

ISIF contends Claimant has made inconsistent representations about his abilities and job search. His vocational expert has provided inconsistent opinions about his disability. Claimant is not totally and permanently disabled under any analysis. *Arguendo*, even if he is he doesn't meet the Idaho Code § 72-332 criteria for imposition of liability to ISIF.

EVIDENCE CONSIDERED

The record in the instant case consists of:

1. Oral testimony at hearing of Claimant;
2. Joint Exhibits 1 – 23 (including the added page “14a” to Exhibit 13); and
3. The depositions of Claimant, orthopedist Joseph Petersen, M.D., vocational experts Nancy J. Collins, Ph.D., and Douglas N. Crum, CDMS.

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

1. Claimant worked as a security officer for Pinkerton. He drove a vehicle around a large facility comprised of several buildings, frequently exiting to walk to security clocks to establish his patrols.

2. Late night on December 26, 2000, he slipped and slid down a slope but did not fall. He jarred his back. He notified his employer and sought medical treatment the following day. He claimed injuries to his neck, shoulders, and low back.

3. Diagnosed as an acute low back strain, X-rays and an MRI since have shown significant degenerative changes in his spine and hips without evidence of acute injury. The MRI noted Claimant's L5-S1 disc “slightly” compressed a nerve root, but this was considered nondiagnostic of acute injury. Physician's assistant Joseph Anderson, PA-C, under Mark Walker, D.O., treated Claimant twice, about two weeks apart.

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4. Claimant visited neurosurgeon Robert G. Peterson, M.D., on February 22, 2001. Straight leg raising was negative bilaterally. Claimant reported stocking hypesthesia in his lower extremities. Dr. Peterson did not recommend surgery.

5. Claimant first visited orthopedist Joseph Petersen, M.D., on May 4, 2001. Straight leg raising was dramatically positive. Dr. Petersen felt the “slightly” bulging disc was the source of Claimant’s complaints and linked it causally to Claimant’s report of the accident. Dr. Petersen opined Claimant was medically stable as of July 17, 2001. On September 10, 2001, Dr. Petersen confirmed Claimant was medically stable and rated his impairment at 5%. He opined Claimant’s lifting restriction at 30 pounds and recommended he no longer work as a security guard.

6. Vocational evaluations were not performed until June 10, 2004 by Doug Crum and May 16, 2006 by Nancy Collins. Both agreed his disability was about 35%. In 2006, both agreed he had probably become totally and permanently disabled.

7. Dean Mayes performed a functional capacity evaluation (“FCE”) on October 21, 2004. He opined Claimant could not perform even sedentary work on a full-time basis.

Vocational and Disability Factors

8. Claimant was born April 16, 1936. His age is his primary non-medical disability factor. On the date he reached medical stability he was 65 years old. He is intelligent and possesses transferable skills. No other non-medical factors are significant for disability analysis.

9. Claimant was adjudicated with a prior permanent impairment through the California workers’ compensation system. He suffers from diabetes and degenerative spine disease.

Discussion and Further Findings

10. **Permanent disability.** Permanent disability and its evaluation is defined by statute. Idaho Code §§ 72-423, -425, -430. The factors pertaining to disability are considered at the time of medical stability. Thus, the impact of Claimant's age and other factors are relevant as of the date of medical stability, July 17, 2001.

11. 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).

12. 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.

13. Claimant is not 100% disabled as of the date of medical stability. Vocational experts opined his disability at 35%.

14. At hearing, Claimant's demeanor was entirely credible. Such a demeanor no doubt was a significant asset in his career as a corrections officer. Moreover, his report of back pain at hearing was consistent with his posture and presentation. Without watch or prompt, he stood every 20-30 minutes during the hearing to relieve discomfort.

15. However, diagnostic studies do not support a finding of acute injury. Doctors' opinions which causally relate his claimed symptoms to an unwitnessed accident rely upon Claimant's description. Early examinations show inconsistent findings. These suggest Claimant was overreporting his symptoms, such as stocking hypesthesia and inconsistent straight leg raising. The medical records suggest that Claimant suffered a minor strain and returned to baseline without additional permanent impairment within a couple of weeks of the accident. Unfortunately, "baseline" consisted of a degenerated spine. However, the Commission will not speculate upon what a doctor might have said if asked. Dr. Joseph Petersen rated Claimant at 5% PPI as a result of the accident "by history." Thus, Claimant established he suffered permanent impairment as a result of the accident.

16. Claimant returned to work for Pinkerton. After termination in August or September 2001, Claimant worked briefly as a personal caregiver for two or three months. That work ended, not for any reason related to impairment or disability, but because the client's circumstances changed. Claimant has not worked elsewhere since.

17. ISIF persuasively raises the question of Claimant's motivation to work. His testimony about his job search varies inconsistently. It is unsupported by credible documentation. Claimant retired in California in 1984 for medical reasons. He worked one job for about two months. He remained retired for a significant period of time after moving to Idaho in 1993. He began to work in Idaho only to appease his mother in-law. His age on the date of medical stability ameliorated his need to work a job to keep family harmony.

18. Claimant was unable to testify in detail about any job search. He clearly considered himself to be retired.

19. Claimant did not conduct a reasonable job search. Others did not conduct one on his behalf. Claimant failed to show it likely that an attempt at a job search would be futile.

20. Claimant failed to show he meets the requirements of any of the three criteria to establish he is an odd-lot worker.

21. All other issues are moot.

CONCLUSIONS OF LAW

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

2. ISIF bears no liability as a result of the accident; and

3. All other issues are moot.

RECOMMENDATION

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

DATED on this 23RD day of March, 2007.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 6TH day of APRIL, 2007, 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:

Dennis R. Petersen
P.O. Box 1645
Idaho Falls, ID 83403-1645

Paul B. Rippel
P.O. Box 51219
Idaho Falls, ID 83405-1219

db

/S/ _____

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

DATED this 6TH 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 6TH 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:

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