



## **CONTENTIONS OF THE PARTIES**

Claimant contends he suffered injury to his lumbar spine when he was struck by a large bucket of concrete on April 9, 2001. He is not yet stable and requires surgery – artificial disc replacement at two levels, L3-4 and L4-5, or, in the alternative, lumbar fusion. He remains temporarily totally disabled until he becomes medically stable. If found stable, he suffers 6% permanent impairment and permanent disability which reaches 70%. He is entitled to benefits for medical care after April 10, 2002, the date of the independent medical evaluation upon which Surety discontinued benefits. Claimant is entitled to future medical benefits including a two-level artificial disc replacement whenever that procedure is approved by the FDA. Claimant is entitled to benefits for retraining and is studying to work in the heating and air conditioning industry.

Defendants contend Claimant was declared stable following IMEs by Dr. Sears on December 4, 2001 and April 10, 2002, and by Dr. Colburn on May 30, 2002. Dr. Colburn performed an IME at Claimant's request. Medical benefits and TTDs were appropriately discontinued upon the opinions of these doctors. Claimant's request for a two-level artificial disc replacement cannot reasonably be considered because the procedure is not available in the United States. Defendants do not dispute the 6% PPI rating stated by Dr. Colburn. Claimant's permanent disability is substantially less than 70%. Finally, while Claimant might benefit from an appropriate retraining program, he has failed to identify one which would yield a job within the restrictions described by Dr. Colburn.

## **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, and vocational rehabilitation consultant Deb Uhlenkott;

2. Claimant's exhibits 1-35 and Defendants' exhibits A-E; and
3. Post-hearing depositions of orthopaedist Robert C. Colburn, M.D., and neurosurgeon Bret A. Dirks, M.D.

### **FINDINGS OF FACT**

1. Claimant is an enrolled member of the Colville tribe of the Nez Perce nation. For most of his adult life he has worked various jobs obtained through the Tribal Employment Rights Office (TERO). On April 9, 2001, he was employed by Employer working a construction project and pouring concrete. He was bent over screeding freshly poured concrete when a bucket of concrete, weighing perhaps 2000 pounds, struck him in the flank and knocked him over. (Screeding is performed by dragging a board across the surface of the wet concrete to make sure its level.) Claimant was not immediately aware of any injury and continued working. He noticed gradually increasing pain throughout the day.

2. Claimant first sought medical attention on April 13, 2001. He visited the Nimiipoo Health Clinic. By preference, he more often saw Roberta Carr, PA-C, but was treated by whomever among the various physicians was available at the time. (Sometimes the record obliterates the physicians' signatures or they are otherwise illegible.) Claimant was diagnosed with left flank pain. He next visited on April 23, 2001 and was similarly diagnosed.

3. Claimant's pain source migrated inexplicably. Indeed, at hearing, he described being struck in the back, near the spine, rather than on either flank.

4. On April 30, 2001, he visited Nimiipoo Health and was diagnosed with *right* flank pain. Physical therapy was prescribed and after several missed appointments and rescheduling attempts, Claimant actually attended 4 physical therapy sessions.

5. On May 24, 2001, Claimant visited Nimiipoo Health complaining of thoracic spine pain. On May 25, 2001, he again appeared requesting a "work excuse for insurance"

purposes. He again reverted to his claim of right flank pain, but included a new complaint of headaches.

6. On June 5, 2001, Claimant underwent T-spine x-rays which showed small disc protrusions at T7-8 and T8-9 “of no clinical significance.” On June 11, 2001, Claimant underwent a CT scan of his brain which showed no abnormalities.

7. On June 21, 2001, orthopaedist Regan Hansen, M.D., examined Claimant and ordered lumbar x-rays which showed some degenerative spurring at L5 but were otherwise normal.

8. On June 25, 2001, a cryptic Nimiipoo Health note records, “LW[null symbol]BS.” This note is not explained in the record or by resort to *Stedman’s Medical Dictionary*, 28<sup>th</sup> ed.

9. On July 22, 2001, a lumbar MRI showed a medium sized herniated disc at L4-5, a moderate sized bulging disc on the left at L3-4, and showed the lumbar spine as otherwise normal.

10. On July 30, 2001, Dr. Hansen interpreted the MRI as showing bulging discs “with no obvious neurologic impingement. It does appear to be degenerative with loss of water.” He continued, “There is no surgical treatment. I would refer him back to his primary care physician, as well as a referral to a neurologist for evaluation of his headaches.”

11. The following day, on July 31, 2001, Nimiipoo Health recorded Claimant’s first complaint of low back pain since the date of the accident. The physician speculated Claimant’s headaches may be related to the medication he was receiving for his back complaints.

12. On September 10, 2001, Dr. Hansen released Claimant to light duty and imposed temporary restrictions for the next two months.

13. On September 25, 2001, neurologist Jean Thomas, M.D., evaluated Claimant’s

complaints of headache and low back pain, and expressed concern about the interaction of Claimant's medications with his alcohol intake.

14. Between November 2001 and March 2002, Claimant attended 12 physical therapy sessions.

15. On February 7, 2002, neurologist William Bozarth, M.D., conducted an electromyogram and nerve conduction velocity study (EMG/NCV) on Claimant. It showed mild slowing associated with the S1 nerve root.

16. On January 14 and February 18, 2002, neurologist William Hill, M.D., examined Claimant. He recommended a restriction of no lifting over 35 pounds and expressed a willingness to consider surgical discectomy if symptoms worsened. At this point, Claimant was complaining of constant low back pain, headaches, and numbness in the first three toes of his left foot.

17. ICRD consultant Lynette Schlader began working with Claimant on February 21, 2002. As Employer was no longer in business, she considered potential retraining including heavy equipment operator, fisheries worker, and auto mechanic programs. Claimant completed flagger training in August 2002. On November 4, 2002, Ms. Schlader recorded, "He states that he is unable to work on his retraining with VR (Nez Perce Vocational Rehabilitation) or finding a job because of his pain level." On December 12, 2002, she closed her file noting, "Based on medical reports, the claimant is stable and capable of working. Services of ICRD have been offered but the claimant believes he is not employable at this time." Similarly, VR closed its file in 2002 asserting Claimant failed to cooperate with attempts to retrain Claimant or return him to work. During most of this time, March through August, Claimant was receiving unemployment benefits.

18. On December 4, 2001, and April 10, 2002, Stephen Sears, M.D., evaluated

Claimant at Surety's request. On both occasions, he found Claimant medically stable without permanent impairment. He did provide temporary restrictions to last 2 months after each visit. He stated, "[S]urgery is certainly not indicated."

19. On May 30, 2002, orthopaedist Robert C. Colburn, M.D., evaluated Claimant at Claimant's request. He found Claimant medically stable with a 6% PPI related to the industrial accident. He restricted Claimant to lifting 35 pounds occasionally with motion restrictions. He opined that despite Claimant's prior history of back pain, no apportionment was appropriate. Later, in November, he declined to approve a job site evaluation (JSE) to allow Claimant to return to work as a concrete finisher. He expressed reservation about a JSE for a flagger job because of the standing involved, although his prior restrictions limited sitting to two hours but did not mention any restriction or limitation for standing.

20. Claimant's prior medical history of low back pain consists of entries in or before 1987 in which Claimant described episodic back pain with activity of one year or several years' duration and a lumbar x-ray showing "very minimal" rotoscoliosis at L4.

21. In July and November 2002, Nimiipoo Health noted new accidents. Claimant struck his knee and back in one, and broke a rib in the other.

22. On May 15, 2003, neurologist Bret Dirks, M.D., began treating Claimant. On examination he noted Claimant described diminished sensation in his whole left leg in a nondermatomal pattern and in his right leg in an L5 nerve distribution.

23. On May 23, 2003, a repeat lumbar MRI showed a new disc protrusion at L5-S1 and unchanged disc bulges at L3-4 and L4-5.

24. On November 12, 2004, Gary Haas, D.O., a pain clinic doctor, examined Claimant and reported no objective diagnostic findings but recommended steroid injections and a possible discogram. Ultimately, Claimant refused to complete the discogram, claiming

it was too painful.

25. On December 14, 2004, Dr. Dirks noted, “He certainly seems to be interested in pursuing surgery at this point, as he has failed all nonsurgical therapies.”

26. On April 21, 2005, Dr. Dirks noted, “Unfortunately he probably is not a candidate for an artificial disc replacement at this time.” Dr. Dirks was considering surgical fusion to be an option. By May 30, 2005, he expressed a willingness to consider a two-level artificial disc replacement “when it becomes available.”

27. On May 16, 2005, a lumbar CT scan showed disc bulges at L3-4, L4-5, and L5-S1, all without stenosis or compressive lesions.

28. On September 8, 2005, orthopaedist Gregory Dietrich, M.D., concurred that consideration of an artificial disc replacement was reasonable. However, on November 23, 2005, Dr. Dietrich opined Claimant “may at some point require surgery, but hopefully not.”

29. On January 6, 2006, Claimant was evaluated by vocational consultant Deb Uhlenkott. She opined Claimant 70% disabled, but also opined Claimant’s HVAC retraining program was inconsistent with his medical restrictions.

30. In depositions, Dr. Dirks opined Claimant’s potential for pain relief following surgery was about 50%. Dr. Colburn opined it much less than 50%.

### **Discussion and Further Findings**

31. **Medical Stability and Temporary Disability.** IME physicians chosen by each party independently opined Claimant was medically stable at the time of their evaluations. While it appears clear that Dr. Sears’ temporary restrictions were merely a suggestion for gradual return to full work activity, they do tend to undercut the concept of medical stability. Dr. Colburn’s date of May 30, 2002 is the appropriate date upon which Claimant should be deemed medically stable. Drs. Dirks and Dietrich did not appear in this matter until more than

a year afterward. The MRIs and Claimant's pre-accident history show Claimant has long had a progressive degenerative condition which continues as shown by the new L5-S1 disc bulge. However, there is not a persuasive opinion or other evidence to suggest that Claimant's degenerative condition was exacerbated or accelerated as a result of the accident. At most, Claimant's degenerative condition predisposed him to suffer the herniated L4-5 disc, which disc herniation was caused by the accident. The MRIs do not show the L4-5 herniation has worsened over time.

32. Claimant is entitled to TTD benefits through May 30, 2002, but not thereafter.

33. **Medical Care.** Claimant is entitled to medical care through May 30, 2002. Subsequent medical care and proposed future medical care has not been shown to be a reasonable response to any injury resulting from the accident. Moreover, Claimant is asking the Commission to approve a procedure that may not yet be legally performed in the United States. Such medical care is unreasonable.

34. Moreover, Dr. Dirks' and Dietrich's opinions about surgery are tepid at best, and based primarily upon Claimant's subjective reports of his current pain and his reported history of pain. The opinions of Drs. Hansen, Sears, and Colburn are nearer in time to the accident and to relevant medical care. Claimant testified that Dr. Dirks or Dietrich assured him he would be pain free after disc replacement surgery. Clearly Claimant misunderstood. The Commission is unaware of any competent medical professional being willing to offer an unequivocal guarantee. Moreover, Dr. Colburn persuasively opined that complicating factors – Claimant's smoking, prior alcohol abuse, and psychological factors – diminish the chance of a successful surgery of any kind.

35. **Permanent Impairment.** Dr. Colburn's 6% PPI rating is accepted by both parties and is not contradicted in its amount by any physician. Claimant is entitled to

PPI rated at 6% of the whole person attributable to the industrial accident.

36. **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). Here, Claimant retained a vocational expert at the 11<sup>th</sup> hour to generate a disability analysis. Essentially, Ms. Uhlenkott assumed an equal 20% of jobs exist for each exertional level, and determined Claimant was unable to perform three and one-half exertional levels. Her analysis is not supported by the evidence. It appears she simply was not given adequate time to perform a credible analysis.

37. Further, the record shows Claimant made meager attempts to cooperate with physical therapy and with vocational counselors at a time when it could have done him the most good. When Ms. Uhlenkott cited Claimant's protracted absence from the labor market as a factor in her disability analysis, she ignored the fact that he declined to cooperate in attempts to return him to the labor market. Additionally, Claimant retains the network for employment upon which he has relied for his entire adult life – TERO.

38. Claimant showed he suffers some permanent disability in excess of impairment. He has medical restrictions and Dr. Colburn has disapproved some jobs and expressed reservations about others. However, considering all factors, including Claimant's age, education, local labor market, medical and other non-medical factors, Claimant failed to show he suffers significant permanent disability related to the accident. Permanent disability was not established above 15% inclusive of PPI.

39. **Retraining.** Claimant's recent interest and attempt at re-establishing his life are commendable. However, Claimant failed to show the HVAC program is a realistic retraining for him. He failed to cooperate with ICRD when other retraining programs were suggested.

No realistic retraining program has been identified as one Claimant is willing to undertake. Claimant failed to show he is entitled to retraining benefits.

### CONCLUSIONS OF LAW

1. Claimant suffered a compensable accident and injury. He is entitled to PPI rated at 6% 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 either TTD or medical benefits after May 30, 2002.
3. Claimant showed he is entitled to permanent disability rated at 15%, inclusive of PPI.
4. Claimant failed to show he is entitled to an award of retraining benefits.

### 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 12<sup>TH</sup> day of July, 2006.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

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

### CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>TH</sup> day of July, 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:

Christopher Caldwell  
P.O. Box 607  
Lewiston, ID 83501

Glenna M. Christensen  
P.O. Box 829  
Boise, ID 83701

db

/S/ \_\_\_\_\_



4. Claimant failed to show he is entitled to an award of retraining benefits.

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

DATED this 27<sup>TH</sup> day of JULY, 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 27<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:

Christopher Caldwell  
P.O. Box 607  
Lewiston, ID 83501

Glenna M. Christensen  
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Boise, ID 83701

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/S/ \_\_\_\_\_