

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

JOHN HUBER,	)	
	)	
Claimant,	)	<b>IC 2003-502108</b>
	)	
v.	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
STATE OF IDAHO, INDUSTRIAL	)	<b>AND RECOMMENDATION</b>
SPECIAL INDEMNITY FUND,	)	
	)	Filed May 5, 2009
Defendant.	)	
_____	)	

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on September 23, 2008. Claimant was present and represented by Dennis R. Petersen of Idaho Falls. Claimant settled his claim against Employer and its surety, State Insurance Fund, prior to hearing. Anthony M. Valdez of Twin Falls represented the State of Idaho, Industrial Special Indemnity Fund (“ISIF”). Oral and documentary evidence was presented. The parties took two post-hearing depositions and submitted post-hearing briefs. This matter came under advisement on March 17, 2009, and is now ready for decision.

**ISSUES**

The issues to be decided as the result of the hearing are:

1. Whether Claimant is totally and permanently disabled, and, if so
2. Whether ISIF is liable pursuant to Idaho Code § 72-332, and, if so
3. Apportionment under the *Carey* formula.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that he is totally and permanently disabled by either the 100% method or the odd-lot doctrine as the result of multiple back surgeries following his last industrial accident combined with his pre-existing back injuries. Therefore, ISIF is liable for a portion of his disability benefits.

ISIF contends that Claimant is not totally and permanently disabled by any method. Claimant is employable in a number of positions available within his physician-based physical restrictions. Claimant does not fit the definition of an odd-lot worker because he has not tried employment and failed, has not put forth a legitimate job search effort, and it would not be futile for him to do so. Finally, even if Claimant is found to be totally and permanently disabled, ISIF is not liable because Claimant's pre-existing physical impairments were not manifest; did not result in subjective hindrances to employment; and did not combine with his last injury to create his total disability.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, vocational evaluator Colleen Baird, and ICRD consultant Gregory Dean Taylor presented at the hearing.
2. Claimant's Exhibits 1-8 admitted at the hearing.
3. ISIF's Exhibits A-W admitted at the hearing.
4. The post-hearing deposition of Douglas N. Crum, C.D.M.S., taken by Claimant on October 22, 2008, and that of Nancy J. Collins, Ph. D., taken by ISIF also on October 22, 2008.

Claimants continuing objection beginning on page 64 of Mr. Crum's deposition is sustained regarding potential employment opportunities identified by vocational expert William Jordan and will not be considered in this decision because Mr. Jordan was not called as a witness to lay the foundation for his report. All other objections are overruled.

### **FINDINGS OF FACT**

1. Claimant was 45 years of age and resided in Twin Falls at the time of the hearing. At the time of his January 27, 2003, accident and injury, he was employed by B & T Construction, a "full concrete company," as a supervisor doing prep work. He generally operated a Bobcat front-end loader.

2. On January 27, 2003, Claimant hit a rock that jarred the Bobcat he was operating and, in turn, jarred his back, "[A]nd just was - - hurt so bad; I knew I was done." Hearing Transcript, p. 89. Claimant had pre-existing non-surgical back problems.

3. Claimant underwent a course of treatment for his back that resulted in the following surgical procedures:

February 19, 2003: L4-L5 diskectomy  
L5-S1 diskectomy  
Dural repair

December 17, 2004: Re-do laminectomies L5  
Re-do laminectomies L4  
Microscope

December 27, 2004: Irrigation and debridement for wound infection  
Primary closure

November 22, 2005: L4-5 anterior lumbar interbody fusion  
L5-S1 anterior lumbar interbody fusion  
L4-5 prosthetic graft  
L5-S1 prosthetic graft  
Instrumentation

May 8, 2007: Laminectomy of L4  
Laminectomy of L5  
Laminectomy of S1

4. Claimant returned to work with restrictions after his 2003 surgery. He was able to work full time, albeit with some self-imposed accommodations; and, at times, worked in excess of 40 hours a week until his second surgery in 2004. Claimant was released to return to work with restrictions in March 2005. He was driving truck for Employer but was only working a 40-hour week as he was unable to work overtime hours as before. Claimant continued to work until his third surgery in November 2005. In February 2006, Claimant again returned to work for Employer as a truck driver-supervisor. Because of his continuing back pain,<sup>1</sup> Claimant cut his hours down by only working four days a week. In October 2006, Claimant quit his job with Employer as he was not making enough money and his treating physician suggested he find lighter work. Claimant has not worked since.

#### **DISCUSSION AND FURTHER FINDINGS**

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors total 100%. If a claimant has met this burden, then total and permanent disability has been established.

5. The medical records in evidence establish that Claimant has incurred whole person PPI of 32% which leaves 68% in non-medical factors in order to reach 100%. For reasons explained more fully below, Claimant's non-medical factors do not equal 68%. While Claimant has incurred some disability above impairment, it is short of 68%.

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<sup>1</sup> The ICRD case notes indicate that Claimant cut down his hours because he began receiving PPI benefits that supplemented his income rather than due to back pain.

The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one “so injured the he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.” *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable “in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.” *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963)

Although Claimant has failed to establish that he is totally and permanently disabled by the 100% method, he may still be able to establish such disability via the odd-lot doctrine. An injured worker may prove that he or she is an odd-lot worker in one of three ways (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

### **Prior injuries**

6. While working for Independent Meat, Claimant injured his low back on August 11, 1994, while lifting. Claimant was treated conservatively with medications and physical therapy. Claimant was released to light, then full duty without restrictions in November 1994.

7. Claimant suffered another accident and injury to his low back while working for Independent Meat on May 24, 1995. He was turning a trailer crank to jack up a trailer when he felt a “pulling” sensation in his low back. Claimant was treated at an emergency room<sup>2</sup> and again participated in physical therapy. He returned to work, but changed to a lighter duty job within the plant. Claimant eventually quit Independent Meat and went to work for a paving company.

### **Educational history**

8. Claimant graduated from Jerome High School in 1981. Upon graduation, Claimant attended a diesel mechanics course at CSI. He did not complete the two semester program because the first semester was too basic for the knowledge he already possessed in that area. Claimant has not received any further formal training.

### **Work history**

9. Claimant has worked in the following areas: feed mills; truck driving; Hyster driving; bookkeeping; concrete crew foreman; handyman; loader and grader operator; farm equipment operator; and customer service.

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<sup>2</sup> There are no medical records in evidence regarding this accident and Claimant’s recollection is understandably somewhat vague.

## Vocational evidence

### Colleen Baird

10. Colleen Baird is a vocational counselor and mental health coordinator at Community Partnerships of Idaho. She administers vocational and academic testing to evaluate people's potential for other types of jobs. At Claimant's attorney's request, Ms. Baird evaluated Claimant both academically and aptitudinally on July 8, 2008. Ms. Baird described the results of the testing at hearing as follows:

On the academic testing he did extremely well on his reading comprehension; he scored post-high school level at the 85<sup>th</sup> percentile. He scored a seventh grade level in spelling with a standard score of 85, and a sixth-grade level in math with a standard score of 84.

\* \* \*

Q. (By Mr. Petersen): What were the results of the aptitude test?

A. He did extremely well on mechanical reasoning. He was [*sic* - at] the 98 percentile, which is the highest score they give on that particular test. He also scored at that level, 98 percentile, in vocabulary.

Hearing Transcript, pp. 28-29.

11. Ms. Baird observed Claimant having difficulty with sitting during the test-taking. However, she testified that colleges such as CSI are required to make accommodations for students with disabilities. She also indicated that Claimant may have to take a one semester remedial math course. Ms. Baird did not believe there was any cognitive reason Claimant could not learn, although, as mentioned, sitting and getting from class to class may be challenging. She also testified that CSI has available home computer training that can be done at one's own pace. Ms. Baird opined that a computer assisted drafting course would be suitable for Claimant. "I feel that if accommodations can be made for him physically to complete further schooling, that - - that would be the right thing to do." *Id.*, p. 36.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7**

Greg Taylor

12. Greg Taylor had been an ICRD counselor in the Twin Falls field office for the past 18 years. He has worked on and off with Claimant since 2005. Mr. Taylor testified at hearing that Claimant had worked full time for three years, not considering recovery time from his various surgeries, since his 2003 industrial injury. Mr. Taylor testified as follows regarding his understanding of Claimant's restrictions:

Q. (By Mr. Petersen): This is a tough question because everybody is a little different on it.

As we sit here today, what do you understand his restrictions to be?

A. Mr. Crum and Nancy Collins and Bill Jordan all have documented in their reports the same restrictions.

Q. And they are?

A. Okay. May lift and carry 10 pounds continuous, 20 pounds occasional, 35 pounds rarely; may work regular shifts. He is able to stand for up to 20 minutes without a break, can sit for 20 minutes without a break, can sit for a total of about six to eight hours per day. He does require the ability to change positions on an ad lib basis.

He may occasionally sit, stand, walk, climb, bend, stoop, kneel, crouch, twist, and reach above or below shoulder level. He may continuously grasp, handle, fine manipulation and fingering, and operate foot controls. He may push or pull up to 20 pounds. He can be on his feet, which is a combined stand and walk, for six to eight hours per day. Would be able to perform a job that required him to sit most of the day. He should avoid prolonged exposure to low-frequency vibration.

The ones that I just read were from Dr. Verst.<sup>3</sup> Dr. Wilson and Dr. Garber, in the panel evaluation,<sup>4</sup> also included an avoid rotational activities, including bending, stooping, and twisting.

Dr. Cheri Wiggins also provided her medical opinion. And this is quoting her: "I believe he will have limitations with sitting, standing, and walking, and will require very frequent breaks for these. Lifting and/or carrying are to 20 pounds. Handling objects, hearing, speaking, and traveling are not limited."

Hearing Transcript, pp. 202-204.

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<sup>3</sup> Dr. Verst has been Claimant's treating physician and has performed all the surgeries.

<sup>4</sup> The panel convened on December 12, 2007, after all of Claimant's surgeries.

13. Mr. Taylor provided Claimant with approximately 80 job leads, although he admitted some were beyond Claimant's physical capabilities. Claimant followed up on some of the job leads but never got an interview. For some reason, Claimant felt it necessary to inform potential employers of his restrictions at the beginning of his job inquiries. At hearing, Mr. Taylor discussed a number of jobs listed in the local paper the day before. He testified that none of the listed jobs were suitable for Claimant due to lifting, bending, stooping, etc. requirements. Mr. Taylor acknowledged that with some training and/or education, the local sedentary labor market would expand for Claimant and that is why Mr. Taylor referred Claimant to a business management course at CSI. Claimant did not pursue this avenue because of his concern that no work would be available once he completed the course.

Douglas N. Crum, C.D.M.S.:

14. Claimant retained Mr. Crum to assist him with vocational issues. His credentials are well known to the Industrial Commission. Mr. Crum reviewed medical records, other vocational reports, Ms. Baird's test results, and met with Claimant on March 11, 2008. He authored a report dated July 16, 2008, and was deposed on October 22, 2008. He described Claimant's pre-2003 work as medium to heavy. Mr. Crum opined that when considering physician-imposed restrictions, as well as Claimant's subjective restrictions, he is unemployable in his labor market. He further opined that Claimant's pre-existing injuries combined with his last accident to render him totally and permanently disabled. He reached that conclusion after he drafted his July 2008 report when Claimant informed him of his alleged difficulties working between his first low back injury in 1994 and his last accident in 2003. Mr. Crum concluded that Claimant's back injuries in 1994 and 1995 constituted subjective hindrances to employment.

Nancy J. Collins, Ph.D.:

15. ISIF retained Dr. Collins to assist them with vocational issues. Her credentials are well known to the Industrial Commission. She reviewed medical records, earnings history, job search information, Ms. Baird's testing results, and interviewed Claimant. She authored a report dated August 13, 2008, and was deposed on October 22, 2008. Dr. Collins opined that there are jobs available to Claimant within his restrictions in the Twin Falls area labor market. She is impressed with Claimant's presentation and recommends that Claimant get involved with the Idaho Division of Vocational Rehabilitation ("IDVR") for financial assistance in pursuing further training and/or education, especially in the area of Computer Assisted Drafting. She testified that if he can live with his subjective pain he is employable; if he cannot, he is not employable.

16. The Referee is not persuaded that Claimant is totally and permanently disabled by being an odd-lot worker. First, Claimant has not attempted work without success after he voluntarily terminated his job with Employer in October 2006. Second, Dr. Collins, Mr. Crum, and Mr. Taylor all agree that Claimant's job search left much to be desired. The Referee finds that it would not be futile for Claimant to continue to search for work, especially if he becomes involved with ICRD and/or IDVR for assistance in how to properly look for work he could do. Further, IDVR can assist in researching and obtaining retraining if appropriate. All the vocational experts involved in this matter believe Claimant is capable of learning. Even if Claimant chooses not to pursue retraining, the Referee is convinced there is work available in his labor market within his restrictions that he is capable of obtaining and performing should he put forth a reasonable effort in securing and attempting such employment.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 10**



## CERTIFICATE OF SERVICE

I hereby certify that on the 5<sup>th</sup> day of May, 2009, 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  
PO BOX 1645  
IDAHO FALLS ID 83403-1645

ANTHONY M VALDEZ  
304 SECOND AVE E  
TWIN FALLS ID 83301

ge

*Gina Espinosa*

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 Claimant, )  
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 v. )  
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 STATE OF IDAHO, INDUSTRIAL )  
 SPECIAL INDEMNITY FUND, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**IC 2003-502108**

**ORDER**

Filed May 5, 2009

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended 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 has failed to prove he is totally and permanently disabled.
2. As Claimant is not totally and permanently disabled, ISIF is not liable.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 5<sup>th</sup> day of May, 2009.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
R.D. Maynard, Chairman

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

\_\_\_\_/s/\_\_\_\_\_  
Thomas P. Baskin, Commissioner

ATTEST:

\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the \_\_5<sup>th</sup>\_\_ day of \_\_May\_\_ 2009, 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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