C., on September 11, 2001 (9-11), when a hijacked airplane crashed into it. He was at a work-related seminar when the plane hit the Pentagon and smelled jet fuel that he thought may contain body parts and observed injured people being evacuated and other scenes that have caused his preexisting depression and anxiety to dramatically worsen and also resulted in the new condition of PTSD.

Defendants argue that Claimant has not complied with Idaho Code § 72-451 that bars “mental-mental” claims in that he has failed to show, by clear and convincing evidence, that the horrific events experienced by Claimant on 9-11 resulted in any physical injury to his body. Further, his eventual termination of employment and other personnel matters are the cause of his post-9-11 problems and such matters are specifically exempt from compensation under the statute.

Claimant counters that his leg swelled while walking back to his hotel from the seminar site, a rash appeared on his hand, and he suffered injury to his central nervous system from his PTSD so, in reality, this is not a “72-451” case. However, even if it is, he has met his burden under the statute by showing physical injury and he should be compensated. Further, Claimant’s termination from employment was directly related to a disagreement with his supervisor regarding how to best safely return to Boise from Washington, D.C., after the attack on the Pentagon.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant adduced at the hearing;
2. Claimant’s Exhibits 1-10, 12, 14, and 21-24 admitted at the hearing;

## **FINDINGS, CONCLUSION, AND RECOMMENDATION - 2**

3. Defendants' Exhibits 1-14(a) admitted at the hearing; and

4. The post-hearing deposition of Eric F. Holt, M.D., taken by Defendants on January 4, 2006.

With the exception of Defendants' objection at page 57 of Dr. Hoopes' October 19, 2005, deposition, all objections made during the taking of any depositions directly related to this case are overruled.<sup>2</sup>

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

### **FINDINGS OF FACT**

1. Claimant was 56 years of age and resided in Boise at the time of the hearing. He has a Master's degree in public administration. Claimant worked for Employer as a self-titled emergency and disaster management coordinator. On 9-11, Claimant was attending a seminar in Washington, D.C., at a location approximately 1,000 feet, or two-and-a-half blocks, from the Pentagon; however, Claimant was unable to directly see the Pentagon due to grassy berms associated with various highways between his location and the Pentagon. Claimant was in a conference room at the Marriot Residence Inn the morning of 9-11 when a lady sitting behind him, who had been talking on her cell phone, stood up and announced that the World Trade Center towers had been hit by airplanes and that one of the towers had collapsed. Claimant left the conference room and went into the lobby where a number of television sets were tuned in to various channels showing the attacks on the towers and the Pentagon. Claimant briefly stepped out of the lobby and observed three or four thin plumes of smoke rising from the area of the Pentagon. He also smelled burned jet fuel and returned to the lobby to get away from the smell.

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<sup>2</sup> A number of deposition transcripts were admitted into the record in this case that were taken in connection with a separate lawsuit filed by Claimant against Employer, and counsel for Defendants herein did not participate in those depositions and, of course, this Referee has no authority to rule on objections made during the taking of those depositions.

2. Claimant was concerned, to say the least, that he was witnessing a first strike against the United States preliminary to a nuclear attack; he feared for his life. Claimant was unable to learn what was going on in the hour or so following the Pentagon attack. He observed injured people being helped into the hotel lobby that he later learned was a planned evacuation route from the Pentagon. He overheard conversations about more planes or missiles coming. He testified that his shock of the events turned to fear. He saw the second tower collapse on a television set in the lobby and decided he needed to get back to his hotel in downtown Washington, D.C.

3. As there was no public transportation going into the downtown area, Claimant decided to walk. His feelings and observations during the three hour or so walk will not be repeated in detail here. Suffice it to say that his observations of injured people, the sights and sounds of jet aircraft and hovering helicopters, his direct observation of where the plane hit the Pentagon, and troops supporting ground-to-air missile launchers on their shoulders left lasting impressions on Claimant resulting in the uncontested diagnosis of PTSD.

4. Once back to his hotel room, Claimant was able to obtain more information regarding the events surrounding 9-11. He learned that his chief of staff and his assistant were also in Washington, D.C. Eventually, Claimant moved from his hotel into the hotel of his chief of staff and they began working on ways to get back to Boise. Employer had made arrangements for them to fly out on Saturday; however, Claimant did not believe it was safe to do so and refused to go. This resulted in a confrontation with the chief of staff that eventually led Employer to not renew Claimant's employment contract. Claimant flew back to Boise on a different flight from a different airport than was arranged for by Employer.

## **DISCUSSION AND FURTHER FINDINGS**

Idaho Code § 72-451 provides:

**Psychological accidents and injuries.** - - Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met:

(1) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by an accident and **physical injury** as defined in section 72-102(18)(a) through 18(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where (i) it results in resultant physical injury so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily recognized and identifiable as having occurred in the workplace, and (iii) it must be the product of a sudden and extraordinary event; and

(2) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from **personnel related action** including, but not limited to, disciplinary action, changes in duty, job evaluation or **employment termination**; and

(3) Such accident and injury must be the predominate cause as compared to all other causes combined of any consequence for which benefits are claimed under this section; and

(4) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense; and

(5) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho workers' compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistics manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist, or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered, and

(6) **Clear and convincing evidence** that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required.

Nothing herein shall be construed as allowing compensation for psychological injuries from psychological causes without accompanying **physical injury**.

This section shall apply to accidents and injuries occurring on or after July 1, 1994, and to causes of action for benefits accruing on or after July 1, 1994, notwithstanding that the original worker's compensation claim may have occurred prior to July 1, 1994.

Emphases added.

An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-

102(18)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in **violence to the physical structure of the body**. Idaho Code § 72-102(18)(c). Emphases added.

5. Defendants argue that the recent Idaho Supreme Court case of *Luttrell v. Clearwater County Sheriff's Office*, 140 Idaho 581, 97 P.3d 448 (2004) is dispositive of the case at hand. In *Luttrell*, the claimant was a dispatcher for the Clearwater County Sheriff's office when she received a 911 emergency call regarding a person who was not breathing. During the course of handling the call, claimant suffered a psychological reaction to the situation and "froze." She was transported to a hospital where she was diagnosed with anxiety and depression as well as sinus tachycardia at the time she was examined. Follow-up examinations confirmed that she suffered from a "nervous breakdown" as the result of an acute anxiety disorder, job related stress, and underlying depression. The Commission held that claimant's case was a "classic mental-mental case" without any physical injury and the claim was barred pursuant to Idaho Code § 72-451. *Id.*, p. 583. The Supreme Court affirmed reasoning that the sinus tachycardia claimant suffered was not a physical manifestation of her dispatching incident in light of the clear and convincing evidence standard mandated by the statute, but was merely a psychological response. Of note, the Commission found that the claimant's heart rate returned to normal after she was removed from the stressful situation.

6. Defendants' reliance on *Luttrell* is well placed. Here, Claimant argues that a rash he developed shortly after the Pentagon attack, a swollen leg apparently from walking back to his hotel, and changes in the volume of hippocampus and amygdala deep within his brain due to his PTSD are physical injuries sufficient to distinguish *Luttrell*.

### The rash.

7. Claimant testified that two days after 9-11, he noticed a strawberry colored bright red rash on the top of his right hand. It did not cause any pain and went completely away by September 16. Claimant sought no medical treatment for the rash and no physician has related the rash to the events of 9-11, or anything else. The Referee finds that Claimant has failed to prove by clear and convincing evidence that the rash was a physical manifestation of Claimant's psychological reaction to 9-11. Further, according to Claimant's own testimony, the rash did not result in violence to the physical structure of his body.

### Swollen leg.

8. Claimant also asserts that his leg swelled during and after his walk back to his hotel and that constitutes the physical manifestation needed to distinguish *Luttrell*. The Referee disagrees. The first record of any mention of Claimant's leg swelling is found in the IME report of psychiatrist Eric F. Holt, M.D., who noted that Claimant informed him of some pain and swelling in his calf. However, no physician has related Claimant's calf or leg swelling to any psychological reaction Claimant had to the events of 9-11. According to Claimant, the swelling went away by September 16. Further, in spite of being given many opportunities to mention leg swelling, Claimant never informed Defendants of the same until he was being cross-examined at the hearing. Claimant testified that he had never had such leg swelling before, yet he also testified that ". . . my right leg swelled up to at least 50% larger **than it usually does** and caused quite a bit of pain." Hearing Transcript, p. 77. His description of the swelling implies that he may have experienced such a swelling in the past that could not have been caused by the events of 9-11. In any event, there are a myriad of reasons why Claimant's leg could have swelled paramount of which Claimant was out of shape and not used to walking as far as he walked on 9-11. The Referee is unable to find by clear and convincing evidence that Claimant's leg swelling was a physical manifestation of his psychological reaction to the events of 9-11.

### **FINDINGS, CONCLUSION, AND RECOMMENDATION - 7**

Central nervous system changes.

9. Claimant has been treated by Scott P. Hoopes, M.D., a psychiatrist. Dr. Hoopes opined that according to the literature, there are certain physical changes caused by PTSD:

Q. (By Mr. Seiniger): Let's talk about them one by one. What physical changes would you expect to see as a result of PTSD?

A. Well, there's fairly good data showing that in post traumatic stress disorder, there's actual changes in the volume of the hippocampus and amygdala which are structures deep within the brain that are highly involved in emotional function and that these changes which include reduced volumes are thought to reduce - - are thought to reflect actual reduction in the nervous tissue. There's actual neurons that degenerate, are no longer present and cannot be recovered.

Dr. Hoopes' Deposition, p. 14.

There are a number of problems with Dr. Hoopes' opinion as it pertains to Claimant. First, he was unable to state whether or not such a change in the volume of the hippocampus or amygdala actually occurred in Claimant. The only way to do so would be to take before and after diagnostic studies like MRI or PET scans. There were no pre-9-11 studies of Claimant so post-9-11 studies would be of no value as there is no baseline within which to compare. Second, according to the deposition testimony of IME psychiatrist Dr. Holt, even if it could be determined that there were such changes in Claimant's central nervous system, two most likely causes would be Claimant's pre-existing major depression and alcohol abuse, not PTSD. Finally, there is no evidence that such a change in volume resulted in violence to the physical structure of Claimant's body. Dr. Hoopes' use of the term "degenerate" when speaking of the loss of neurons implies otherwise. The Referee is unable to find clear and convincing evidence that any change in the structure of Claimant's central nervous system is a physical manifestation of Claimant's psychological reaction to the events of 9-11.

10. The Referee is convinced that Claimant's reaction to what he witnessed, smelled, and otherwise experienced on 9-11, and the days following, has profoundly affected him. What is hard to tease out of all of that is the affect of the disagreement with his superior regarding how

to best get back to Boise and his ultimate termination versus Claimant's reaction to the events of 9-11. Claimant unsuccessfully sued Employer for discrimination in the manner in which he was treated. Virtually all of the mental health professionals involved in Claimant's treatment agree that he cannot move forward with his life until litigation ends. Perhaps now Claimant, who appeared to this Referee to be a talented and valuable employee, can do just that.

### CONCLUSION OF LAW

Claimant has failed to prove by clear and convincing evidence that he is entitled to benefits pursuant to Idaho Code § 72-451.

### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this \_\_30<sup>th</sup>\_\_ day of \_\_June\_\_, 2006.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the \_\_7<sup>th</sup>\_\_ day of \_\_July\_\_, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

W BRECK SEINIGER  
942 MYRTLE ST  
BOISE ID 83702

GARDNER W SKINNER  
PO BOX 359  
BOISE ID 83701-0359

\_\_\_\_\_/s/\_\_\_\_\_

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**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

DAVID S. GEORGIADES,	)	
	)	
Claimant,	)	<b>IC 02-013881</b>
	)	
v.	)	
	)	<b>ORDER</b>
IDAHO DEPARTMENT OF	)	
ENVIRONMENTAL QUALITY,	)	Filed July 7, 2006
	)	
Employer,	)	
	)	
and	)	
	)	
STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants.	)	
_____	)	

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 conclusion 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 conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove by clear and convincing evidence that he is entitled to benefits pursuant to Idaho Code § 72-451.

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

DATED this \_\_7<sup>th</sup>\_\_ day of \_\_July\_\_\_\_, 2006.

INDUSTRIAL COMMISSION

\_\_\_\_/s/\_\_\_\_\_  
Thomas E. Limbaugh, Chairman

UNAVAILABLE FOR SIGNATURE  
James F. Kile, Commissioner

\_\_\_\_/S/\_\_\_\_\_  
R. D. Maynard, Commissioner

ATTEST:

\_\_\_\_/S/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_7<sup>th</sup>\_\_ day of \_\_July\_\_, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

W BRECK SEINIGER  
942 MYRTLE ST  
BOISE ID 83702

GARDNER W SKINNER  
PO BOX 359  
BOISE ID 83701-0359

\_\_\_\_/s/\_\_\_\_\_

ge