

ISSUE

The sole issue to be decided as a result of the hearing is whether, and to what extent, Claimant is entitled to permanent partial disability (PPD) benefits in excess of his permanent partial impairment (PPI).

CONTENTIONS OF THE PARTIES

Claimant contends he is entitled to PPD benefits of between 42.5% and 75% of the whole person when considering medical and non-medical factors. Defendants concede that Claimant may be due some PPD, but more in the neighborhood of 10%.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing;
2. Claimant's Exhibit 1 admitted at the hearing;
3. Defendants' Exhibits A-C admitted at the hearing; and
4. The post-hearing deposition of Stephan A. Wasilewski, M.D., taken by Claimant on June 13, 2006.

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 29 years of age and resided in Jerome at the time of the hearing. His ability to understand and speak English is limited; he understands English better than he speaks it.

2. Claimant was born and raised in Mexico and came to the United States when he was 19 years of age. He has primarily worked in the dairy industry as a milker and general laborer.

3. On June 27, 2002, Claimant injured his right shoulder when a cow pinned him against a bar in the stall where he was working. He has had three surgeries on his right shoulder.

4. On September 27, 2004, between his second and third surgery, his treating physician assigned Claimant a 4% whole person impairment rating. A different physician performed the third surgery but did not increase the 4% rating.

DISCUSSION AND FURTHER FINDINGS

“Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. “Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the

FINDINGS, CONCLUSION, AND RECOMMENDATION - 3

Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

5. Claimant’s treating physician has assigned the following physical restrictions: no repetitive overhead lifting and occasional lifting of up to 100 pounds below mid-chest height. Claimant can no longer milk, as he is unable to perform the repetitive tasks required.

6. According to his Complaint, at the time of his injury, Claimant was earning \$2,300.00 a month. At the time of the hearing, Claimant was earning \$1,800.00 a month as an “outside worker” at another dairy. His duties include: “I check the cows. I help calved [*sic*], with calving. I give them injections and give them medicine when they’re sick. Sometimes I scrape the corrals and clean them with a loader.” Hearing Transcript, p. 34. Claimant testified that a full-time milker could be expected to earn \$2,400.00 a month.

7. When considering the medical factor of Claimant’s 4% whole person impairment and the non-medical factors of his limited English-speaking capabilities, his limited education, and limited work experience, and his loss of income from being unable to continue milking, the Referee finds that Claimant has incurred a whole person disability of 25% including his 4% PPI. Claimant’s concern that he will have difficulty finding employment in the event his current job is

terminated is speculative. His experience in dairy work should make him readily employable and the only restriction that he has is no repetitive overhead work with his right hand/shoulder; he is otherwise healthy.

CONCLUSION OF LAW

1. Claimant is entitled to permanent partial disability benefits equating to 25% of the whole person inclusive of his 4% whole person permanent partial impairment.

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 __30th__ day of __October__, 2006.

INDUSTRIAL COMMISSION

____/s/_____
Michael E. Powers, Referee

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _7th_ day of __November__, 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:

JEFF STOKER
PO BOX 1597
TWIN FALLS ID 83303-1597

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

____/s/_____

ge

____/s/_____
James F. Kile, Commissioner

____/s/_____
R. D. Maynard, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __7th__ day of __November__, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

JEFF STOKER
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GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

____/s/_____

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