

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WAYNE BUTTS,)
)
 Claimant,)
)
 v.)
)
 WAYNE F. BUTTS,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2004-524396

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

Filed: February 7, 2011

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 Twin Falls on September 16, 2010. Claimant, Wayne Butts, was present in person and represented by Keith E. Hutchinson, of Twin Falls. Defendant Employer, Wayne F. Butts, and Defendant Surety, the Idaho State Insurance Fund, were represented by Neil D. McFeeley, of Boise. The parties presented oral and documentary evidence. One post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on December 14, 2010.

ISSUES

The issues to be decided were narrowed at hearing to the sole issue of whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine. In their briefing, the parties have also raised and argued the issue of whether Claimant’s permanent disability benefits should be reduced by the amount of his actual post-accident earnings.

CONTENTIONS OF THE PARTIES

Claimant alleges that he is totally and permanently disabled pursuant to the odd-lot doctrine due to his October 28, 2004 industrial accident, which resulted in permanent impairment of 89% of the whole person. Defendants acknowledge the industrial accident and do not contest the 89% permanent impairment rating, but assert that Claimant suffers no disability in excess of impairment and is not an odd-lot worker, largely due to his position as a county commissioner. Defendants also assert that if Claimant is determined to be an odd-lot worker, his benefits should be reduced by the amount of his actual earnings.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken October 20, 2009, admitted as Defendants' Exhibit C;
3. The testimony of Claimant taken at the September 16, 2010 hearing;
4. Claimant's Exhibits 1 through 6 and Defendants' Exhibits A through F and J, admitted at the hearing;
5. The post-hearing deposition of Nancy J. Collins, Ph.D., taken October 6, 2010.

The objections posed during Dr. Collins' deposition are overruled. After considering 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 55 years old and had resided in Challis for over 30 years at the time of the hearing. He was born and raised on a ranch and learned welding and mechanics from his father while maintaining and servicing farming and ranching equipment. Claimant graduated

from Challis High School in 1974. He has not served in the military or received any formal higher education. After high school, Claimant worked as a core driller, drilling cores and extracting mineral samples. He later opened his own post and pole business, where he used a chainsaw and operated a bulldozer and log skidder.

2. In approximately 1978, Claimant moved to California, where he helped build a plastic pipe manufacturing company. He became the maintenance foreman and supervised about 20 workers. In 1981, Claimant moved back to Challis, where he worked for a construction company as a dump truck driver, loader operator, and air track driller, installing infrastructure for the city of Challis. From 1983 until 1986, Claimant and his wife managed a gas station and automotive service center in Challis. Claimant ordered and stocked products and managed the gas jockeys and mechanics.

3. From 1991 until 1995, Claimant and his wife operated a radiator repair shop. In 1995, he became a volunteer EMT and volunteer fire chief for Challis.

4. In 1995, Claimant and his wife opened their own welding and fabrication business in Challis. That same year Claimant became a subcontractor for Hecla Mining. Hecla required Claimant to obtain workers' compensation coverage for himself, which Claimant carried through 2004. Also commencing in 1995, Claimant became a subcontractor doing welding and fabrication for Ledcor Industries, a Canadian-based construction company. Claimant also became a parts broker and maintenance foreman. He worked on various Ledcor projects in Oregon, Nevada, and California, as well as Challis.

5. In approximately 1998, Claimant certified as an advanced EMT.

6. In 2002, Claimant was elected as one of three county commissioners for Custer County. He has served continuously since that time.

7. In 2003, Claimant made a profit of \$39,000.00 from his fabrication business.

8. On October 28, 2004, Claimant was at his shop kneeling underneath a flatbed trailer when the trailer slipped off the jack and crushed him. Claimant suffered multiple spinal injuries, including an L1 burst fracture and an L4 compression fracture, and was essentially paraplegic immediately after the accident. He was taken via emergency vehicle and helicopter to an Idaho Falls hospital, where he was x-rayed and told he would never walk again. He was then taken by emergency helicopter to Boise, where he underwent anterior and posterior surgery including open reduction and internal fixation of his L1 burst fracture and fusion with instrumentation from T10 through L2. Claimant's spinal cord injury produced cauda equina syndrome with loss of bowel and bladder control. Following surgery, Claimant was initially numb from mid-chest down and confined to a wheelchair. Though he was told he would never walk again, he progressed over the ensuing months to a walker and, ultimately, to walking with the aid of two canes.

9. Claimant ceased serving as the Challis volunteer fire chief. However, he continued to serve as a volunteer advanced EMT.

10. While Claimant was undergoing rehabilitation treatment, the community of Challis used Claimant's materials to build a sales showroom for Claimant on his property. Defendants arranged for Claimant to receive hands-on training in small engine repair and fronted approximately \$15,000.00 to cover equipment and training costs. Claimant's shop in Challis was converted into a small engine sales and repair shop.

11. On April 19, 2006, Rodde Cox, M.D., found Claimant medically stable and rated his permanent impairment at 89% of the whole person, all attributable to his industrial accident.

12. In 2008, Claimant received a TENS unit implant, which helped manage his persisting back and leg pain. Also in 2008, Claimant was re-elected as a county commissioner.

13. Claimant has chronic bilateral leg weakness and pain, as well as back and foot pain. He can ambulate short distances with the aid of two canes. He is able to sit for

approximately one and one-half hours and stand for 15 to 20 minutes at a time. Lying down regularly helps relieve his leg and back pain. He also takes prescription Darvocet and Neurontin to manage his pain. Claimant has arranged his small engine sales and repair shop to include hoists, benches, six stationary chairs, and a rolling chair to better accommodate his limitations. He can work at his shop for approximately two and one-half to four hours each morning, five days per week. He is unable to tolerate further standing or sitting and must lie down or rest in a recliner chair for the balance of the day. Three or four business days each month, he is unable to work in his shop at all due to back pain. New equipment sales generate very little profit. Equipment service and repairs provide profit potential. However, Claimant is sending away repair business because he cannot tolerate additional time working in his shop. Attempts to hire an employee proved too costly and Claimant could not offer wages competitive with local mining work that pays \$20.00 per hour. His shop is mostly busy from mid-April through September each year. At the time of the hearing, his small engine sales and repair business had been listed with a realtor for sale for more than three years.

14. As a Custer County Commissioner, Claimant earns approximately \$22,000.00 annually and receives health insurance benefits. He conducts at least two open public meetings each month, which may last from seven to nine hours each. He also serves on several volunteer committees, which meet approximately quarterly. Claimant estimated he may spend 30 to 36 hours in county-related meetings each month. Together with the two other county commissioners, Claimant manages the Custer County budget of approximately \$8.3 million. As a commissioner, he communicates frequently with his constituents via telephone, e-mail, and through other means. Claimant estimated he may spend a total of nearly 150 hours per month fulfilling his duties as a commissioner.

15. Claimant's cauda equina syndrome has continued since his industrial accident. He must catheterize five or six times daily to relieve his bladder and observes a strict bowel program. Even so, he has regular—up to several times weekly—episodes of bowel incontinence. As a commissioner, Claimant has had to temporarily adjourn public hearings and excuse himself for a time due to bowel incontinence. Because of frequent bowel incontinence, he has not traveled out of state for county-related meetings since his accident. He is unsure whether he will seek re-election in 2012.

16. Claimant continues to serve as a volunteer advanced EMT in Challis. He was paid approximately \$400.00 in 2009 for providing certification training to other EMTs.

17. Having observed Claimant at hearing and compared his testimony to other evidence in the record, the Referee finds that Claimant is a highly credible witness. His work history—particularly his post-accident work and public service history—demonstrates stoic determination and an exemplary work ethic.

DISCUSSION AND FURTHER FINDINGS

18. The provisions of the Idaho 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).

19. **Permanent disability.** The primary issue is the extent of Claimant's permanent disability, specifically, whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine. "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. 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). Pursuant to Idaho Code § 72-422, “The proper date for disability analysis is the date that maximum medical improvement has been reached.” Stoddard v. Hagadone Corp., 147 Idaho 186, 192, 207 P.3d 162, 168 (2009).

20. To evaluate Claimant’s permanent disability several factors merit examination, including his permanent impairment, the physical restrictions resulting from his permanent impairment, and his potential employment opportunities—particularly as identified by vocational rehabilitation experts.

21. Permanent impairment. All parties agree that Claimant suffers a permanent impairment of 89% of the whole person due to his industrial injuries.

22. Physical restrictions. Dr. Cox directed Claimant to avoid ambulation on uneven surfaces, avoid working at unprotected heights, avoid repetitive bending, twisting, and stooping, ensure close access to a bathroom, lift only approximately 10-15 pounds occasionally, and avoid prolonged exposure to low frequency vibration.

23. Employment opportunities. Nancy Collins, Ph.D., testified as Claimant's vocational rehabilitation expert that he is totally and permanently disabled from competitive gainful employment. She noted that his lifting restrictions limit him to the sedentary to light range of employments. Claimant's cauda equina syndrome and resulting incontinence figured prominently in Dr. Collins' conclusions. She opined that incontinence would be a difficult issue for a potential employer to accommodate and would preclude Claimant from working customary full-time hours. She opined that with his endurance, incontinence, and pain issues, there are no employers who will provide the accommodations Claimant requires. Dr. Collins testified that Claimant is not competitively employable in any well-known branch of the labor market in the Challis area. Her opinion is persuasive. The record contains no other vocational opinion.

24. Claimant's activities in his small engine repair business and as a county commissioner demonstrate that he is capable of some—albeit limited—gainful activity. Challis has a population of approximately 900 people; Custer County has a population of approximately 4,200 people, and employment opportunities are limited.

25. Based on Claimant's impairment rating of 89% of the whole person, his permanent physical restrictions, cauda equina syndrome and resulting incontinence, and considering his non-medical factors including his age at the time of the accident, limited education, and inability to return to his previous positions, Claimant's ability to engage in regular gainful activity has been greatly reduced. The Referee concludes Claimant has established a permanent disability of 95%, inclusive of his 89% whole person impairment.

26. Odd-lot. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing that he is an odd-lot worker. An odd-lot worker is one “so injured that 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, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). 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). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he has attempted other types of employment without success;
2. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

27. In the present case, Claimant has not presented evidence of an unsuccessful work search or of multiple failed attempts at other types of employment. However, he has presented Dr. Collins’ expert opinion that he is totally disabled, thus inferring it would be futile for him to look for work. As noted above, Dr. Collins’ opinion in this regard is persuasive. Claimant has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the Lethrud test.

28. Once a claimant establishes a prima facie odd-lot case, the burden shifts to the employer “to show that some kind of suitable work is regularly and continuously available to the claimant.” Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The employer must prove there is:

An actual job within a reasonable distance from [claimant’s] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the [employer] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

29. Defendants attempt to rebut Claimant’s prima facie odd lot case by asserting that he is already self-employed in small engine sales and repair and that he also works as a Custer County Commissioner.

30. Claimant readily acknowledges that he operates his own small engine sales and repair business in Challis. However, his productivity is so reduced by the sequelae of his industrial accident as to make his enterprise not competitively viable. Claimant’s unchallenged testimony establishes that profit potential exists only in service and repair, not in new equipment sales. Even with the best of accommodations, Claimant’s impairments do not allow him to work more than a few hours each business day and entirely preclude him from working three or four business days each month. Claimant’s wife must close the shop for him regularly. He is able to work on lawnmowers and chainsaws, but not on snow blowers or larger engines. Dr. Collins reviewed Claimant’s financial statements from his small engine sales and service business since his accident and opined: “None of his profits are anywhere near even minimum wage. They’re certainly not a living wage, and he has a loss as often as he has a profit. So it doesn’t appear to me that he’s competitively employed.” Collins Deposition, p. 34, l. 25 – p. 35, l. 4. Claimant has been attempting, unsuccessfully, to sell the business for more than three years.

31. Claimant's position as a Custer County Commissioner requires knowledge, skill, and significant time and energy. However, Dr. Collins explained her resistance to characterizing the county commissioner position as competitive work:

The problem, for me, is that I don't think it's regularly-available, competitive work. If he doesn't have this job, if he doesn't win the election or he chooses to leave, the typical tenure there is ten years or less. There are no other jobs like that; it's a unique animal. He controls – basically, controls all of his hours and his work, other than the couple of meetings that are mandatory.

Collins Deposition, p. 38, l.19 – p. 39, l. 1.

32. Claimant was elected a county commissioner in 2002 and re-elected in 2008. His chronic bowel incontinence precludes his attendance at out of state county-related meetings. He is unsure whether he will seek re-election in 2012. An elected county commissioner position is available, at best, only periodically and does not constitute “work *regularly and continuously available* in the open labor market.” Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984) (emphasis supplied).

33. Defendants have not shown there is work regularly and continuously available that Claimant can perform. Claimant has proven he is totally and permanently disabled pursuant to the odd-lot doctrine commencing April 19, 2006, the date he reached maximum medical improvement. See Stoddard v. Hagadone Corp., 147 Idaho 186, 192, 207 P.3d 162, 168 (2009).

34. **Disability benefit reduction.** Defendants assert that Claimant's total permanent disability benefits should be reduced by the amount of his actual post-accident earnings as a county commissioner and from his small engine sales and service business. This notion was rejected by the Supreme Court in Garcia v. J.R. Simplot Co., 115 Idaho 966, 973, 772, P.2d 173, 180 (1989), overruled on other grounds, Archer v. Bonners Ferry Datsun, 117 Idaho 166, 786 P.2d 557 (1990), wherein the Court found that Garcia was totally and permanently disabled and the fact that she “was able to find some employment that would provide her with income would not affect her right

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 2011, 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:

KEITH E HUTCHINSON
PO BOX 207
TWIN FALLS ID 83303-0207

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

sc

_____/s/_____