



c. Attorney fees.

The Notice of Hearing identified a retraining issue which was withdrawn by Claimant.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he suffered a compensable accident at work when a car backed into him on May 2, 2005. He injured his low back and neck. He is entitled to benefits. His PPI and disability should not be apportioned because his preexisting spinal arthritis was asymptomatic at the time of the accident. Employer and Surety unreasonably denied his claim.

Defendants contend Claimant has been paid in full for his medical and TTD benefits. His PPI of 1.5% related to the accident has been paid. The accident did not cause the condition for which Claimant seeks additional benefits. Defendants acted reasonably at all times.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, coworkers Jeffrey Johnson, Travis White, Scott Phipps, and Janet Cliff;
2. Claimant's Exhibits 1 – 16;
3. Defendants' Exhibits 1 – 18; and
4. Post-hearing depositions of physiatrists, Michael Gibson, M.D., and Michael Sant, M.D., and neurologist Michael O'Brien, M.D.

All objections made during posthearing depositions are overruled. 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**

1. Claimant worked as a car salesman for Employer for four months when, on May 2, 2005, a coworker began releasing the brake on a Hyundai XG350 which was idling in reverse gear. The car rolled backward no more than five feet. Claimant screamed.

The coworker immediately reapplied the brake. The parties agree that the car's rear bumper or trunk lid touched Claimant and that this constituted a compensable accident.

2. Claimant immediately sought medical attention and complained of low back, left hip, neck, and bilateral shoulder pain. Michael Gibson, M.D., examined Claimant thoroughly and took X-rays. Apart from subjective mild tenderness, Dr. Gibson found no abnormality caused by recent acute injury – no cuts, no scrapes, no bruises. X-rays were similarly negative, although they did show degenerative spine and disk disease and an old fracture of Claimant's tailbone. Dr. Gibson diagnosed soft tissue strains.

3. Claimant received extensive conservative treatment from Dr. Gibson. An MRI of the cervical spine also showed significant degenerative disease but no recent acute injury.

4. On May 24, 2005, Claimant visited Brian Pfaff, D.C., for chiropractic treatment. He diagnosed "subluxation complexes" throughout Claimant's spine. After 13 visits, Dr. Pfaff discharged Claimant from care on June 15, 2005. Dr. Pfaff opined Claimant had "improved significantly" but still complained of pain.

5. Dr. Pfaff's notes of his initial evaluation of Claimant state, "went to chiro years ago for mid t-spine." Claimant testified he never suffered back injury or pain before the May 2, 2005 accident.

6. Timothy Doerr, M.D., evaluated Claimant on June 16, 2005, upon referral from Dr. Gibson. Dr. Doerr suspected a temporary exacerbation of an underlying preexisting degenerative disk disease. An MRI on June 17, 2005, showed chronic degenerative changes including disk bulges in Claimant's thoracic spine but "no acute compression fracture."

7. Claimant underwent 21 outpatient physical therapy sessions from June 15 through August 11, 2005. He was discharged from therapy with a home exercise program.

8. On June 23, 2005, Michael Sant, M.D., began treating Claimant for rehabilitation upon referral from Dr. Doerr. Upon examination, Dr. Sant noted subjective soft tissue tenderness but found no objective evidence of acute injury. On August 16, 2005, Dr. Sant opined Claimant medically stable, rated Claimant's PPI at 6% with  $\frac{3}{4}$  of it preexisting and  $\frac{1}{4}$  related to the accident, and gave mild restrictions which he opined were largely due to the preexisting arthritis rather than to the accident. Dr. Sant noted, "I think he has been downplaying somewhat what his symptoms might have been prior to his injury as well." In deposition testimony, Dr. Sant clarified his rating. He opined 1.5% PPI was related to the accident. Claimant suffers 4.5% PPI from degenerative changes unrelated to the accident.

9. On February 28, 2007, Michael O'Brien, M.D., examined Claimant for purposes of establishing a PPI rating. He rated Claimant's entire spine and arrived at a 19% PPI related to the industrial accident without apportionment.

#### **DISCUSSION AND FURTHER FINDINGS OF FACT**

10. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. Aldrich v. Lamb-Weston, Inc., 122 Idaho 316, 834 P.2d 878 (1992).

11. **Credibility.** Claimant's testimony about his symptoms and the facts of the occurrence of the accident is inherently irreconcilable to the testimony of witnesses and to his early descriptions of the accident to medical providers. The medical records show an

inflation of claimed symptoms over time which is inconsistent with the nature of the accident and inconsistent with the treatment given. Claimant's assertions that his degenerative condition was totally asymptomatic before the industrial accident is called into question by Dr. Pfaff's note of a history of prior chiropractic treatment and by an August 2, 1996 medical record which notes: "Unfortunately, he also has grinding and creaking [sic] in his neck, probably secondary to prolonged work with horses." Moreover, the extent of the degenerative condition was so pronounced on radiological examinations that Dr. Sant had cause to question the veracity of Claimant's claim of no prior symptoms. In sum, Claimant lacks credibility.

12. **Causation.** A claimant must prove he was injured as the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). A preexisting condition does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the preexisting condition to produce the disability for which compensation is sought. An employer takes the employee as it finds him. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

13. Claimant established he suffered a soft tissue injury to his neck as a result of the industrial accident. The treating physicians unanimously reject the existence of a likely relationship between the accident and the degenerative condition of his spine. At most, Claimant suffered a temporary exacerbation of symptoms related to his degenerative condition which subsided to baseline by the time of medical stability.

14. The opinions of Drs. Sant and Gibson are afforded more weight than those of Dr. O'Brien. Dr. O'Brien's opinions were formed later in time and upon complete acceptance of Claimant's confabulated history of the accident and his symptoms.

15. **Permanent Impairment.** "Permanent impairment" is defined by statute. Idaho Code §§ 72-422, -424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989); Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975).

16. Dr. Sant's initial rating of 6% with apportionment created unfortunate semantic confusion. Dr. Sant clarified his rating in deposition testimony. Claimant suffered a 1.5% PPI as a result of this industrial accident. Any other impairment was unrelated to the subject accident. The industrial accident did not cause or create any permanent impairment to Claimant's degenerative disease. Indeed, for a soft tissue injury, Dr. Sant's rating of 1.5% PPI appears generous. Dr. Sant's examination for rating purposes was thorough and considered all parts of Claimant's body for which a rating arose as a result of the industrial accident. For the reasons set forth above, Dr. Sant's PPI rating carries more weight than Dr. O'Brien's.

17. Claimant's reliance on Campbell v. Key Millwork & Cabinet Co., 116 Idaho 609, 778 P.2d 731 (1989) is misplaced. The so-called "hindrance or obstacle" doctrine relates to the liability of the Industrial Special Indemnity Fund ("ISIF") and totally and permanently disabled workers. ISIF is not a party. This Claimant does not allege total and permanent disability.

18. **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).

19. Claimant offered no evidence of permanent disability, beyond his age. Claimant's age in this case does not, by itself, provide a reasonable basis for additional disability. Considering all potentially relevant medical and nonmedical factors, Claimant is not entitled to permanent disability in excess of PPI.

### **CONCLUSIONS OF LAW**

1. Claimant suffered a soft tissue injury from the accident on May 2, 2005. This accident and injury did not further permanently impair a preexisting degenerative condition in his spine.

2. Claimant became medically stable on August 16, 2005 and is entitled to PPI rated at 1.5% of the whole person as a result of the accident.

3. Claimant failed to show he is entitled to permanent disability in excess of PPI.

### **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 1ST day of August, 2007.

INDUSTRIAL COMMISSION

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Douglas A. Donohue, Referee

ATTEST:

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Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10TH day of AUGUST , 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:

Christopher D. Gabbert  
5700 E. Franklin Road, #200  
Nampa, ID 83687-8402

Alan K. Hull  
P.O. Box 7426  
Boise, ID 83707

db

/S/ \_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

LEE HARRISON, )  
 )  
 Claimant, ) **IC 2005-004751**  
 v. )  
 )  
 BRONCO MOTORS, ) **ORDER**  
 )  
 Employer, )  
 and ) FILED AUG 10 2007  
 )  
 ADVANTAGE WORKER'S COMPENSATION )  
 INSURANCE COMPANY, )  
 )  
 Surety, )  
 Defendants. )  
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Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the 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 conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffered a soft tissue injury from the accident on May 2, 2005. This accident and injury did not further permanently impair a preexisting degenerative condition in his spine.

2. Claimant became medically stable on August 16, 2005 and is entitled to PPI rated at 1.5% of the whole person as a result

of the accident.

3. Claimant failed to show he is entitled to permanent disability in excess of PPI.

4. The record fails to support Claimant's request for attorney fees in this matter. Such fees are not warranted and are denied.

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

DATED this 10TH day of AUGUST , 2007.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
James F. Kile, Chairman

/S/ \_\_\_\_\_  
R. D. Maynard, Commissioner

\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on 10TH day of AUGUST , 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Christopher D. Gabbert  
5700 E. Franklin Road, #200  
Nampa, ID 83687-8402

Alan K. Hull  
P.O. Box 7426

**ORDER - 2**

Boise, ID 83707

db

/S/\_\_\_\_\_

**ORDER - 3**