

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSE R. SALDIVAR,)
)
 Claimant,)
)
 v.)
)
 SOLO CUP COMPANY,)
)
 Employer,)
)
 and)
)
 ZURICH AMERICAN INSURANCE)
 COMPANY,)
)
 Surety,)
 Defendants.)
 _____)

IC 2006-001370

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

Filed: January 8, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on July 8, 2008. Emil F. Pike, Jr., of Twin Falls represented Claimant. Glenna M. Christensen of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing and filed post-hearing briefs. The matter came under advisement on November 19, 2008, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI);

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2. Whether and to what extent Claimant is entitled to disability in excess of his impairment, including total permanent disability pursuant to the odd lot doctrine; and

3. Whether Claimant is totally and permanently disabled as a matter of law.

In his post-hearing briefing, Claimant abandoned his claim of total and permanent disability as a matter of law, asserting only that he was an odd-lot worker, or had disability inclusive of impairment of at least 50%.

CONTENTIONS OF THE PARTIES

Claimant asserts that as a result of his industrial injury, he has sustained permanent partial impairment of 7% of the whole person based on loss of range of motion throughout his right upper extremity. Additionally, Claimant argues that he is entitled to total permanent disability as an odd-lot worker, or at the least, disability in excess of 50% of the whole person.

Defendants contend that Claimant has failed to establish that he experienced any objective impairment as a result of his industrial accident, and therefore cannot have sustained any disability in excess thereof.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Damian Rodriguez, and David Duhaime, taken at hearing;
2. Claimant's Exhibits 1 through 7, admitted at hearing; and
3. Defendants' Exhibits A through G, admitted at hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was born in Mexico. He received seven years of schooling, and reads and speaks Spanish. He has had no vocational training, and he neither reads nor speaks the English language. Claimant was 49 years of age at the time of hearing.

2. Claimant's work history in Mexico includes work at a hardware store when a teenager, and approximately fifteen years as a driver for the Coca Cola Company delivering beverage products. Just prior to coming to the United States, Claimant worked as an automobile detailer and salesperson.

3. After coming to the United States, Claimant worked briefly in Walla Walla, Washington, during the asparagus harvest. In 1997, he moved to the Twin Falls area and began working at a cattle ranch where his primary duty was feeding calves. Claimant worked at the ranch for four years until he sustained an injury to his left leg. Claimant was unemployed for approximately two years while he recovered from his leg injury.

4. Following his recovery, Claimant worked briefly at two different food processors before going to work for Employer on its production line. During the time that Claimant worked for Employer, he worked primarily with production and packaging of straws and plastic utensils. This work involved repetitive movement with both upper extremities at a fast pace.

5. At the time of hearing, Claimant was working approximately forty hours per week, without pay, at his church's bookstore selling books, pictures, and CD's, and cleaning the library.

INJURY/MEDICAL CARE

6. In early January 2006, while reaching for something on the production line,

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Claimant reported that he experienced pain in his right arm and hand, and Employer placed him on modified duty.

7. Douglas Stagg, M.D., first saw Claimant on January 26, 2006. Claimant complained of pain at the base of his neck on the right side, as well as pain in his right shoulder, upper arm, elbow, forearm, wrist, and hand, including paresthesia from the elbow to the hand and some weakness in the hand. On exam, Dr. Stagg identified diffuse tenderness throughout the upper right extremity, but saw no swelling. Claimant demonstrated normal range of motion in his neck, shoulder, elbow, wrist, and hands, but did exhibit a significant difference in grip strength on the right as compared with the left hand. Dr. Stagg's initial diagnosis was overuse of the right upper extremity and concerns of possible carpal tunnel syndrome based on the complaints of paresthesia. He recommended a wrist splint, anti-inflammatories, and referred Claimant for nerve conduction studies to rule out carpal tunnel syndrome. Dr. Stagg imposed work restrictions including "no repetitive gripping or twisting. Do not lift over five pounds and no hand tool use of the right hand." Ex. A., p. 002. Claimant continued to work, performing modified duty.

8. Claimant returned to Dr. Stagg on February 7, 2006. Nerve conduction studies done following Claimant's first visit to Dr. Stagg were normal. Claimant described his condition as slightly improved. Dr. Stagg noted that Claimant was "improving" but with "persistent overuse" of the right upper extremity and persistent paresthesias of the right hand. *Id.*, at p. 006. He referred Claimant to occupational therapy. Work restrictions were unchanged, and Dr. Stagg advised Claimant to continue using anti-inflammatory medication. Claimant continued working in his modified job.

9. Dr. Stagg saw Claimant again on February 15, 2006. He had completed three

sessions of occupational therapy with minimal effect. Claimant reported that his shoulder was better, but he was still having pain in his elbow, forearm, wrist, and hand, with intermittent paresthesia in the right hand. Claimant exhibited no tenderness at the shoulder, but some mild diffuse tenderness through the forearm, wrist, and hand. Claimant demonstrated full range of motion throughout the right upper extremity. Dr. Stagg's treatment plan included continuing the occupational therapy, anti-inflammatories, and work restrictions. If Claimant had not improved by his next visit, Dr. Stagg suggested steroid injections of the medial and lateral epicondyles. Claimant continued in his modified work position, but did not return to Dr. Stagg for further treatment.

10. Dr. Stagg referred Claimant to David Christensen, M.D., for a second opinion. Dr. Christensen saw Claimant February 28, 2006. Claimant presented with complaints of upper right extremity pain—mostly in the hand and elbow, but also extending into the shoulder and right side of the neck. On exam, Claimant had equal musculature in both upper extremities with no loss of muscle mass or muscle tone. Claimant exhibited full range of motion bilaterally at the shoulder, elbow, wrist, and fingers. Strength testing of bilateral upper extremities showed slightly decreased strength on the right, some of which Dr. Christensen attributed to guarding or questionable effort. Wrist x-rays were unremarkable. Dr. Christensen opined that Claimant was not in need of any additional treatment—while he may have some residual discomfort in his right upper extremity associated with work, that was not indicative of actual tissue damage. Dr. Christensen recommended that Claimant's work restrictions continue, and that he use moist heat and gentle stretching daily to help with his symptoms.

11. Claimant returned to Dr. Christensen on April 19, 2006. He complained of pain over the back of his right hand and around his right elbow, along with swelling of the right wrist

and hand. Dr. Christensen examined Claimant's right upper extremity "extensively," finding "no swelling, effusions or bogginess of any of the joints. Additionally, there is no soft tissue swelling, no fluctuance, no erythema and no other evidence of swelling noted in the dorsum of the right or left hands." Ex. C, p. 019. Claimant exhibited full range of motion bilaterally. Dr. Christensen did note mild diffuse tenderness over Claimant's lateral and medial epicondyles, and diagnosed right lateral and medial epicondylitis. Dr. Christensen observed that Claimant had tried a number of treatment modalities during occupational therapy without success and suggested steroid injections, to which Claimant consented. Dr. Christensen injected both lateral and medial epicondyles. Claimant reported 100% relief of pain around his elbow, with continuing tenderness over the back of his right hand. Dr. Christensen directed that Claimant could return to his time-of-injury job for at least two hours per shift, with a follow-up appointment in two weeks. Electromyography and nerve conduction studies ordered by Dr. Christensen and performed on May 16, 2006 were entirely normal for both upper extremities.

12. Claimant returned to Dr. Christensen on May 16, 2006. The chart note indicates that Claimant's medial and lateral epicondylitis was improved, but that Claimant was reporting popping and tenderness in his right shoulder. Dr. Christensen gave Claimant a steroid injection in the right shoulder, and prescribed a course of physical therapy to strengthen his rotator cuff and stabilize his scapula.

13. On June 13, 2006, Dr. Christensen noted that Claimant's condition was substantially unchanged. He administered a second steroid injection, continued orders for physical therapy, and returned Claimant to primarily light duty at work. Restrictions imposed from June 13 to July 14, 2006 were: no overhead reaching with the right arm, no repetitive gripping or twisting with the right hand, and no lifting over ten pounds with the right hand.

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14. Claimant returned to Dr. Christensen on July 18, 2006. Dr. Christensen reported that Claimant's right medial and lateral epicondylitis and right carpal tunnel symptoms were resolved, but that Claimant continued to have impingement-type pain in his right shoulder. Dr. Christensen sought approval for six additional physical therapy visits, and ordered that Claimant increase the time spent performing his time-of-injury work by two hours per day each week for four weeks.

15. On August 15, 2006, Claimant returned to Dr. Christensen reporting shoulder pain that was "constant, and over time has been worsening." Ex. C, p. 036. Claimant stated that the pain radiated into his neck and arm. Claimant received another steroid injection in the right shoulder. On exam, Claimant's right shoulder was essentially normal. There was some tenderness on palpation and some sign of instability, but range of motion testing was normal and bilaterally symmetric, as was motor strength. Dr. Christensen opined that Claimant had "[c]hronic enesopathies at medial and lateral epicondyles, long head of biceps, and lateral pectoralis tendons." *Id.* at p. 041. Dr. Christensen prescribed anti-inflammatories, and imposed permanent restrictions: No repetitive bending, stooping or twisting,¹ no repetitive gripping/twisting with the right hand, and no repetitive or forceful rapid movements with the right arm. Interestingly, there were no permanent restrictions regarding overhead work with the right arm or lifting restrictions for the right arm. Dr. Christensen released Claimant from his care, stating that no further active treatment was indicated.

¹ This restriction appears out of nowhere, and bears no discernable relationship to Claimant's right upper extremity complaints. Its clinical relevance is unclear based on the medical record, and one suspects that it was marked on the restrictions form in error. The Referee disregarded this restriction in preparing these findings, conclusions, and recommendation.

MEDICAL EVALUATIONS

16. On his last visit with Claimant, Dr. Christensen prepared an impairment rating for Claimant's right upper extremity using the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Ed. (*AMA Guides*). Dr. Christensen found no deficits in Claimant's range of motion for his right upper extremity because they were consistent with range of motion testing in his unaffected left upper extremity. Dr. Christensen did note a small difference in strength on the right side, and awarded a 3% impairment of the right upper extremity, which converts to a 0% whole person impairment rating.

17. Claimant's counsel referred Claimant to K. Cheri Wiggins, M.D., for an independent medical evaluation (IME) and impairment rating. Dr. Wiggins reviewed Claimant's medical records, took a history, and performed an examination on March 7, 2007. Claimant reported that he felt like "something was 'loose in the neck.'" Ex. E., p. 046. Claimant described the pain as a burning sensation radiating down his arm into the thumb and first two fingers of the right hand, and rated the pain as 8 out of 10. Claimant reported swelling in his right hand every morning. He complained that any activity exacerbated his pain and doing nothing alleviated it. Claimant had not worked since September 15, 2006, but his right upper extremity complaints had not decreased since he left employment. On exam, Claimant reported tenderness throughout the right upper extremity. Dr. Wiggins observed "minimal limitations in range of motion". *Id.* at p. 048. Claimant exhibited slightly impaired strength in the right hand as compared with the left. Dr. Wiggins noted that all "objective findings are normal." *Id.* Dr. Wiggins used the *AMA Guides* and found Claimant had an impairment of the right upper extremity of 11%, which converts to a whole person impairment of 7%. Dr. Wiggins' report did not address permanent restrictions.

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18. Defendants referred Claimant to Paul Collins, M.D., for an IME and impairment rating. Dr. Collins took a history, reviewed Claimant's medical records, and examined Claimant on October 22, 2007. Dr. Collins described "variable" or "inconsistent" responses to much of the testing. Ex. F, p. 051. In particular, range of motion testing of Claimant's shoulders showed some variation between right and left, depending upon the maneuver, but all range of motion values were remarkably similar as between the right and left upper extremities. Dr. Collins found muscle testing difficult because of Claimant's inconsistent effort. In particular, Claimant's grip strength varied widely as a result of the variability of effort. Dr. Collins agreed with both Drs. Christensen and Wiggins that Claimant had reached maximum medical improvement. Dr. Collins calculated impairment using the *AMA Guides* and the results of the testing he had performed, assigning an 8% upper extremity impairment, which converts to 5% of the whole person. Dr. Collins specifically noted that if he compared the results of testing on Claimant's right extremity with the results of testing of his left extremity, he would have no impairment at all, as Dr. Christensen had calculated. Dr. Collins did not impose permanent restrictions, but did suggest that Claimant not perform repetitive lifting above shoulder level, but believed that he could return to his time-of-injury position with Employer.

19. On June 25, 2005, Michael O'Brien, M.D., performed a neurologic consultation regarding Claimant's right upper extremity complaints. While Dr. O'Brien had access to Claimant's prior medical records, it does not appear that he performed any independent testing of Claimant's right upper extremity, but rather relied on the testing and impairment ratings given by Drs. Christensen, Collins, and Wiggins. Dr. O'Brien opined that Claimant had a loss of anatomic function in his right upper extremity, and that Dr. Wiggins' rating of 7% of the whole person was reasonable because the "limitations and loss of function *can be implied* to an

impairment and certainly as a neurologist, I would tend to agree with Dr. Wiggins' assessment." Ex. 6, p. 02 (emphasis added). Dr. O'Brien identified permanent restrictions to include occasional lifting up to five pounds, limited use of the right upper extremity, and extremely limited use of the right upper extremity at shoulder height or above.

VOCATIONAL EVIDENCE

20. Damian Rodriguez works as a vocational rehabilitation counselor with the Idaho Division of Vocational Rehabilitation (IDVR). Mr. Rodriguez has a master's degree in counseling and rehabilitation counseling and has worked in the field for ten years. Mr. Rodriguez testified that he first met Claimant in August 2007 to obtain the information necessary to determine whether Claimant qualified for IDVR services. Once Mr. Rodriguez had determined Claimant's eligibility and obtained basic information regarding Claimant's work restrictions, he referred Claimant to a private contractor (Magic Valley Rehabilitation Services, "MVRs") for a community-based work evaluation. Based on Claimant's work experiences and his restrictions, MVRs placed Claimant in a job that involved sanding furniture by hand. Claimant performed the work for about twenty minutes and then said he could not do the job. MVRs made no other attempts to find suitable placement for Claimant and IDVR closed his file.

21. Mr. Rodriguez testified that Claimant's work restrictions would likely prevent him from performing the type of work that he had done in the past, including feeding calves or driving a delivery truck. Neither did he believe Claimant could work in food preparation, as a waiter, a ticket taker at a theater, a janitor, or as a cashier. Mr. Rodriguez used a five-pound lifting restriction, along with limited bending, stooping, and twisting, and limited twisting or forceful use of his right hand as permanent restrictions in analyzing Claimant's potential for employment.

22. David M. Duhaime works as a rehabilitation field consultant for the Industrial Commission Rehabilitation Division (ICRD) in Twin Falls. Mr. Duhaime has more than eighteen years of experience and training with ICRD.

23. Mr. Duhaime testified that Surety's claims adjuster first referred Claimant to ICRD in mid-September 2006. Mr. Duhaime met with Claimant in early October 2006 and began to gather information about Claimant's education, work history, and relevant medical history. Mr. Duhaime identified Claimant's work restrictions as:

no repetitive bending, stooping, or twisting, no repetitive gripping, twisting with right hand, no repetitive rapid movements, and no forceful rapid movements with the right arm.

Tr., p. 88. Mr. Duhaime asked Dr. Christensen to review job site evaluations for several positions that Claimant had held in the past, as well as others that Mr. Duhaime believed might be appropriate for Claimant given his experience and restrictions. Dr. Christensen approved, with only minor modifications consistent with the restrictions, jobs as product handler, calf feeder, and truck driver, as well as other positions in food service. Based on the input from Dr. Christensen, Mr. Duhaime identified a number of jobs in sales, agriculture, food service, cash handling, entertainment, custodial, and transportation that he believed Claimant could perform.

24. Mr. Duhaime met with Claimant later in October to review the list of potential positions and obtain the Claimant's view of his own abilities. Mr. Duhaime opined that Claimant's own view of his physical abilities was markedly more limited than what his physician had written. Mr. Duhaime stated that he believed the Claimant's main focus was on his injury, and not on seeking work, so he referred Claimant back to Dr. Christensen through his attorney. Thereafter, Mr. Duhaime made several unsuccessful attempts to contact Claimant and eventually closed the case. Almost a year later, Claimant's attorney contacted Mr. Duhaime, who agreed to

meet again with Claimant. At the meeting, Mr. Duhaime discussed job-seeking skills, the need for repeated contact with potential employers, and the need to focus on jobs within Claimant's physical restrictions. He reviewed a number of potential positions with Claimant, and answered Claimant's questions about his claim, discussing in particular that the longer Claimant was off work, the harder it would be for Claimant to return to work.

25. At hearing, Mr. Duhaime testified that he believed that there were jobs available to Claimant in the Twin Falls area that he could perform despite his restrictions and in spite of the language barrier. Mr. Duhaime noted in particular that Claimant's work at his church library demonstrated that he had marketable skills. Mr. Duhaime acknowledged that it would take Claimant from three to six months of full-time effort to find a job, intimating that Claimant's biggest hurdle could be mustering the interest to actually conduct a meaningful job search.

DISCUSSION AND FURTHER FINDINGS

IMPAIRMENT

26. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Restrictions

27. Of the four physicians who examined Claimant, permanent restrictions range from none (Dr. Collins), to the most restrictive “occasional lifting up to five pounds, limited use of the right upper extremity, and extremely limited use of the right upper extremity at shoulder height or above,” imposed by Dr. O’Brien. As noted elsewhere, the Referee did not consider one restriction identified by Dr. Christensen—limited bending, twisting, and stooping—because it has no physiological basis in relation to Claimant’s right upper extremity injury. For purposes of this analysis, the Referee finds that the restrictions set out by Dr. O’Brien relate most directly to the complaints Claimant was expressing at the end of his treatment, focusing primarily on the right shoulder.

28. The physicians who imposed permanent restrictions did so primarily based on Claimant’s subjective reports of pain—not because of objective medical evidence. Claimant complained of pain in his entire right upper extremity from his shoulder up to his neck and down to his fingers, yet no doctor could identify any objective pathology that correlated with Claimant’s complaints. One thread runs throughout the medical records of all four providers—Claimant’s complaints were consistently inconsistent with medical findings. He complained of swelling, but numerous examinations did not reveal any swelling. He complained of pain that he rated as eight out of ten, but maintained normal and symmetrical bilateral range of motion and strength. Even though doctors identified over-use as the root cause of Claimant’s complaints, he has been off work for more than two years with no improvement in his condition.

Impairment Ratings

29. Claimant’s work restrictions were primarily based on his subjective complaints of pain, so it follows that his impairment ratings were based on loss of function due primarily to

subjective pain complaints. Given the vagary of Claimant's complaints, it is not surprising that there were disparities in impairment ratings among and between the physicians involved in his treatment and evaluation.

Dr. Christensen, Claimant's treating physician, calculated a 3% upper extremity impairment, based on minimal loss of grip strength. When converted to a whole person impairment rating, the 3% upper extremity becomes 0% of the whole person.

Dr. Wiggins found a 7% whole person PPI based upon "minimal" loss of range of motion and "slight" loss of strength in the right extremity with normal objective findings.

Dr. Collins calculated a 5% whole person permanent impairment, but identified two caveats: 1) Claimant exerted inconsistent effort in both range of motion and strength testing; and 2) if Claimant's uninjured left upper extremity strength and range of motion were considered as "normal" for Claimant, then there was *no* identifiable impairment because his right side strength and range of motion were symmetric with his left.

Dr. O'Brien, with little explanation or analysis, agreed with Dr. Wiggins on a 7% whole person impairment.

30. Based on the opinions of Drs. Christensen, and Collins, and the lack of objective findings, there is sufficient credible evidence in the record to support a finding that Claimant had no permanent impairment. There is also sufficient credible evidence, based upon the opinions of Drs. Wiggins and O'Brien and some of the strength and range-of-motion testing, to support a finding that Claimant sustained a modest permanent impairment. While either position is arguably supportable, the preponderance of evidence supports a finding that Claimant sustained some permanent partial impairment as evidenced by his permanent restrictions. The Referee finds that 3% permanent impairment of the whole person is reasonable in light of the record.

The Referee bases this finding on the opinions of three-quarters of the physicians who treated or evaluated Claimant and who either imposed restrictions or awarded impairment. While the Claimant's assertions regarding the extent and seriousness of his injuries are subject to claims of exaggeration, there remained enough evidence of minimal loss of function to justify the imposition of permanent use restrictions and to cause evaluators to measure and calculate Claimant's impairment.

Disability in Excess of Impairment

31. The definition of "disability" under the Idaho workers' compensation law is:

. . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). 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 fundamental or marked change in the future can be reasonably expected.

Idaho Code § 72-423. A rating of permanent disability is an appraisal of the injured employee'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 nonmedical factors. Idaho Code § 72-425.

Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

32. The burden of proof is on the claimant to prove disability in excess of impairment. Expert testimony is not required to prove disability. The test is not whether the

claimant is able to work at some employment, but whether a physical impairment, together with non-medical factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho*, 110 Idaho 32, 714 P.2d. 1 (1986).

33. The Referee finds that Claimant has failed to carry his burden of proving that he has sustained permanent disability in excess of his 3% impairment. Claimant presented no convincing evidence that his impairment, even when considered along with other relevant factors such as his language limitations, lessened his access to the labor market or to the type of wage he was accustomed to earning.

34. Claimant offered the testimony of Damian Rodriguez in support of his position that he has sustained significant disability in excess of his employment. However, the vocational evidence presented by Mr. Rodriguez provided little support for Claimant's assertion. Basically, Mr. Rodriguez determined that Claimant qualified for IDVR's services, then contracted with MVRS to find a placement for Claimant. MVRS provided one job placement, which Claimant attempted briefly, then refused. MVRS made no further effort to find suitable work for Claimant, and returned his file to IDVR. Mr. Rodriguez testified that he did not believe that there was much work in the Twin Falls labor market that Claimant could perform, but he did not perform a labor market survey, conduct job site evaluations, make independent inquiries, contact potential employers, or work with Claimant on a job search.

35. On the other hand, as evidenced by the ICRD records and Mr. Duhaime's testimony, Claimant demonstrated little desire for and exerted little effort toward obtaining employment. Mr. Duhaime counseled Claimant on how to conduct an effective job search, and stood ready with resources and reassurance to aid him in such an endeavor. Mr. Duhaime identified a number of jobs readily available in the Twin Falls labor market that he believed

Claimant was capable of obtaining and retaining. He prepared job site evaluations for several of those jobs and presented them to Claimant's treating physician for review. Mr. Duhaime was not under the illusion that finding a job would be quick or easy for Claimant. Notwithstanding the obstacles, he opined that Claimant could find work if he wanted to and was willing to expend the effort that a real job search required, and his opinion was buttressed by Claimant's testimony regarding his work at the church library.

36. The record in this proceeding does not paint a portrait of a Claimant who wants desperately to work and pursues all avenues available to achieve that goal without success. Rather, it is a snapshot that captures the more candid truth—Claimant preferred not to work. He exaggerated his symptoms, his efforts to find work were sporadic and lackadaisical at best, and he declined to take advantage of the assistance that was offered him. Even when given one-on-one counseling, coaching, and encouragement from Mr. Duhaime, Claimant made no effort to pursue a meaningful job search.

Odd-Lot Worker

37. Having failed to establish that he sustained any disability in excess of his 3% whole person impairment, there is no need to address the issue of the extent of Claimant's disability in excess of impairment or whether his disability is so substantial that he should be declared an odd-lot worker.

CONCLUSIONS OF LAW

1. Claimant sustained 3% whole person impairment as a result of his industrial injury.
2. Claimant has failed to establish an entitlement to any disability in excess of his impairment.

3. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 31 day of December, 2008.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSE R. SALDIVAR,)
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 SOLO CUP COMPANY,)
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IC 2006-001370

ORDER

Filed: January 8, 2009

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. 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 sustained 3% whole person impairment as a result of his industrial injury.
2. Claimant has failed to establish an entitlement to any disability in excess of his impairment.

3. All other issues are moot.

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

DATED this 8 day of January, 2009.

INDUSTRIAL COMMISSION

/s/ _____
R.D. Maynard, Chairman

/s/ _____
Thomas E. Limbaugh, Commissioner

/s/ _____
James F. Kile, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of January, 2009, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

EMIL F PIKE JR
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GLENNA M CHRISTENSEN
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djb

/s/ _____