

CONTENTIONS OF THE PARTIES

Claimant sustained an injury to his back. After surgery he returned to work briefly and was unable to perform fully. Employer fired him. He is now significantly disabled.

Defendants agree that Claimant had a work-related injury and resulting permanent impairment. Claimant's permanent disability is related in part to his preexisting degenerative condition. Permanent disability related to the accident, based upon objective factors, is small.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and his wife;
2. Claimant's Exhibits 1 – 3;
3. Defendants' Exhibits 1 – 30; and
4. Posthearing depositions of psychiatrists Allen M. Weinert, Jr., M.D., and Michael Sant, M.D., neurosurgeon Paul Montalbano, M.D., psychologist Robert F. Calhoun, Ph.D., physical therapist Gary Lusin, and vocational experts Herbert G. Keating and Nancy Collins, Ph.D.

All objections raised in the depositions are overruled, except that objections to the exhibits to Dr. Collins' deposition are sustained. After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

The Accident

1. Claimant began working for Employer in April 2001. On May 9, 2002, he suffered an industrial accident that injured his back. Claimant was moving a residential propane tank attached to a makeshift crane when he fell into the ditch for the gas line. He experienced immediate low back pain into his upper left leg. He notified Employer and sought medical treatment.

2. Surety accepted the claim and paid TTD benefits.

Medical Care

3. Initially, Claimant sought chiropractic care. On May 10, 2002, he reported the accident and symptoms. He also reported a similar episode of symptoms occurring about three weeks prior. These had nearly resolved but were reagravated by the accident.

4. A June 19, 2002 MRI showed moderate multilevel degenerative disease with a disc bulge at L4-5 which potentially caused radiculopathy.

5. John E. Bishop, M.D., treated Claimant conservatively and noted gradual improvement. On July 18, 2002, Dr. Bishop recommended surgery.

6. Surgery was performed on August 19, 2002. Claimant returned to light work after about three weeks, but began to overexert himself at work. Dr. Bishop recommended Claimant consider a job change. Dr. Bishop later recommended physical therapy and an industrial corset for work. He emphasized Claimant should work within his restrictions.

7. On April 2, 2003, Dr. Bishop opined Claimant was stable and working at full duty with some lingering symptoms. In response to an April 21 letter, Dr. Bishop rated Claimant at 13% PPI with a 60-pound lifting limit and avoidance of certain motions on a frequent basis and avoidance of prolonged standing as restrictions.

8. On June 18, 2003, Dr. Bishop noted continuing symptoms which were exacerbated by carrying a toolbox up a flight of stairs.

9. A June 26, 2003 MRI showed no recurrent disc herniation and reconfirmed the degenerative condition with mild osteoarthritis. An EMG showed mild chronic right L5 radiculopathy without recent changes. Dr. Bishop referred Claimant to Dr. Moreland for pain management.

10. Dr. Moreland performed a pair of epidural injections. These increased his pain.

11. On September 15, 2003, Paul J. Montalbano, M.D., treated Claimant at Surety's request. Dr. Montalbano reported a history of slipping in the shower five weeks earlier. X-rays and a CT myelogram showed the disc disease with bulging lumbar discs as before, without vertebral misalignment or undue motion. A bone scan showed mild degenerative changes. Dr. Montalbano opined Claimant did not need surgery and suggested a psychological assessment and recommended a second opinion from Timothy Floyd, M.D.

12. Dr. Floyd evaluated Claimant on October 10, 2003. He found mild abnormalities consistent with Claimant's history of back pain. He did not recommend surgery. He opined Claimant was not stable, but should become stable by November 1. He recommended Claimant consider seeking a lighter job. He concurred with Dr. Bishop's PPI rating and restrictions, opined no new PPI existed, and opined no apportionment was appropriate.

13. Dr. Montalbano concurred with Dr. Floyd's opinions and restrictions.

14. On October 10, 2003, Robert F. Calhoun, Ph.D., performed a psychological evaluation. Claimant reported he had not worked since August 2003 and did not think he was able to do that job anymore.

15. On March 20, 2005, Anthony Konecny, M.D., evaluated Claimant for purposes of Social Security disability eligibility. He opined it was "impossible" for Claimant to find work or be retrained.

16. On July 25, 2006, Claimant was evaluated by Dr. Montalbano, Michael Sant, M.D., and Dr. Calhoun at Defendants' request. They opined his disability conviction was not supported by objective findings and that he was stable and able to work under the restrictions previously given by Dr. Bishop.

17. On August 15, 2006, Claimant was evaluated (FCE) by physical therapist Gary Lusin at Claimant's request. He opined Claimant was capable of light work two to three hours per day and that Claimant over perceived the extent of his disability.

18. On October 4, 2006, physiatrist Allen M. Weinert, Jr., M.D., evaluated Claimant at Claimant's request. He opined Claimant was stable and capable of light work on a part-time basis.

19. On November 3, 2006, vocational consultant Herbert Keating evaluated Claimant at Claimant's request. He opined that using Dr. Weinert's assessment Claimant was 95% disabled. Using Dr. Bishop's restrictions, Claimant was 45% disabled.

20. On November 26, 2006, Nancy Collins, Ph.D., evaluated Claimant at Defendants' request. She opined Claimant's loss of market access under Dr. Bishop's restrictions at 20% and under Dr. Weinert's at 47%. Considering potential wage loss as well, she opined his overall disability at 25-50% depending upon which restrictions were considered. These numbers would be higher if he could find only part-time work.

Prior Medical Care

21. Claimant's medical records are available from 1987 forward. He was treated with prescription medication for anxiety-related symptoms. These affected his ability to work in 1998. In 1998 these symptoms were first diagnosed as depression. He did not complain of low back pain.

Non-Medical Factors

22. At the time of the accident, Claimant was 40 years old.

23. Claimant's work history primarily involves manual labor. He has also owned a restaurant and performed managerial duties.

24. Claimant returned to work for Employer but was unable to perform the heavy work. Eventually, after Employer changed ownership, Claimant was terminated.

25. ICRD assisted Claimant with his initial return to Employer and later regarding work options.

26. Montana Vocational Rehabilitation Services Program (MVR) assisted Claimant. In his application for services dated December 2, 2004, Claimant reported his restrictions at lifting 25 pounds, no bending or stooping, and limited standing and sitting. Other history Claimant provided was also inconsistent with the medical records in evidence. MVR assisted Claimant in obtaining Social Security disability benefits.

DISCUSSION AND FURTHER FINDINGS OF FACT

27. **Causation.** Claimant suffered a herniated L4-5 disc as a result of the industrial accident. Although radiological evidence showed a degenerative disc condition, there are no medical records to support that this condition was symptomatic or required any medical care before the accident. The record shows no basis which would require apportionment under Idaho Code § 72-406. Claimant continues to suffer low back pain and intermittent radiculopathy.

28. **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). Wage earning capacity may be considered. Baldner v. Bennet's, 103 Idaho 458, 649 P.2d 1214 (1982). Wage earning capacity may not be the sole factor considered in determining permanent disability. Loya v. J.R. Simplot Co., 120 Idaho 62, 813 P.2d 873 (1991).

29. Permanent disability is a question of fact, and the Commission is the ultimate decision maker regarding questions of fact. Urry v. Walker & Fox Masonry, 115 Idaho 750,

769 P.2d 1122 (1989); Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975).

30. Claimant's presentation at hearing was entirely credible. He began shifting his posture in the witness chair after about 10 to 15 minutes, but appeared to be minimizing his physical responses to the increasing discomfort of sitting during questioning. He stood briefly after about 30 minutes of sitting.

31. The medical records as a whole demonstrate that Claimant has become more and more convinced that his lingering back pain is profoundly debilitating. This conviction has increased, particularly after Employer was unable to eliminate heavy lifting from Claimant's job and ultimately fired him. Whether a true clinical depression or a situational frustration, Claimant's mental state has impacted his perceptions of his ability to work.

32. As time has progressed, Claimant's conviction that he is disabled has hardened into a certainty in his own mind. That conviction, coupled with the deconditioning that accompanies his inertia, has decreased his physical abilities over time. Although the resulting disability numbers show wide variation, all physicians are consistent in opining that Claimant has residual symptomatology from the accident and surgery.

33. The date of medical stability is the date upon which an assessment of the medical factors of permanent disability apply. Thus, Dr. Bishop's restrictions given in April 2003 are the appropriate basis for assessing disability. Considering all statutory and other factors, Claimant's disability is nearer the lower end of Dr. Collins' assessment.

34. Claimant established he suffered a permanent disability of 30%, inclusive of PPI.

CONCLUSIONS OF LAW

1. Claimant's herniated L4-5 disc is causally related to the subject accident;

2. No basis for apportionment under Idaho Code § 72-406 was established;
3. Claimant's permanent disability should be rated at 30% of the whole person, inclusive of the 13% whole person permanent impairment;

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 9TH day of July, 2007.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27TH day of JULY , 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:

Richard S. Owen
P.O. Box 278
Nampa, ID 83653

James A. Ford
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Boise, ID 83701-1539

db

/S/ _____

of the whole person, inclusive of the 13% whole person permanent impairment.

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

DATED this 27TH day of JULY , 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 27TH day of JULY , 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Richard S. Owen
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ORDER - 2

db

/S/ _____

ORDER - 3