

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEFFREY L. WUTHERICH,)
)
 Claimant,)
)
 v.)
)
 TERTELING COMPANY, INC.)
 d/b/a WESTERN STATES EQUIPMENT)
 COMPANY,)
)
 Employer,)
)
 and)
)
 SENTRY SELECT INSURANCE)
 COMPANY (FORMERLY JOHN)
 DEERE INSURANCE COMPANY),)
)
 Surety,)
)
 Defendants.)
 _____)

IC 1998-003827

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

Filed: August 11, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on August 25, 2008. Claimant, Jeffrey L. Wutherich, was present in person and represented himself. Defendant Employer, Terteling Company, Inc., d/b/a Western States Equipment Company (Western States), and Defendant Surety, Sentry Select Insurance Company, were represented by Max Sheils, of Boise. The parties presented oral and documentary evidence. Briefs were later submitted. The matter came under advisement on June 15, 2009.

ISSUES

The issues to be decided are:

1. Claimant's entitlement to additional medical care.
2. Whether Claimant is medically stable, and if so, the date thereof.
3. Claimant's entitlement to additional temporary partial and/or temporary total disability benefits.
4. Claimant's entitlement to additional permanent partial impairment benefits.
5. Claimant's entitlement to permanent disability benefits in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant argues that he is entitled to additional benefits, including further surgical treatment, and additional temporary disability benefits, for his 1997 industrial accident. Defendants maintain that Claimant has been paid extensive medical, temporary disability, and permanent impairment benefits and has not proven his entitlement to any additional benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. All evidence considered in the Industrial Commission's July 30, 1999, Findings of Fact, Conclusions of Law and Order in this case;
2. The testimony of Claimant taken at the August 25, 2008, hearing;
3. Defendants' Exhibit 1, admitted at the August 25, 2008, hearing;
4. Claimant's Exhibits E1 through E4, including Claimant's handwritten letter dated April 21, 2008, a letter by Edwin Clark, M.D., dated April 16, 2008, a CT Cervical Spine report dictated by Bicken Garabedian, M.D., on March 26, 2008, and a CT Cervical Spine report from Stanford Hospital & Clinics dated February 22, 2008, all of which were admitted by Commission order dated May 6, 2009; and

5. Defendants' Exhibits A, B, and C filed May 29, 2009, and admitted into evidence on June 15, 2009.

Defendants' June 24, 2009, Motion to Strike Claimants' June 19, 2009, submission with two attached medical bills is granted.¹ After having considered the above evidence and the arguments 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 born in 1959 and was 49 years old at the time of the hearing. He attended high school through the 11th grade at Meridian High School where he enjoyed wood and metal shop but did not excel in academics.

2. Prior to 1987, Claimant worked at Pillow Palace where he manufactured giant pillows and bean bag chairs and assembled water beds. Claimant also worked at RC Cola loading and unloading trucks with a forklift. For several periods prior to 1987, Claimant was self-employed as an auto mechanic specializing in Volkswagen repair.

3. From 1986 to 1991, Claimant worked as a maintenance man at Super 8 Lodge where he installed toilets, linoleum floors, and sprinkler systems, painted rooms, and performed general repairs. He earned \$7.50 per hour.

4. In approximately 1991, Claimant injured his neck in a jet skiing accident. He received chiropractic treatments and his symptoms resolved.

5. From 1992 to 1994, Claimant worked as a warehouseman at Pam Oil, a parts warehouse, where he pulled freight and operated a forklift. Claimant earned \$7.50 per hour.

¹ Claimant's June 19, 2009, letter with two attached medical bills, and Claimant's June 26, 2009, letter with another attached medical bill, are denied admission into evidence because they were not timely disclosed. The Referee notes that even if these documents were admitted into evidence they would not impact the resolution of the issues addressed herein because there is no medical evidence relating these charges to Claimant's 1997 industrial injury. Furthermore, these charges apparently pertain to medical services performed long after Claimant became medically stable from his industrial injury.

6. In March 1994, Claimant commenced working for \$6.00 per hour at Western States' warehouse where he shelved auto parts and supplies. Claimant filled orders, made hydraulic lines, filled batteries with acid, threw freight, operated a forklift, and assisted customers. Claimant regularly lifted batteries and large pins weighing more than 100 pounds. Pulling parts required him to bend and twist regularly. Claimant assisted with the necessary paperwork for parts orders and shipment. At that time, Claimant was six feet three inches tall and weighed approximately 175 pounds.

7. On November 11, 1997, Claimant sustained a whiplash injury to his neck when he was forcefully shoved by a supervisor at work. At the time of the injury, Claimant worked 40 hours per week and earned \$9.25 per hour. He received extensive medical treatment and was ultimately diagnosed with a C5-6 disk herniation. Claimant stopped working approximately January 16, 1998, and apparently has not worked since that date.

8. On March 24, 1998, Christian Zimmerman, M.D., performed an anterior cervical discectomy and allograft fusion with plating at C5-6. Claimant initially improved after surgery, but on January 15, 1999, he presented to Dr. Zimmerman complaining of essentially the same symptoms that he had preoperatively, but less intense, and now worsening. Dr. Zimmerman opined Claimant had suffered some type of spinal cord injury from the severity of the original injury he sustained at work. On February 8, 1999, Dr. Zimmerman noted that Claimant's cervical CT myelogram showed a solid bony fusion at C5-6 with the hardware in good position.

9. Defendants denied payment for the surgical treatment provided by Dr. Zimmerman. After hearing on February 4, 1999, the Commission issued its decision and order of July 30, 1999, awarding Claimant medical benefits for his cervical surgery, temporary total disability benefits, and attorney fees. Defendants appealed the Commission's award of attorney fees. The Idaho Supreme Court affirmed the Commission's decision and awarded attorney fees

on appeal. Defendants subsequently retained different counsel and Claimant terminated the services of his attorney.

10. Claimant continued to complain of multiple cervical and upper extremity symptoms and underwent a second cervical surgery on January 18, 2005, by Samuel Jorgensen, M.D. Defendants paid for this medical treatment and temporary disability benefits thereafter.

11. Claimant complained of persisting symptoms and presented to Paul Montalbano, M.D. In February 2006, Dr. Montalbano performed a third cervical surgery. Defendants paid for this medical treatment and temporary disability benefits thereafter.

12. Claimant has treated with David Ballance, M.D., regularly since his third cervical surgery.

13. Defendants have paid Claimant non-medical benefits totaling \$72,561.65, including temporary disability benefits of \$48,151.27, and permanent partial impairment benefits of \$24,410.38 corresponding to a 20.5% permanent impairment of the whole person.

14. Claimant believes he has still not recovered from the surgery performed by Dr. Montalbano in February 2006. At hearing, Claimant testified he is suffering from headaches, neck, arm and leg pain, and that he needs yet another cervical surgery.

DISCUSSION AND FURTHER FINDINGS

15. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. 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, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

16. **Medical care.** The first issue is whether Claimant is presently entitled to additional medical care. An employer shall provide for an injured employee such reasonable medical,

surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code Section 72-432(1). The Idaho Supreme Court has held that Idaho Code Section 72-432(1) "requires the employer to pay for the costs of reasonable medical treatment required by the employee's physician," Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 721, 779 P.2d 395, 396 (1989), where the employee makes gradual improvement from the treatment received, the treatment is required by the employee's physician, and the treatment received is within the physician's standard of practice the charges for which are fair, reasonable and similar to charges in the same profession. Hipwell v. Challenger Pallet and Supply, 124 Idaho 294, 298, 859 P.2d 330, 334 (1993) (citing Sprague, 116 Idaho at 722-23, 779 P.2d at 397-98).

17. In the present case, Claimant believes that he has still not healed from the surgery performed by Dr. Montalbano in February 2006. Claimant testified that he is suffering from headaches, neck, arm and leg pain, and that he needs another cervical surgery. No medical expert has recommended a fourth cervical surgery; to the contrary, several medical practitioners have opined that further medical intervention is not indicated.

18. In his letter of September 20, 2007, Dr. Montalbano concurred with Dr. Friedman's declaration that Claimant was medically stable and needed no further medical workup.² Dr. Montalbano noted a solid arthrodesis at C4-5 as well as C5-6. Dr. Montalbano noted that an exhaustive medical workup had been completed to investigate Claimant's many subjective complaints, including facial numbness, vibratory sensory loss and sensory loss in his

² Dr. Friedman apparently found Claimant's medical condition stable prior to August 2007; however the record does not conclusively reveal the date.

upper extremities which follow no dermatomal distribution. Dr. Montalbano opined Claimant demonstrated high functional overlay and no further medical workup was indicated.

19. Claimant apparently relies upon his CT cervical scan taken February 22, 2008, at Stanford Hospital and Clinics, which was read by Gem State Radiology and interpreted as showing mature bony bridging across C4-5 and C5-6, diffuse C3-4 disk bulging, and mild C6-7 disk bulging. The same scan was also read by Stanford as showing bony fusion and no significant bony spinal stenosis or neuroforaminal narrowing. Claimant further notes that a letter from Edwin Clark, M.D., dated April 16, 2008, opined that Claimant's cervical condition deserved further study and evaluation by a qualified spine surgeon.

20. After reviewing Claimant's February 22, 2008, cervical scan and comparing it to films taken in September 2007, Dr. Montalbano opined that there is no evidence of anterolisthesis, hardware failure, spinal canal/foraminal stenosis, next segment degeneration, or instability in Claimant's cervical or thoracic spine. Dr. Montalbano reaffirmed his conclusion that Claimant was medically stable in September 2007 and that a high functional overlay continues to be present based on Claimant's persistent subjective complaints.

21. In his letter of May 21, 2009, Dr. Clark noted that his 2008 opinion that Claimant needed further medical evaluation was based upon Claimant's subjective complaints and Claimant's representation that diagnostic studies demonstrated spinal instability. After reviewing the actual February 22, 2008, scan, Dr. Clark expressly concurred in Dr. Montalbano's interpretation of the scan and agreed that there is no evidence of pseudarthrosis, canal/foraminal stenosis, or instability. Dr. Clark also agreed that Claimant reached medical stability as of September 2007.

22. Claimant has presented no persuasive expert medical evidence of his professed need for another cervical surgery and has not proven that such treatment would be related to his 1997 industrial injury. Claimant has not proven his present entitlement to any further medical care.

23. **Medical stability and temporary disability benefits.** The next two issues are related and include whether Claimant is medically stable from his industrial injury and whether Claimant is entitled to additional temporary disability benefits.

24. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Furthermore:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

25. In the present case, Defendants paid Claimant temporary disability benefits totaling \$48,151.27, for the following periods: January 21, 1998, through February 25, 1998; March 2, 1998, through August 1, 1998; and January 18, 2005, through May 2, 2007. As noted previously, the record establishes that Dr. Friedman, Dr. Montalbano, and Dr. Clark all found Claimant’s condition medically stable on or before September 2007.

26. Claimant argues he is entitled to, but was not paid, temporary total disability benefits from September 1998 through September 23, 2000; from May 5, 2001, through January 18, 2005, and from May 15, 2007, through the present. However Claimant has produced no medical evidence that he was in a period of recovery during any of these periods.

27. Claimant has not proven his entitlement to any additional temporary disability benefits.

28. **Permanent impairment.** The next issue is whether Claimant is entitled to additional permanent impairment benefits. 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 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 employee’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, 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).

29. Defendants have paid Claimant permanent impairment benefits of \$24,410.38, constituting 20.5% impairment of the whole person. This figure is apparently the average of two permanent impairment ratings. There is no other evidence in the record regarding permanent impairment. Claimant has not proven his entitlement to any additional permanent impairment benefits beyond the 20.5% whole person impairment rating which Defendants have already paid.

30. **Permanent disability.** The final issue is whether Claimant is entitled to disability in excess of impairment. “Permanent disability” or “under 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. “Evaluation (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

provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

31. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

32. Claimant herein has not submitted any evidence of his current employment opportunities or efforts to find employment. He has not submitted any medical evidence of his current physical restrictions. The record from the 1999 hearing contains medical evidence restricting Claimant to lifting no more than 50 pounds. Unfortunately, the current validity of such restrictions is not addressed in the record. However, the Commission, as the ultimate evaluator of impairment and disability, is not unaware of the limitations which usually result from repeated cervical surgeries and multiple-level cervical fusions.

33. Claimant was earning \$9.25 per hour at the time of his industrial injury. Present minimum wage rate is \$7.25 per hour. Based on Claimant’s impairment rating of 20.5% of the whole person, the reality that with his multiple-level cervical fusion Claimant will not likely be able to return to his time of injury warehouse work of lifting over 100 pounds, and considering

non-medical factors including his age, 11th grade education, and prior work experience serving customers, operating a forklift, and running his own auto mechanic shop, Claimant's ability to engage in gainful activity has been reduced. The record establishes that Claimant suffers a permanent disability of 25%, inclusive of his 20.5% permanent impairment.

CONCLUSIONS OF LAW

1. Claimant has not proven his present entitlement to additional medical benefits.
2. Claimant reached medical stability in or before September 2007.
3. Claimant has not proven his entitlement to any additional temporary disability benefits.
4. Claimant has not proven his entitlement to additional permanent impairment benefits beyond the 20.5% whole person impairment rating which Defendants have already paid.
5. Claimant has proven his entitlement to permanent disability benefits of 25%, inclusive of his 20.5% whole person permanent impairment.

RECOMMENDATION

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

DATED this 30th day of July, 2009.

INDUSTRIAL COMMISSION

/s/ Alan Reed Taylor, Referee

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 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:

JEFFREY WUTHERICH
PO BOX 88
MERIDIAN ID 83680

MAX M SHEILS JR
PO BOX 388
BOISE ID 83701

sc

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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 COMPANY (FORMERLY JOHN)
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 Defendants.)
 _____)

IC 1998-003827

ORDER

Filed: August 11, 2009

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 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 has not proven his present entitlement to additional medical benefits.
2. Claimant reached medical stability in or before September 2007.

3. Claimant has not proven his entitlement to any additional temporary disability benefits.
4. Claimant has not proven his entitlement to additional permanent impairment benefits beyond the 20.5% whole person impairment rating which Defendants have already paid.
5. Claimant has proven his entitlement to permanent disability benefits of 25%, inclusive of his 20.5% whole person permanent impairment.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 11th day of August, 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 11th day of August, 2009, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

JEFFREY WUTHERICH
PO BOX 88
MERIDIAN ID 83680

MAX M SHEILS JR
PO BOX 388
BOISE ID 83701

sc

_____/s/_____