



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

DATED this 18<sup>TH</sup> day of DECEMBER, 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 18<sup>TH</sup> day of DECEMBER, 2009, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Richard S. Owen  
P.O. Box 278  
Nampa, ID 83653

Mark C. Peterson  
P.O. Box 829  
Boise, ID 83701

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



Defendants contend Claimant's disability as rated by Doug Crum is "excessive and not entirely supported by the record."

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Hearing testimony of Claimant,
2. Claimant's Exhibits 1—12, and
3. Post hearing deposition of Doug Crum.

Defendants offered no testimony or exhibits. After examining the evidence, the Referee submits the following findings of fact, conclusion of law, and recommendation for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant worked for Employer as a service manager and outside salesman. He was required to inspect houses for pests, including crawling under houses.

2. On July 20, 2007, while maneuvering in a crawl space, Claimant felt sudden sharp back pain. When it did not resolve over the weekend, he reported it to his supervisor.

3. Claimant sought medical care which ultimately resulted in surgery. At his first visit, on July 23, 2007, he was evaluated by a physician's assistant at Primary Health. Claimant provided a history which has been consistent throughout his medical records and through the date of hearing.

4. Claimant next visited Dr. Lossman at Primary Health. After MRI and other testing, Dr. Lossman opined that there existed a degenerative and chronic component to Claimant's symptoms as well as an acute one. Claimant's medical records do not show his back condition required treatment before the July 23, 2007 accident.

5. Upon referral by Surety, Claimant visited Dr. Montalbano. Dr. Montalbano recommended surgery. Surety approved and paid for the L5-S1 decompression and fusion performed on February 14, 2008. The pre- and post-operative diagnoses were lumbar spondylosis, discogenic low-back pain, and lateral recess stenosis. Dr. Gussner also treated Claimant before and after surgery at Dr. Montalbano's referral.

6. On June 30, 2008, Dr. Gussner recommended permanent restrictions. These included no lifting over 20 pounds occasionally and 10 pounds frequently, together with limited body motion and position changes as needed. He rated Claimant's impairment at 8% without apportionment.

7. Claimant testified at hearing that if he had known the symptomatic result of surgery beforehand he never would have allowed the surgery.

8. Doug Crum evaluated Claimant. He concluded Claimant suffered a loss of market access of 75% and a loss of wage earning capacity of 52% and opined Claimant suffered an overall permanent disability of 65%, inclusive of PPI.

9. Claimant has worked at farm labor, as a laborer for a utility company, and as a welder. He has worked as a salesman, as a supervisor and trainer.

10. After surgery, Claimant was unable to return to work for Employer. Claimant made reasonable job search and has not found employment elsewhere.

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

11. **Credibility – Claimant.** Claimant's demeanor at hearing was credible. He stood or paced through much of the hearing, partly to be nearer the attorneys questioning him – he is significantly deaf – and partly from back discomfort which exacerbates while sitting. While standing, he rocked gently from one foot to the other, consistent with a man trying to

find a comfortable position. This motion appeared unconscious and therefore credible. Claimant's testimony was also consistent and credible.

12. **Permanent Disability.** Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423, -425, 430. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

13. Claimant's condition includes degenerative changes in his spine. However, Dr. Gussner found no basis for apportionment when he rated Claimant's PPI. Moreover, prior medical records do not support a finding that Claimant probably suffered symptomatically from degenerative changes before the compensable accident.

14. Non-medical disability factors were considered, including especially Claimant's work history and age. With a long history of physical and often outdoor work in his background and his age of 64 years, combined with the medical factors and restrictions imposed by Dr. Gussner, Mr. Crum's assessment of Claimant's disability was well supported.

15. Defendants argue that Claimant's job search was less than rigorous. Nevertheless, the record shows Claimant did make a reasonable attempt to return to work for Employer and made a reasonable job search for employment elsewhere

#### **CONCLUSION OF LAW**

Claimant established he is permanently partially disabled, rated at 65% of the whole person, as a result of his compensable accident.

**RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusion of Law as its own and issue an appropriate final order.

DATED this 11<sup>TH</sup> day of December, 2009.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

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