

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LARRY GENE DAVIS,

Claimant,

v.

GARY AMOTH TRUCKING, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Surety,

Defendants.

IC 2012-005977

IC 2012-024518

IC 2013-028072

IC 2013-028073

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

Filed April 24, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Twin Falls, Idaho, on September 25, 2014. Claimant was represented by Dennis R. Petersen, of Idaho Falls. Joseph M. Wager, of Boise, represented Gary Amoth Trucking, Inc., (“Employer”) and Liberty Northwest Insurance Corporation (“Surety”), Defendants. Oral and documentary evidence was admitted. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on March 23, 2015.

ISSUES

By agreement of the parties, the issues to be decided¹ are;

1. Whether the condition for which Claimant seeks benefits was caused by one or more industrial accidents.
2. Whether and to what extent Claimant is entitled to the following benefits;
 - a. medical care; and
 - b. temporary total disability.
3. Whether the Commission should retain jurisdiction beyond the statute of limitations.

Claimant's entitlement to permanent partial impairment, permanent partial disability, and retraining benefits are reserved.

CONTENTIONS OF THE PARTIES

Claimant filed four injury notices for various incidents occurring in 2012. The first claim was accepted by Surety and paid appropriately. The next two incidents resulted in no medical treatment, and were denied by Surety. It is the fourth incident, which occurred on September 24, 2012 which is at issue herein.

Claimant injured his low back on September 24, 2012 while lifting a tarp in the course and scope of his employment with Employer. His claim was accepted and he received medical attention. He was cleared by his treating physician to full work duties in mid-October 2012. Claimant continues to have low back symptoms, and is not at MMI. He needs further medical treatment for his low back injury, and is entitled to temporary total disability benefits for the time he has been unable to work post-accident.

¹ In briefing, both parties ask the Commission to decide issues not listed herein. The issues decided at this time are limited to those requested by the parties at the time of hearing.

Defendants argue Claimant failed to establish he is entitled to additional medical or time loss benefits. He was returned to full time work with no restrictions by Douglas Stagg, M.D. as of October 15, 2012, and declared at MMI by November 20, 2012. Brian Johns, M.D. subsequently examined Claimant and opined his current complaints are unrelated to his September 24, 2012 industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;
2. Claimant's Exhibits (CE) A through Z, admitted at hearing;
3. Defendants' Exhibits (DE) 1 through 16, admitted at hearing;
4. The post-hearing deposition transcript of James H. Bates, M.D., taken on November 18, 2014; and
6. The post-hearing deposition transcript of Brian A. Johns, M.D., taken on December 9, 2014.

Having considered the evidence and 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. At the time of hearing, Claimant was fifty nine years old and living in Twin Falls, Idaho. Since January 2014, he has been on Social Security Disability. His last employment ended on November 6, 2012. Since 1986, Claimant has been a truck driver.
2. Claimant has a history of low back injuries dating back to at least 1998 or 1999. None of those injuries precluded him from returning to truck driving after a period of recovery.

3. In approximately May of 2010, Claimant began working for Gary Amoth Trucking (Employer) as an over-the-road truck driver.

4. During his tenure with Employer, Claimant suffered four mishaps which led to worker's compensation claims. This decision centers around his fourth incident, IIC claim no. 2012-024518.

5. On September 24, 2012, Claimant experienced pain in his lower back toward the middle and right side as he was moving tarps as part of his employment. The accident occurred in California. Although he claims he had to stop more frequently than normal due to back pain, Claimant was able to complete his route back to Idaho on September 25, 2012.²

6. Employer directed Claimant to Douglas Stagg, M.D., for treatment on September 26, 2012. Dr. Stagg noted Claimant had a similar injury in 1998 which resulted in three bulging disks requiring two steroid injections. Claimant indicated he had done well since then, with only intermittent low back discomfort. Dr. Stagg diagnosed right low back strain with marked spasm and moderate left spinal list. He started Claimant on a regimen of gentle exercises, with the use of ice and heat for his low back. The doctor prescribed Ibuprofen for daytime use, and Norco and Valium as needed.

7. Over the course of the next month, Claimant saw Dr. Stagg in follow up. During his October 1 visit, Dr. Stagg recommended Claimant see Joshua Olsen, D.C., for three sessions. Claimant saw Dr. Olsen on four occasions from October 1 through October 8, 2012. By Claimant's last chiropractic visit, Dr. Olsen noted Claimant was

² Claimant testified at hearing that it took two days to get from his location in California to Idaho, but the medical records from Dr. Stagg indicate Claimant arrived on September 25, and was seen by Dr. Stagg the next day, September 26, 2012.

doing much better and if careful could return to work. Claimant sought no further chiropractic treatment.

8. Claimant continued to improve. By October 8, 2012, Claimant indicated to Dr. Stagg that he was close to being ready to return to work. His spinal list was gone. He moved stiffly, but showed signs his low back strain was resolving.

9. At his October 15, 2012 office visit, Claimant indicated he was “doing great” and had no pain, just some stiffness. He moved easily and appeared comfortable. He could flex his low back to sixty degrees with minimal discomfort. Dr. Stagg released Claimant for normal work.

10. On October 19, 2012, Claimant returned to work for Employer.

11. At Claimant’s November 6, 2012 check up with Dr. Stagg, the history reveals that Claimant had been “out on the road for a couple of weeks” and did fairly well. Claimant complained of “occasional slight discomfort in the right low back, but much improved.” (CE Q, p. 118.) Claimant indicated he had no trouble doing his trucking activities, including tarping. Dr. Stagg noted Claimant moved easily and appeared comfortable. There was no spinal list observable and only very mild tenderness in the right low back. Flexion ROM was to sixty degrees with minimal discomfort. Dr. Stagg diagnosed an improving right low back strain, opined Claimant would be at MMI by November 20, 2012 with no impairment, and released him from further care.

12. Claimant testified at hearing he exaggerated his improvement to his doctors because he was getting pressure from Employer to return and was concerned he would be terminated if he stayed off work. Regardless, Claimant did return to work for Employer

from October 19 to November 6, 2012, when he was terminated due to a succession of property damage-causing work incidents.³

13. Claimant unsuccessfully applied for numerous jobs after he was terminated. He testified at hearing that due to his back condition, he doubted he would be able to perform many of the jobs for which he applied, but was willing to “give it a shot”, as he put it. Claimant testified his back has continued to bother him to the date of hearing. He claims he can not sit for more than about forty-five minutes, and stand for thirty minutes. He does not believe he can lift more than about twenty pounds.

IMEs

14. Two physicians saw Claimant in an independent medical examination setting. Brian Johns, M.D., a board-certified occupational and environmental physician practicing in Twin Falls saw Claimant on behalf of Defendants. Claimant hired James Bates, M.D., a board-certified physical medicine and rehabilitation physician practicing in Meridian.

15. Dr. Johns saw Claimant on September 26, 2013. At that time, the doctor took a detailed history from Claimant and did a physical examination. Claimant told Dr. Johns about a low back injury he suffered in the mid or late 1990s where he “tore” three disks and had two epidural injections. Claimant indicated he did fairly well thereafter, with just occasional back discomfort. Claimant also described two recent industrial accidents which negatively impacted his back; a fall resulting in a large hematoma on his right side, and an incident where he was slammed around inside a trailer

³ Claimant was fired on the same day Dr. Stagg released him from further care. It is likely Claimant saw Dr. Stagg prior to finding out he was terminated, since he made no mention of it to the doctor, and the time of the medical examination was 8:30 a.m.

while attempting to unload its contents using a pallet jack.⁴ Subsequently, Dr. Johns reviewed medical records for two other occasions where Claimant sought treatment for low back pain. One was in April 2008 when Claimant was seen for low back pain which went down his right leg. Previously, in May 2006, Claimant had presented for immediate onset of low right-sided back pain from a work-related accident.

16. During his physical examination, Dr. Johns discovered an unrelated neurologic disorder affecting Claimant's lower extremities, but otherwise only subjective findings. Based on Claimant's complaints of ongoing pain and limitations, Dr. Johns ordered an MRI to explore the possibility of a pathology related to the industrial accident in question.

17. Claimant's lumbar MRI showed chronic degenerative changes, more significantly on the left than right. The MRI showed nothing which would account for Claimant's ongoing pain complaints in his right low back. Based upon his examination, record review, and MRI findings, Dr. Johns opined Claimant's ongoing complaints were related to his pre-existing back condition. Dr. Johns felt Claimant was at MMI as of the date suggested by Dr. Stagg and could return to work without restrictions from his industrial accident of September 24, 2012.⁵ Dr. Johns also suggested Claimant do home exercises and take over-the-counter pain medication as needed.

18. In his deposition, Dr. Johns supported his opinions with the following facts:

- Nothing on Claimant's recent MRI showed an acute, or even one year old injury;

⁴ These two accidents comprise IIC claims 2012-005977 and 2013-028073.

⁵ Dr. Johns felt that due to his unrelated neurological findings, Claimant should not be driving commercially, working at heights, or with dangerous machinery until he was seen by a neurologist.

- Claimant's MRI shows significant degenerative changes in his lumbar spine;
- Claimant had similar complaints of low back pain at least as far back as the late 1990's;
- When Claimant sought treatment previously, the records show he stopped treatment when he was much improved but prior to becoming asymptomatic;
- Claimant had periodic leg pain associated with his low back on a very intermittent basis during past episodes of low back pain;
- Claimant has a major undiagnosed neurological disorder which apparently is recent and the extent of its effect is unknown.

Johns Deposition, p. 38, ll. 11-25, p. 39, ll. 1-8; p. 40, ll. 2-9; p. 42, ll. 16-25, p. 43 ll. 1-3.

19. Dr. Bates examined Claimant on December 16, 2013 at Claimant's request. Dr. Bates reviewed medical records and did a physical examination of Claimant. During the examination, the doctor found no evidence of nerve root involvement but did record Claimant's subjective pain complaints during various tests and limited ROM in all axes. Dr. Bates noted nothing on Claimant's previous MRI other than degenerative changes.

20. Dr. Bates diagnosed a lumbar strain. He correlated the strain to Claimant's September 24, 2012 industrial accident. Dr. Bates also felt Claimant was not presently at MMI. He recommended physical therapy to get Claimant to stretch and develop strength in his low back. During his period of recovery, Dr. Bates would restrict Claimant's work to those activities allowing a frequent change of positions, including sitting, standing, and/or walking every hour as needed, and only moderate (45 pound) lifting on an occasional basis.

21. In support of his opinions, Dr. Bates reasoned as follows:

- Claimant strained his lumbar spine on September 24, 2012 in an industrial accident;

- Thereafter, he had insufficient medical treatment, which included limited chiropractic treatment, but no sustained medication trials, and no physical therapy;
- Claimant was released from further care while he was still symptomatic;
- Claimant's lumbar strain had not resolved by December 2013;
- Physical therapy would be beneficial to resolving Claimant's strain;
- Until the strain is resolved, Claimant should be limited in his work activities.

22. Dr. Bates dismissed Claimant's degenerative spinal condition, since he felt it was asymptomatic. Dr. Bates also dismissed Claimant's prior back injuries, since he believed those injuries resolved with contemporaneous treatment.

DISCUSSION AND FURTHER FINDINGS

23. 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). Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934, (1993).

Current Condition

24. The first noticed issue is whether the condition for which Claimant seeks benefits was caused by one or more of his industrial accidents. Resolution of this issue requires the

analysis and weighing of the contrasting opinions of Drs. Johns and Bates, and review of the record.

25. Both doctors make reasonable observations. As stated by Dr. Johns, this issue presents a close question. For the following reasons more weight is given to Dr. Johns' opinion.

26. It appears from the record Claimant's pre-existing baseline included some level of at least periodic back pain. For example, in his history to Dr. Stagg on September 26, 2012, Claimant indicated that after his 1998 low back injury he had done fairly well, "with just intermittent low back discomfort." (CE Q, p. 99.) At hearing, Claimant testified his back pain "eased for awhile" after epidural shots from the 1998 injury. (HT, p. 24, ll. 3-20.) After his industrial accident of March 7, 2012 where he fell and injured his right side, on his last visit with Dr. Johns (Claimant's treating physician for that event), Claimant still had some pain in his thigh, and the assessment on that visit listed "back pain." (CE Q, p. 95.) Furthermore, medical records from a Kurt Seppi, M.D., dated April 9, 2008 indicate Claimant was seen for one visit, citing low back pain going into his right leg with no known trauma. While Claimant has no recollection of that visit, and suggests Dr. Seppi's records might be for a different "Larry Davis," the evidence is overwhelming that in spite of his lack of memory on the event it was he who sought this treatment.

27. Further supporting the notion that Claimant's base line profile includes some level of recurring back pain, Claimant often discontinued treatment while his back was still symptomatic. In addition to each of the examples cited above, when Claimant last saw Dr. Olsen

on Monday, October 8, 2012 he was doing much better, but still was sore across his lower back, and was instructed to return for further care that upcoming Thursday, which he did not do.⁶

28. Claimant argues he was able to perform his trucking duties after each of his prior low back injuries, so whatever discomfort, if any, he may have felt was insignificant. It is true Claimant returned to trucking after his acute low back pain subsided. Consistent with that observation, after his industrial accident of September 24, 2012, Claimant returned to trucking for Employer, and was able to perform his duties until he was fired for reasons unrelated to his back. After two weeks of trucking, Claimant told Dr. Stagg he was doing “fairly well” and had no trouble with his trucking activities, a claim which he reasserted at hearing. While subsequently Claimant testified he was untruthful with the doctor out of fear of losing his job, what he told in his contemporaneous history to his doctors cannot be rejected outright. Claimant indicated to Dr. Johns that as of November 6, 2012, Claimant was concerned that if he did not return to work he would be fired, so he told Dr. Stagg he was doing better than he really was. However, Claimant had also, as far back as early October, told Dr. Olsen he was doing much better. More weight is placed on what Claimant told his doctors regarding his medical status than what he testified to after the fact.

29. Claimant testified he applied for numerous jobs after being fired by Employer. At hearing, he speculated he probably could not have performed the majority of jobs for which he applied. There is no legitimate reason for Claimant to apply for jobs he was not able to perform. More weight is assigned to the fact Claimant applied for jobs

⁶ While one could argue Claimant did not return since he had already exceeded his authorized number of chiropractic visits, it does not appear Claimant made any effort to obtain authorization for additional treatments.

which included driving, operating a forklift, and flagging, than to his subsequent testimony regarding limitations which would preclude such work.

30. Considering the record and weighing the competing testimony of Drs. Bates and Johns, the Referee finds Claimant has failed to prove his current low back condition for which he seeks benefits was caused by the subject accident.

Medical Benefits

31. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, ... as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of 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.

32. It does not appear from the record Claimant has incurred any past medical charges for which he seeks reimbursement. Since Claimant is not within a period of recovery from his industrial accident, Defendants are not obligated for future medical care Claimant may seek.

Temporary Disability Benefits

33. Idaho Code § 72-408 provides for income benefits for total and partial disability during Claimant's period of recovery. The burden is on Claimant to establish through expert medical testimony 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). Once Claimant reaches medical stability, he is no longer in a period of recovery, and temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

34. Claimant argues he is still in a period of recovery, with physician-imposed limitations which preclude him from his former work duties with Employer. Furthermore,

Employer failed to offer Claimant work within his limitations. As such, he is entitled to total disability benefits from the time he was fired until he is medically stable, or Employer offers him work within his limitations or can show there is employment in the general labor market which Claimant has a reasonable opportunity of obtaining. *See, e.g., Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

35. On or about October 19, 2012, Claimant, while still in a period of recovery, returned to work with no restrictions. However, upon his return, Claimant was placed on probation. Claimant argues his probation was due to his back injury. Defendants aver the probation was the result of Claimant's past work performance, including speeding tickets and improper cargo securement. Claimant understood that while on probation, further mishaps would result in termination. The record supports Defendants' claim, and does not support Claimant's theory on this point. (*See* DE 16, p. 255.)

36. Claimant was able to perform his work duties after his return to work in mid-October. However, while hauling a load through Houston, Texas, Claimant slammed on his brakes when a car cut in front of him, causing his load to shift forward, damaging the truck's header rack. Then on November 5, 2012, Claimant took a wrong turn ending up on a canal bank in rural Twin Falls County. He high-centered the right rear corner of the trailer on a concrete structure, causing substantial damage to the trailer axle and tool box. Claimant was fired the following day.

37. Employer provided Claimant suitable work during his period of recovery. The employment was to continue through Claimant's period of recovery. The record is clear that the only reason Claimant did not continue in his employment with Employer through his period of recovery and beyond is due to his driving mishaps, which were unrelated to his injury.

38. Since Employer presented Claimant with suitable work which Claimant was performing during his period of recovery, and which was slated to extend through his period of recovery (barring further driving mishaps), Defendants satisfied their obligation under *Malueg v. Pierson Enterprises*, 111 P.2d 789, 791, 727 P.2d 1217, 1219 (1986). (Temporary disability benefits continue *until* Employer makes a legitimate offer of suitable employment which Claimant is capable of performing and which is anticipated to last through Claimant's period of recovery.) The fact Claimant was terminated from his employment for reasons unrelated to his industrial injury does not alter the analysis. Claimant is not entitled to temporary disability benefits after he returned to work on or about October 19, 2012.

Retention of Jurisdiction

39. Claimant requests the Commission retain jurisdiction since not all issues were litigated during the instant hearing. Since the matter was bifurcated and issues remain, there is technically no need to seek retention; the case is still active. As such, jurisdiction is retained until those matters not adjudicated herein are heard and decided, or the matter is concluded through settlement, voluntary dismissal, or failure to prosecute under J.R.P. 12B.

CONCLUSIONS OF LAW

1. Claimant failed to prove the condition for which he seeks benefits was caused by his industrial accident.
2. Claimant has not established a right to further medical care after November 20, 2012.
3. Claimant has not established a right to additional temporary disability benefits beyond October 18, 2013.

4. The Industrial Commission retains jurisdiction of this matter pending the resolution of all reserved issues not decided herein.

RECOMMENDATION

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

DATED this 27th day of March, 2015.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2015, 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 PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403

JOSEPH WAGER
PO BOX 6358
BOISE ID 83707

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LARRY GENE DAVIS,

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GARY AMOTH TRUCKING, INC.,

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ORDER

Filed April 24, 2014

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 failed to prove the condition for which he seeks benefits was caused by his industrial accident.
2. Claimant has not established a right to further medical care after November 20, 2012.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403

JOSEPH WAGER
PO BOX 6358
BOISE ID 83707

jsk

/s/