

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GABRIEL DELGADILLO,
Claimant,

v.

ANDERSEN MANUFACTURING,
Employer,

and

ADVANTAGE WORKERS
COMPENSATION INSURANCE CO.,
Surety,
Defendants.

IC 2011-011230

**FINDINGS OF FACT,
CONCLUSION OF LAW,
AND ORDER**

Filed February 13, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael Powers, who conducted a hearing in Idaho Falls, Idaho, on August 9, 2013. James D. Holman, of Idaho Falls, represented Claimant. Alan R. Gardner, of Boise, represented Defendants. Oral and documentary evidence was admitted. Two post-hearing depositions were taken. The parties filed post-hearing briefs. The matter came under advisement on November 20, 2013. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUE

By agreement of the parties at hearing, the sole issue to be decided is whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits in excess of his undisputed permanent partial impairment (PPI) benefits.

SYNOPSIS OF CASE AND CONTENTIONS OF THE PARTIES

Claimant lost complete vision in, and use of, his left eye in an industrial accident while working for Employer in 2011. The parties stipulated to a PPI of 30% of the whole person, in accordance with I.C. § 72-428. Claimant now seeks permanent disability benefits in excess of his 30% impairment.

Claimant relies on vocational expert Douglas Crum, CDMS, who argues for a 50% permanent disability rating, inclusive of impairment. Defendants rely on Mary Barros-Bailey, Ph.D., who assesses Claimant's disability at 21.4%, inclusive of his 30% impairment, which results in no disability benefits due and owing to Claimant.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing.
2. Claimant's Exhibits A through H, admitted at hearing.
3. Defendants' Exhibits 1 through 12, admitted at hearing, exclusive of Exhibit 8, which was not offered.¹
4. The pre-hearing deposition transcript of Claimant (Defendants' Exhibit 9).

¹ Defendants objected to Claimant's Exhibit G on foundational grounds, and the ruling was reserved until after the deposition of Douglas Crum. At this time, the objection is overruled and Exhibit G is admitted. Claimant objected to Defendants' Exhibits 10, 11, and 12, which were conditionally admitted. At this time, the objection is overruled and those Exhibits are hereby deemed admitted.

5. The post-hearing deposition transcripts of Mary Barros-Bailey, Ph.D., and Mr. Douglas Crum, CDMS, both of which were taken on August 23, 2013.

All objections raised in the depositions are overruled.

FINDINGS OF FACT

1. At the time of hearing, Claimant was a 43-year-old married man with a ninth grade formal education. He, his wife, and children, have lived in Idaho Falls since 2005. Prior to then, he primarily lived in southern California.

2. Claimant was born in Mexico and moved with his family to the United States when he was three. He is a U.S. citizen.

3. After dropping out of school, Claimant worked at a variety of unskilled or semi-skilled jobs prior to moving to Idaho.

4. At his brother's suggestion, Claimant moved to Idaho, where he landed a job at a fishing line manufacturing plant.

5. In December 2005, Claimant began working for Employer, where he is still employed. His starting wage was \$14.50 per hour, and over the past eight years his hourly wage has increased to \$16.50 as of the date of hearing.

6. On May 5, 2011, Claimant suffered a serious industrial injury while working at Employer's place of business, which left him totally blind in his left eye. His other symptoms from this accident include frequent headaches, disfigurement around his left eye, numbness on his left cheek, loss of peripheral vision and depth perception, and frequently his left eye waters.

7. Loss of an eye is a scheduled injury under Idaho's workers' compensation statutory scheme. The parties agree Claimant has a statutory impairment of 30% of the

whole person. Claimant seeks a permanent partial disability award in excess of this impairment rating.

DISCUSSION AND FURTHER FINDINGS

8. Idaho Code § 72-422 defines permanent disability as “any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation.” One is under a permanent disability “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.” I.C. § 72-423. As defined in I.C. § 72-425 “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....” Those “pertinent nonmedical factors” include that nature of the physical disablement, the disfigurement and its effect on procuring or holding employment, the cumulative effect of multiple injuries, the employee’s occupation and age at the time of the accident, the employee’s diminished ability to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, in addition to other factors the Commission may deem relevant. I.C. § 72-430.

9. The test for determining if Claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Co.*, 115 Idaho 293, 294, 66 P.2d 763, 766 (1988). The burden of establishing

permanent disability is upon a claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

10. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The Idaho Supreme Court in *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing.

11. Both sides of this issue hired vocational experts who rendered opinions regarding Claimant's permanent disability as defined above. Each expert used a methodology which is markedly different than the other. Dr. Barros-Bailey utilized an analytical approach, while Mr. Crum's approach was based more on his experience with the Idaho Falls labor market. The Commission has reviewed both reports and finds each contains valid and useful information that will assist the fact finder in making a determination of Claimant's permanent disability.

Dr. Barros-Bailey

12. Dr. Barros-Bailey began by reviewing Claimant's background, both socially and functionally. She then considered his work history and skill sets. After assembling a set of transferrable skills, she was able to quantify the number of jobs in the Idaho Falls Metropolitan Statistical Area for which Claimant would qualify, but for the loss of his left eye. From this total, she subtracted the jobs for which Claimant would no longer qualify with his current injury, and determined Claimant's "universe" of potential jobs had been reduced by seven percent (7%). In conducting her evaluation of Claimant's loss of access to the labor market, Dr. Barros-Bailey specifically considered Claimant's deficiencies in depth perception and peripheral vision.

13. Dr. Barros-Bailey also considered Claimant's loss of access to the labor market using another measure. Using research from the National Institute of Disability and Rehabilitation Research, Dr. Barros-Bailey determined that in the population at large, approximately 81.9% of persons without disabilities participate in the labor market. However, only 66.8% of individuals with monocular vision participate in the labor market, a difference of 15.1%.

14. As of the date of hearing, Claimant was earning \$16.50 per hour with his time of injury employer, performing his time of injury job. Dr. Barros-Bailey recognized that if Claimant loses his current job, it is unlikely that he will be able to restore his current wage in other employment. Claimant's current employment falls into SFC Code 51-9121 of the Occupational Employment Survey for coating, painting, spraying machine centers, operators and tenders. The median wage for this position is \$13.39 per hour. The entry level wage for this job code is \$10.79 per hour. Should Claimant lose his current job, he would not be expected to earn only \$10.79 per hour in similar employment because he would not be regarded as an "entry level" employee; he would bring all of his transferrable job skills to such a position, making it more likely that he would be paid something similar to the median wage of \$13.39 per hour. Using these assumptions, Dr. Barros-Bailey concluded that Claimant had a wage loss of approximately 19%.

15. Dr. Barros-Bailey testified that in calculating Claimant's disability, she averaged his 15% loss of access to the labor market with his 19% wage loss, yielding a disability figure in the range of 17%. To this, she also added an additional 2.5% for Claimant's age and 1.85% for disfigurement. She concluded that Claimant has disability referable to the subject accident of

21.4% of the whole person. Dr. Barros-Bailey did not consider Claimant's disfigurement or age to be significant factors in contributing to his disability.

Douglas Crum

16. As did Dr. Barros-Bailey, Mr. Crum initiated his evaluation of Claimant's disability by calculating Claimant's loss of access to the labor market and his wage loss. Employing labor market statistics from the Idaho Department of Labor, Mr. Crum concluded that immediately prior to the subject accident, Claimant had access to approximately 14.8% of the jobs in his local labor market. Specifically, Mr. Crum testified that based on Claimant's age, education, work history, physical capacity and transferrable job skills, Claimant had access to 14.8% of the jobs in his labor market prior to the subject accident. (Crum Deposition 16/21-21/16). Factoring in Claimant's vision loss left him able to compete for only 10% of the jobs in the labor market, a 32% loss of labor market access.

17. Although Claimant was earning \$16.50 per hour at the time of hearing, at the time of injury, Claimant earned only \$14.50 per hour. Based on his experience, Mr. Crum testified that should Claimant lose his current job, he will not be able to find other employment initially paying more than about \$11.00 per hour. Therefore, according to Mr. Crum, Claimant has suffered a wage loss of approximately 24%.

18. As did Dr. Barros-Bailey, Mr. Crum believed that Claimant's disfigurement is a factor contributing to his overall disability. Averaging Claimant's 32% loss of labor market access and his 24% wage loss yields a disability in the range of 28%. However, Mr. Crum testified that Claimant's disability is greater than the average of the calculations referenced above. In this regard, his report reflects the following:

Based on the above analysis, considering all the medical and non-medical factors, I would propose that Mr. Delgadillo has experienced Permanent Partial Disability,

inclusive of Permanent Partial Impairment, of approximately 50% of the whole person. Although this number is in excess of Mr. Delgadillo's calculated losses of labor market access or wage loss, I believe that it is vocationally reasonable, especially when his medical impairment is combined with the non-medical factor of age, low level of education, disfigurement, low level of transferable skills, and a high unemployment rate in his labor market.

To the same effect is the following testimony from his deposition in which he explained how he arrived at a 50% disability rating for the effects of the subject accident:

Mr. Crum: It is based on - - again, the calculation of labor market access loss, which I calculated at 32 percent. And potential for a significant loss of wage earning capacity were he to lose his current job. Also, I believe that those - - often, we look at those two numbers to - - sometimes we average them or sometimes we take one or the other of the numbers to make a proposal of what the level of permanent partial disability a person might have. In this particular case it is my opinion that this injury is going to have a rather profound effect on Mr. Delgadillo's employment for a long time. And I believe that even the calculated numbers that we talked about above understated the vocational effect of the injury.

Q. (By Mr. Holman) In your experience have you ever run into something of a synergistic effect on a combination of various factors, the combination of injury, lack of education, lack of transferable skills, age, ethnicity might result in a sum - - a whole that is greater than the sum of the parts? I guess that is the easiest way to say it. Your account of that?

Mr. Gardner: I object again. There is no disclosure of any kind of basis for such an opinion. It is really speculative.

Mr. Crum: And, again, all of my analysis is designed to hopefully conform to the way the code is written. The code considers medical and nonmedical factors. And I think the answer to your specific question is I have in the past been involved in cases where I recommended permanent partial disability in excess of kind of the calculated numbers. Because I believe that that synergistic effect, the combination of all of those factors, results in a more profound level of disability than the simple analysis might show you.

Mr. Crum also testified that he felt it appropriate to exclude certain jobs from Claimant's post-injury labor market, not because he could not perform them, but because they might subject his remaining eye to an unacceptable risk of injury. He recognized, however, that things such as safety glasses/goggles are available to ameliorate such risks.

19. To synopsise, Dr. Barros-Bailey has concluded that Claimant has disability in the range of 21%, while Mr. Crum has proposed that Claimant's disability is more in the range of 50%. Both reports contain elements that we find persuasive; neither report is altogether persuasive.

20. On the issue of wage loss, we believe that Mr. Crum's gestalt of the Idaho Falls labor market more accurately reflects what Claimant could expect to earn should he lose his current position. Dr. Barros-Bailey's wage loss analysis calculated what Claimant could earn in the same job code should he lose his current position, not what Claimant might be expected to earn in the universe of other jobs for which he is qualified to perform at the present time. Although we recognize that it is important to take into account the possibility that Claimant may lose his job in the future, we must also take into account the fact that he is currently employed at \$16.50 per hour, with no evidence that his current job is at risk.

21. Dr. Barros-Bailey and Mr. Crum came to different conclusions concerning Claimant's loss of access to the labor market. Mr. Crum proposed that Claimant has suffered a 34% loss of access, while Dr. Barros-Bailey has proposed a 15% loss of access. Dr. Barros-Bailey's report, as supported by her deposition testimony, reveals in step-by-step fashion the methodology she used to calculate both the Claimant's pre-injury and post-injury access to the labor market. Her opinion is well explained. Although we are aware of no irregularities or insufficiencies in the methods utilized by Mr. Crum to calculate loss of labor market access, his conclusions are not as well explained as those of Dr. Barros-Bailey. More troubling, however, is the subjective "add on" component which completes Mr. Crum's disability analysis. As developed above, Mr. Crum testified that in measuring Claimant's pre-injury labor market, he considered Claimant's physical capacity, his transferrable job skills, his education, his age, in

short, all of the circumstances personal to Claimant that made a particular job either suitable or unsuitable for him on a pre-injury basis. In measuring Claimant's post-injury access to the labor market he considered the same personal circumstances, with the addition that Claimant now has monocular vision. This approach yielded a loss of access to the labor market of 34% related to Claimant's loss of vision.

22. However, a careful review of Mr. Crum's report strongly suggests that he relied on some of the same personal circumstances to increase Claimant's disability by another 20% or so. His report states:

Based on the above analysis, considering all the medical and non-medical factors, I would propose that Mr. Delgadillo has experienced Permanent Partial Disability, inclusive of Permanent Partial Impairment, of approximately 50% of the whole person. Although this number is in excess of Mr. Delgadillo's calculated losses of labor market access or wage loss, I believe that it is vocationally reasonable, especially when his medical impairment is combined with the non-medical factor of age, low level of education, disfigurement, low level of transferable skills, and a high unemployment rate in his labor market.

Mr. Crum's deposition testimony makes it clear that in measuring Claimant's loss of access to the labor market he considered the impact of Claimant's age, education, work history, transferrable job skills and other abilities. Yet, he relied on some of the same factors to justify a significant increase in the disability from what his initial analysis suggested, based on a somewhat vague assertion that Claimant's disability is greater than the sum of his medical and nonmedical factors. We find this approach problematic because it appears to endorse counting the same non-medical factors more than once in measuring disability. We think it clear that what Mr. Crum was really trying to say is that the conventional approach to measuring disability understates disability in this case.

23. Here, we find that Claimant's disability falls somewhere between the views expressed by Mr. Crum and Dr. Barros-Bailey. We conclude that Claimant has suffered disability of 35%, inclusive of PPI.

CONCLUSION OF LAW AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Claimant is entitled to permanent partial disability (PPD) of 35%, inclusive of his 30% PPI.

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

DATED this __13th__ day of __February____, 2014.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Chairman

/s/
R.D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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/s/ _____