



3. Whether Claimant is entitled to total temporary disability (TTD) benefits, and the extent thereof.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that he has incurred a compensable occupational disease doing heavy and repetitive work as a sawyer/assembler/cabinet maker/delivery driver that has resulted in a herniated lumbar disc requiring surgery. As this is a denied claim, should the same be found to be compensable, Surety should be required to pay Claimant directly 100% of the bills related to treatment to date, as well as to be incurred in further treatment, including surgery. Finally, Surety should be required to pay TTD benefits during Claimant's period of recovery.

Defendants concede that the lumbar microdiscectomy recommended by Claimant's treating physician is reasonable; however, they argue that the need for such surgery is not related to Claimant's work. Claimant had underlying degenerative disc disease and facet arthritis prior to his employment with Employer as a sawyer, and it is not possible to date a free-floating disc fragment apparent on an MRI. Claimant's lumbar spine disease was not incurred in or arise out of and in the course of his employment. Further, if the Commission finds otherwise, Surety is not required to pay 100% of any prospective treatment; only 100% up to the time of the Commission's finding of compensability. Finally, in the event compensability is found, the extent of TTD benefits owed will work itself out.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Claimant's Exhibits 1-14 admitted at the hearing.
2. Defendants' Exhibits A-G admitted at the hearing.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

3. The post-hearing deposition of Michael S. Weiss, M.D., taken by Defendants on January 27, 2009.

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**

1. Claimant was 31 years of age and resided in Nampa at the time of the hearing.
2. Claimant had been employed as a sawyer for Employer less than a year and a half when he began to develop back pain on or around November 2007. Claimant is not contending that he suffered an accident, but is contending that the heavy/repetitive nature of his work duties resulted in his lumbar disc disease. Claimant described his job duties as follows:

#### Lifting/carrying of 4 x 8 Laminated Panels of Laminated Particle Board

I use the forklift on the production floor to pick up a pallet/unit of laminated particle board (approximately 34 sheets) and move it into position near the beam saw. After placing the pallet/unit on the floor with the forklift, I have to physically reach out away from my body with both hands/arms and grab each individual 4 x 8 sheet off of the stacked pallet/unit. Each sheet weighs approximately 150 pounds. After I grab and lift the sheet, I have to twist and turn my body around approximately 180 degrees and then maneuver the sheet onto the saw and place it in the proper cutting position. I then perform cuts to specifications with the saw. After the product has been cut to specification, I will manually pick up each cut and stack the individual cut sheets into a stack on the fall-off table which is attached to the saw. After I stack 4-6 individual cut pieces, I then manually grab the entire stack, lift it, turn and carry it approximately 15-20 feet where I place it on a parts cart. The cart has two shelves. The upper shelf is approximately 40 inches off of the ground and the lower shelf is approximately 10 inches off the ground. When I slide the cut pieces into the shelves, I bend and twist at the waist in order to manipulate and position the cut product. In order to place the cut product on the lower shelf, I have to bend all the way down almost to the floor and then bend over at the waist and slide the product onto the lower shelf by pushing with both arms outstretched away from my body. Most of the time, I have to stretch my leg out and place my right foot behind the wheel on the cart in order to prevent it from moving or slipping away during the shelving process. During a standard 8.0 hour work shift, I will lift, carry, twist, turn, bend at the waist, push and pull these laminate sheets approximately 6 out of every 8

hours or 75% to 80% of the time. As part of the production cycle, I am required to perform these physical movements repeatedly at a very fast pace (i.e., as fast as the saw will cut the product and as fast as I can move my body while lifting and carrying these heavy sheets of laminate).

Claimant's Exhibit 3, p. 1, and Hearing Transcript, pp. 22-33.

3. Claimant's job duties also required him to load and off-load finished cabinets at the customer's location.

4. Sometime in November 2007, Claimant began to feel a sharp, cramping pain in his left buttock that radiated down to the back of his left knee. He initially presented to a chiropractor, who treated him on December 12, 2007. It is unclear from the record what treatment the chiropractor provided, but Claimant was diagnosed with lumbar ligament laxity and sciatica (no disc). Claimant testified that he saw the chiropractor several times, but the only record in evidence is just for the December 12 visit. In any event, the chiropractor referred Claimant to James H. Bates, M.D., a physiatrist.

5. Claimant first saw Dr. Bates on January 27, 2008, with a chief complaint of cramping and pain in his left buttock and leg. Dr. Bates prescribed Darvocet, a Medrol Dosepak, and stretching exercises. Dr. Bates continued to monitor Claimant's medications and on January 22 ordered a lumbar MRI that revealed a moderate-sized left paracentral disk herniation at L5-S1 with a free-floating fragment. Based on the MRI, Dr. Bates referred Claimant to R. Tyler Frizzell, M.D., a neurosurgeon.

6. Dr. Frizzell first saw Claimant on March 6, 2008. Upon examination and lack of success with conservative care, Dr. Frizzell recommended a microdiscectomy at L5-S1. Surety has denied authorization for that procedure and, consequently, it has not been performed.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4**

## DISCUSSION AND FURTHER FINDINGS

As in industrial accident claims, an occupational disease claimant must prove a causal connection between the condition for which compensation is claimed and the occupation to a reasonable degree of medical probability. Langley v. State of Idaho, Special Indemnity Fund, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995).

Pertinent Idaho statutes in effect at the time of the alleged manifestation of Claimant's occupational disease include Idaho Code §72-102(22) which defines occupational diseases and related terms as follows:

- (a) "Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.
- (b) "Contracted" and "incurred" when referring to an occupational disease, shall be deemed the equivalent of the term **"arising out of and in the course of" employment.**
- (c) "Disablement," except in cases of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, and "disability" means the state of being so incapacitated.

Emphasis added.

Idaho Code §72-437 defines the right to compensation for an occupational disease:

When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, or in case of his death, his dependents shall be entitled to compensation.

Lastly, Idaho Code §72-439 provides:

An employer shall not be liable for any compensation for an occupational disease **unless such disease is actually incurred in the employer's employment.** Emphasis added.

7. Claimant has offered as proof that he contracted an occupational disease a letter sent to Dr. Frizzell outlining the legal requirements of finding such disease, as well as enclosing Claimant's medical records and job description. *See*, Claimant's Exhibit 8, pp. 10-40. Dr. Frizzell responded by succinctly typing the word "Yes" following each question posed by Claimant's counsel.

8. Surety arranged for Claimant to be independently examined by Michael Weiss, M.D., on October 1, 2008. Dr. Weiss is Board Certified in Occupational Medicine, Physical Medicine and Rehabilitation, and Electrodiagnostic Medicine. He also has a degree in epidemiology, which he described in his deposition as the study of disease in populations. He is a "consultant physician." He is the director of Saint Luke's Regional Medical Center's occupational health services program. Dr. Weiss consults for the State Insurance Fund, Idaho Division of Vocational Rehabilitation, and a case management firm named Paradigm Health.

9. Dr. Weiss reviewed medical records and a job description, examined Claimant, and took his history. He reached the diagnosis of chronic low back pain with sciatica. He noted that back pain is very common in the population which makes it difficult to ". . . say what's causal in something that everybody has." Dr. Weiss Deposition, p. 17. He further noted that Claimant's January 23, 2008, lumbar MRI revealed advanced degenerative disc disease at L5-S1 and moderate to severe left L4-L5 and mild-moderate bilateral L5-S1 facet joint arthropathy. Dr. Weiss opined that it was not possible to determine when the free fragment occurred, but that

Claimant does not have sufficient physical findings to conclude that the free fragment is causing his back pain.

10. Dr. Weiss sees no connection between Claimant's need for back surgery and his employment. He concedes that heavy materials handling is associated with chronic back pain as is strictly sedentary work. Dr. Weiss is troubled that there was no specific event that could be temporally related to the onset of Claimant's back pain. He acknowledged that high impact activity can lead to the progression of underlying arthritis, but does not cause it.

11. The Referee is persuaded by Dr. Weiss's observations. He has the credentials to render a well-reasoned expert opinion. The major hurdle facing Claimant is set out in question number 4 posed by Claimant to Dr. Frizzell: "In my opinion, do I believe that Mr. Watson's disease was incurred in or arose out of and in the course of his employment with Joslin Millwork, Inc.?" Dr. Frizzell responded, "Yes." The Referee questions how Dr. Frizzell could reach that conclusion. Degenerative disc disease and facet arthritis develop over time. In fact, Claimant saw a chiropractor for low back pain on December 13, 2005, and was taken off work for a few days. Dr. Meissner's records from December 2005 reflect that Claimant's low back pain arose without accident and was first noted on a Sunday, while at home. Also, prior to the commencement of his employment by Joslin, Claimant had complained to another employer that he hoped to get out of the drywall business because it was causing him low back pain. Claimant's underlying degenerative joint disease and arthritis was certainly present in November 2007 and was not caused by his work. According to Dr. Weiss, degenerative disc disease may be caused by many factors including heredity, aging, diet, smoking, and obesity. It would be reasonable to conclude that Claimant's heavy/repetitive work activities (with which Defendants

do not disagree) may have speeded the progression of his underlying disease, but *Nelson*<sup>1</sup> and its progeny preclude recovery as there is no accident here.

12. Claimant cites *Flores v. Boise Cascade*, 2008 IIC 0420 (2008) and *Wiltz v. Subway*, 2001 IIC 0867 (2001) in support of his argument that Claimant has met his burden of proving a compensable occupational disease. Although, *Flores* bears some similarity to the instant matter, that case was decided on its own particular facts, and on those facts, the Commission was persuaded that Claimant's low back injury was, in fact, causally related to the demands of his employment. The Referee does not find that the evidence before him in this matter supports the same conclusion.

13. In *Flores*, the Commission further found that claimant had satisfied his burden of proving that the risk to which he was exposed was characteristic of and peculiar to his employment. Under Idaho Code § 72-102(22), claimant must show that his employment results in exposure to a hazard which distinguishes that particular employment from the general run of occupations. *Bowman v. Twin Falls Construction Company, Inc.*, 199 Idaho 312, 581 P.2d 770 (1978). In *Flores*, there was unrebutted expert testimony that claimant's work involved constant repetition of three activities, which led the Commission to conclude that claimant had met his burden of proving that the risk to which he was exposed was characteristic of and peculiar to his employment. Claimant has also cited *Wiltz v. Subway*, 2001 IIC 0867 (2001) in support of the proposition that the risk of injury to which claimant was exposed in this matter is characteristic of and peculiar to his employment. In *Wiltz*, the Commission found that a particular hand motion used by claimant to operate a manual vegetable slicer subjected her to a risk of injury that was distinguishable from the general run of occupations.

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<sup>1</sup> *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

14. Neither *Flores* nor *Wiltz*, support a finding that the particular activities in Claimant's job constitute a risk of injury that is distinguishable from the general run of occupations. To be sure, Claimant's job involved a good deal of heavy lifting, twisting, bending, etc. However, so do many, if not most, jobs which involve manual labor. Here, no particular machine, or constant repetitive activity is implicated in causing Claimant's disease, even if it be assumed that Claimant's condition is causally related to his employment. This case is more like *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996), and accordingly, the Referee finds that claimant has failed to establish that his disease is the result of his exposure to a risk of injury which is characteristic of and peculiar to his employment at Joslin.

15. The Referee finds that Claimant has failed to prove that his need for surgery is the result of an occupational disease arising out of and in the course of his employment.

16. Based on the above finding, the remaining issues are moot.

#### **CONCLUSIONS OF LAW**

1. Claimant has failed to prove that the need for his lumbar surgery is the result of an occupational disease arising out of and in the course of his employment.

2. All other issues are moot.



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

ROBERT A. WATSON, )  
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 Claimant, )  
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 v. )  
 )  
 JOSLIN MILLWORK, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 LIBERTY NORTHWEST INSURANCE )  
 CORPORATION, )  
 Surety, )  
 )  
 Defendants. )  
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**IC 2008-017579**

**ORDER**

Filed June 8, 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 that the need for his lumbar surgery is the result of an occupational disease arising out of and in the course of his employment.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

**ORDER - 1**

DATED this \_\_8<sup>th</sup>\_\_ day of \_\_June\_\_, 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 \_\_8<sup>th</sup>\_\_ day of \_\_June\_\_ 2009, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICK D KALLAS  
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*Gena Espinosa*

**ORDER - 2**