

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, his supervisor Kal Wilkinson, and vocational consultant Doug Crum;
2. Claimant's Exhibits 1 – 9; and
3. Defendants' Exhibits 1 – 13.

After having fully considered the above evidence and arguments of the parties, along with the Recommendation of the Referee, the Commission hereby issues its decision in this matter.

FINDINGS OF FACT

1. Claimant has worked for Employer since 1988. On December 2, 2003, he suffered an industrial accident that injured his back. He received medical treatment. His TTD was paid.

2. After he achieved medical stability, medical restrictions against lifting over 40 pounds repetitively and never over 50 pounds were imposed. Claimant was rated at 10% PPI. The PPI was paid.

3. Claimant returned to work for Employer at a different position that better accommodated his medical restrictions. Claimant and his coworkers act as a team and help each other as needed. Thus, Claimant is able to self-modify his job.

4. Employer does not reduce an employee's wage because of a position change. As a result, Claimant is paid more than his current coworkers. His wage is frozen until his coworkers, through raises, reach a comparable wage.

5. Claimant is eligible to apply and, because of his seniority, would be a strong candidate for other less demanding jobs as Employer makes them available.

FINDINGS OF FACT, CONCLUSIONS, AND ORDER - 2

6. Doug Crum evaluated Claimant's permanent disability at the request of Defendants. Mr. Crum not only reviewed Claimant's medical records, but also Employer's personnel records and payroll and income information. He also interviewed both Claimant and Employer. Mr. Crum opined that as a result of restrictions associated with his back injury and surgery, Claimant suffered a loss of access to approximately 18% of the labor market. Mr. Crum further determined that, with his current skills, Claimant could earn at least 85% of his time of injury wage in competitive employment. Finally, Mr. Crum concluded:

In my professional opinion, based on all of the foregoing, it is reasonable to propose that Mr. Scott Ellis has sustained permanent partial disability, inclusive of permanent partial impairment, of not more than 20%. That level of disability would compensate Mr. Ellis for the loss of access that he may have experienced due to reduced physical capacities, and also for the theoretical loss of wage earning capacity [] he might experience in competitive employment.

Claimant's Exhibit 2, p. 20.

7. Claimant was born in 1963. He graduated from high school. He has no additional education. Claimant has a good work history and possesses some transferable skills. Claimant has a pre-existing left knee condition for which he has undergone surgery and wears a knee brace as needed. There is no indication in the medical records that Claimant's knee condition required any accommodations by Employer.

DISCUSSION AND CONCLUSIONS

8. "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 functional or marked change in the future can be reasonably expected. Idaho Code § 72-423. An "evaluation of permanent disability" is an appraisal of the claimant's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors provided for in Idaho Code § 72-

430. Idaho Code § 72-425.

9. The burden of proof is on the claimant to prove the existence of any disability in excess of impairment. Seese v. Ideal of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986). Consideration should be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographic area considering all the personal and economic circumstances of the employee. Idaho Code § 72-430(1).

10. Wage earning capacity may also be considered. Baldner v. Bennett's, 103 Idaho 458, 649 P.2d 1214 (1982). "The only requirement is that the Commission's comparison of pre-injury and post-injury income levels 'accurately reflects [a claimant's] ability to engage in gainful activity.'" McClurg v. Yanke Machine Shop, Inc., 123 Idaho 174, 176, 845 P.2d 1207, 1209 (1993). "The Commission may not consider such increases where they are speculative and unsupported by law." Reiher v. American Fine Foods, 126 Idaho 58, 61, 878 P.2d 757, 760 (1994).

11. When Claimant reached medical stability following his December 2003 industrial injury permanent medical restrictions were imposed. Claimant was advised against lifting over 40 pounds repetitively and was warned to never lift over 50 pounds. Although Claimant continues to work for Employer, he now holds a different position that better accommodates his medical restrictions. Mr. Crum opined that, as a result of restrictions associated with Claimant's back injury, he suffered a loss of access to approximately 18% of the labor market.

12. Because Employer does not reduce an employee's wages when a change of position occurs, Claimant's wage is higher than that of his new similarly situated coworkers. As a result, his wage is frozen until they "catch up." It, then, can be inferred that Claimant's more accommodating position with Employer does not warrant the same rate of pay that Claimant received in his time-of-injury position. It is not mere speculation that, regardless of his

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ____26th day of ____April ____, 2007, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon each of the following:

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_____/s/_____
