

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD BARNHARD,)
)
 Claimant,)
)
 v.)
)
 EDWARD HUGHES,)
)
 Employer,)
)
 and)
)
 TRANSGUARD INSURANCE)
 COMPANY OF AMERICA,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2005-001662

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

April 24, 2007

INTRODUCTION

The Industrial Commission assigned this matter to Referee Lora Rainey Breen, who conducted a hearing in Idaho Falls on January 4, 2007. Claimant appeared *pro se* and Max M. Sheils, Jr., represented Defendants. The parties presented oral and documentary evidence at hearing, took no post-hearing depositions, and provided closing oral arguments at hearing in lieu of post-hearing briefs. The matter came under advisement on February 12, 2007.

ISSUE

The sole issue to be determined at this time is whether Claimant is medically stable from the industrial accident, and if so, the date thereof. At hearing, Claimant withdrew the issue relating to medical care because Surety was currently paying all medical benefits.

CONTENTIONS OF THE PARTIES

Claimant asserts he is not medically stable from his industrial accident due to debilitating headaches for which he is receiving medical benefits.

Defendants contend Claimant has not met his burden of showing by expert medical evidence that he is entitled to total temporary disability benefits.

EVIDENCE CONSIDERED

The record in the present matter consists of the following:

1. The hearing testimony of Claimant and his wife, Darla Barnhard; and,
2. Claimant's Exhibits 1 through 4 admitted at hearing.

After considering all of the evidence and arguments of the parties, the Referee submits the following Findings of Fact and Conclusion of Law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 62 years of age and had worked as a truck driver since the early nineties. On February 5, 2005, he was involved in a rollover truck accident in Marion, Illinois, while working for Employer. He lost consciousness for several minutes and was hospitalized for five days. Along with orthopedic injuries, Claimant sustained a head injury noted to involve a skull fracture and right subdural hematoma.

2. The medical records relating to Claimant's initial treatment are not in evidence. Apparently, all medical bills have been, or are being, paid by Surety.

3. Following the accident, Claimant has suffered from headaches, which he describes as debilitating. He testified as to the onset and nature of his headaches at hearing:

Okay. The headaches were almost immediate. I say "almost" because I cannot focus on a, on a day 'cause I was hurting pretty bad in the hospital in Saint Louis. So – but it was actually after – I can, I can say better – that after I had left Saint Louis, the university hospital there, that I was starting to get these tremendous

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headaches.

And what they would do is it just – it came around. It would start mainly up in the frontal portion of my forehead, and they would just go around to the back of my head. And the top of my head just almost felt like a volcano. It was trying to get out. It was very, very tender.

But at that time, and even to today, not as bad I – there's parts of my, top of my head, skull, whatever, that I have no feeling. I do feel pain, but that's about it.

Transcript, pp. 24-25. On rare occasions, Claimant's headache becomes so intense he can barely open his eyes. Usually, the episodes are bad enough to require him to sit or lay down for 30 minutes to an hour before he can adequately function again.

4. On June 15, 2006, psychiatrist Cheri Wiggins, M.D., examined Claimant at Surety's request.¹ She noted chief complaints of headache, neck and shoulder soreness, numbness in the right thigh, thought problems, and vision problems. She recorded the debilitating nature of the headaches, which Claimant described as occurring daily, and noted Claimant had not seen anyone specifically to address them. She also described vision problems consisting of pricks of light and objects coming in front of him and then dropping off to the side. As for the thought problems, Claimant indicated those had "gotten better." Exhibit 2. Dr. Wiggins concluded, "With the exception of his headaches, yes Mr. Barnhard has reached maximum medical improvement." *Id.* She provided impairment ratings for his cervical spine and cognitive difficulties and recommended Claimant see a neurologist for his headaches. Regarding return to work, Dr. Wiggins opined Claimant could return to gainful employment but would function best at repetitive tasks, should not be driving, and also had some physical limitations with respect to stooping, bending, and twisting.

5. On July 14, 2006, Claimant saw neurologist Stephen Vincent, M.D., regarding his

¹ She had apparently also seen Claimant for an IME in November 2005, but those records are not in evidence.

headaches. Dr. Vincent assessed intense pressure headaches involving the entire top of the head. He noted, “This combined with the visual changes makes me wonder about elevated intracranial hypertension.” Exhibit 2. He recommended a lumbar puncture to help determine opening pressure and also requested a brain MRI if one had not already been done. Claimant underwent these tests on August 1, 2006, and July 20, 2006, respectively, with normal results.

6. On July 25, 2006², Surety’s adjuster wrote to Claimant and indicated Claimant’s temporary total disability benefits would terminate as of that date based on Dr. Wiggins’ report and the finding that he had reached maximum medical improvement for all conditions arising from the industrial injury “except for your headaches.” Exhibit 1. The adjuster continued, “With regards to the headaches and treatment with Dr. Vincent, this will continue to be covered until Dr. Vincent determines the cause and the treatment for same.” *Id.*

7. Claimant saw Dr. Vincent into at least August 2006. Dr. Vincent’s medical records of August 31, 2006 described the “next step” as considering a pain specialist and/or pain clinic. At the time of hearing, Claimant was continuing to receive treatment for his headaches. He was seeing a physician at a pain clinic in Blackfoot and taking Percocet for the pain.

8. Claimant has not sought work because of his headaches: “I didn’t feel I could do a, an employer justice if – you know, because I – like I say, I like I say, I don’t know when they’re going to come on. I don’t know the severity at the time.” Transcript, p. 46. Claimant’s wife also testified as to the debilitating nature of Claimant’s headaches and said he cannot drive when a severe headache comes on; he has to pull off the road and wait it out. The testimony of Claimant and his wife is uncontradicted and credible.

² The Referee notes that this was prior to completion of the testing requested by Dr. Vincent.

DISCUSSION AND FURTHER FINDINGS

Medical Stability. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

Furthermore, once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to temporary disability benefits unless and until such evidence is presented that he has been released for light duty work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light work release and which employment is likely to continue throughout his or her period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986).

The medical evidence admitted in this matter establishes Claimant is *not* at maximum medical improvement with respect to his headaches³, a condition covered by Surety as related to his industrial accident. He is still in a period of recovery and receiving continuing treatment. Although Dr. Wiggins opined Claimant could return to gainful employment, it is clear she deferred evaluation of his headaches to a neurologist. She addressed impairment as to orthopedic and cognitive issues only and was asked to address only permanent restrictions.

³ When Dr. Wiggins states that Claimant has reached maximum medical improvement *except* for his headaches, one can only conclude that he is *not* at maximum medical improvement with respect to that condition.

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of April, 2006, a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States mail upon:

RICHARD BARNHARD
PO BOX 34
IRWIN ID 83428

MAX M SHEILS JR
PO BOX 388
BOISE ID 83701

jkc

/s/_____

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ORDER

April 24, 2007

Pursuant to Idaho Code § 72-717, Referee Lora Rainey Breen submitted the record in the above-entitled matter, together with her 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 recommendations of the Referee. The Commission concurs with these recommendations. 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 is not medically stable from his industrial accident.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 24 day of April, 2007.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ R. D. Maynard, Commissioner

/s/ Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __24__ day of __April____, 2007, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

RICHARD BARNHARD
PO BOX 34
IRWIN ID 83428

MAX M SHEILS JR
PO BOX 388
BOISE ID 83701-0388

jkc

/s/