

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JOSHUA DAY,

Claimant,

v.

ALLEN CONSTRUCTION, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE  
CORPORATION,

Surety,

Defendants.

**IC 2009-018051**

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

November 27, 2013

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Idaho Falls on April 9, 2013. Claimant was present at the hearing and represented by Dennis R. Petersen of Idaho Falls. Kent W. Day of Boise represented Employer and Surety (referred to collectively as Defendants). The parties presented oral and documentary evidence and two post-hearing depositions were taken. Post-hearing briefs were filed, and the matter came under advisement on November 6, 2013 following Claimant's notification that he would not file a reply brief.

## **ISSUES**

By agreement of the parties, the issues to be decided are:<sup>1</sup>

1. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or, if not, whether and to what extent he is entitled to disability in excess of impairment; and
2. Whether the Industrial Commission should retain jurisdiction of this matter.

## **CONTENTIONS OF THE PARTIES**

Claimant suffered low back herniations at L4-5 and L5-S1 while lifting a 2,000 pound rebar pad with three coworkers on July 6, 2009. His injuries required spinal fusion surgery, performed by Dr. Frizzell, in August 2010. Dr. Frizzell issued permanent restrictions in May 2012 that the parties agree should apply to the determination of Claimant's disability. Dr. Frizzell also recommended a second low back surgery in October 2012, which Claimant declined because he is afraid it will worsen his condition.

Claimant contends that he is totally and permanently disabled as an odd-lot worker due to his July 6, 2009 low back injury requiring corrective surgery at L4-S1. He relies upon the opinions of Delyn Porter, vocational consultant, and Lecil Walker, vocational evaluator. In the event the Commission finds Claimant is not totally and permanently disabled, Claimant asserts he has suffered disability inclusive of impairment of at least 65.5%. Claimant also seeks an order retaining jurisdiction of his case beyond the statute of limitations so that he may remain eligible for additional indemnity benefits, should he decide to undergo additional surgery recommended by Dr. Frizzell in October 2012.

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<sup>1</sup> These are the issues briefed by the parties. They are slightly changed from those agreed to at the hearing.

Defendants counter that Claimant is not totally and permanently disabled, and that he has suffered no more than 60% disability in excess of impairment. They rely upon the vocational opinions of Mary Barros Bailey, Ph.D. In addition, they assert that there is insufficient basis to retain jurisdiction since Claimant's industrial condition is medically stable.

### **OBJECTIONS**

All pending objections preserved in the deposition transcripts are overruled.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Claimant's testimony taken at the hearing;
2. Claimant's Exhibits (CE) A-V admitted at the hearing;
3. Defendants Exhibits (DE) 1-18 admitted at the hearing; and
4. The post-hearing depositions of Delyn Porter and Mary Barros-Bailey, Ph.D. taken July 15, 2013.

After having considered all the above evidence and briefs of the parties, Referee Marsters submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant was 33 years of age at the time of the hearing and resided in Pocatello.

#### **SUBJECT INDUSTRIAL ACCIDENT: JULY 6, 2009**

2. On July 6, 2009, Claimant was working with three other men to lift a 2,000-pound oxygen tank pad when his back "blew out" and he could not move. TR-27. "Well, when I was lifting, my back just gave out; and I was hunched over. And I couldn't move for approximately

30 minutes. I kept trying, and then it - - finally I got it to where I could actually stand up.” TR-28. He was earning \$17.36 per hour at the time.

### **POST-INDUSTRIAL INJURY MEDICAL CARE**

3. **July 6, 2009 initial evaluations.** Claimant went immediately to the emergency department at Gooding County Memorial Hospital, where he was evaluated by David White, PA-C. Mr. White observed Claimant “is a strapping 6-foot 3-inch 280-pound healthy and active male who has had no significant medical problems up to this point” and that he was “unable to move easily on his own and we had to help transport him from gurney for almost all movements.” CE-7, 8. Mr. White diagnosed lumbar spine intervertebral disk hemorrhage, provided pain medications, and arranged to transport Claimant via ambulance to St. Alphonsus Regional Medical Center (SARMC) in Boise.

4. At SARMC, Claimant was evaluated by Mark A. Burriesci, M.D., an emergent care physician. Claimant’s symptoms had improved with medication and x-rays appeared normal. MRI imaging revealed lumbar disc disease and possible acute compression fracture at T-12. Dr. Burriesci diagnosed low back injury, lower extremity numbness and low back pain.

5. **Follow-up care.** Claimant followed up with a physical therapist in Gooding and with Tyler Frizzell, M.D., a neurosurgeon. Dr. Frizzell diagnosed a herniation at L4-5 and a protrusion at L5-S1 and recommended an epidural steroid injection, which Claimant did not immediately agree to. He did not address T12. On a follow-up visit, Dr. Frizzell also diagnosed lumbago. Claimant continued with conservative treatment, in part administered by Mark J. Harris, M.D., a Boise physiatrist, but as of November 12, 2009, he still had right radicular symptoms and dysesthesia plus “pins and needles” and weakness in his left leg. An epidural

steroid injection around this time failed to produce long-term relief. Following a December 3, 2009 MRI indicating a more significant L5-S1 herniation than shown on the prior study, and Claimant's reports of increased right leg pain (severe now), Dr. Frizzell recommended a bilevel discectomy and fusion at L4-S1.

6. **Independent medical evaluations (IMEs).** In February 2010, Neil Schechter, M.D., an orthopedic surgeon who performed an IME at Surety's request, disagreed with Dr. Frizzell's recommendation, providing an alternative analysis of Claimant's case. In April 2010, Michael V. Hajjar, M.D., a neurosurgeon, also performed an IME at Surety's request. He agreed with Dr. Frizzell's recommendation. Surety approved the procedure.

7. **Surgery.** On June 23, 2010, Claimant underwent a posterior L4-S1 decompression, iliac crest bone graft and anterior lumbar fusion with plating. During his recovery, Claimant underwent physical therapy in Gooding and continued to see Dr. Harris in Boise. He continued to have symptoms suspicious for radiculopathy, but Dr. Frizzell remained optimistic that Claimant would reach medical stability by the end of 2010. However, Claimant developed sexual dysfunction and intermittent numbness of the penis. Too, MRI images taken of Claimant's lumbar spine on January 4, 2011 revealed "a lot more granulation tissue than one would normally see." CE-74. Concerned, Dr. Frizzell referred Claimant to Paul Montalbano, M.D., a neurosurgeon, for a second opinion. These symptoms improved within a couple of months, but did not completely resolve. Dr. Frizzell wrote, "I cannot recall a similar clinical presentation in my 20 plus years of practice." CE-75.

8. **Maximum medical improvement (MMI) opinion: May 5, 2011.** Claimant underwent a CT scan on April 1, 2011 that showed granulation tissue with some nerve root

compression at L5-S1. Claimant had ongoing numbness and tingling in his legs and sexual dysfunction, but no significant radicular pain, bowel or bladder dysfunction or hypesthesia in the genital region. On May 5, 2011, Dr. Frizzell opined Claimant had reached MMI and assessed a 50-pound lifting restriction.

9. Dr. Frizzell continued to call in Norco and gabapentin prescriptions for Claimant until shortly before the hearing date, but he had referred Claimant to another physician for pain management. Claimant had not yet seen any other physician at the time of the hearing. He takes one Norco for pain, or sometimes more, approximately five days per week, when he needs it. Walking too far or standing or sitting too long prompt him to increase his intake.

10. Dr. Frizzell never restricted Claimant from any activities based on his medications. However, Claimant testified that Norco makes him drowsy and comes with a warning not to drive or operate heavy machinery while taking it because it induces sleepiness.

11. **Post-MMI treatment.** As of November 2011, Claimant's pain on standing had increased and he still had numbness down both legs, as well as erectile dysfunction. Dr. Frizzell prescribed Viagra and ordered a new MRI, taken December 14, 2011, that showed complete resolution of his post-operative granulation tissue and good surgical results. Dr. Frizzell noted findings, however, that indicate Claimant will likely require another decompressive surgery, at L3-4, in approximately five years. He also opined Claimant would require Viagra for another year. Otherwise, Dr. Frizzell reaffirmed that Claimant was medically stable and restricted to lifting no more than 50 pounds.

12. **Functional capacity evaluation (FCE).** In May 2012, after reviewing an FCE report prepared by Tracy Ervin, P.T., following an evaluation she conducted of Claimant on

May 8 and 9, 2012, Dr. Frizzell again confirmed that Claimant was medically stable, and issued the following permanent restrictions:

Lifting: 25 pounds occasionally and 15 pounds frequently (16" to waist level)

Kneeling, stair climbing, ladder climbing: Occasionally

Sitting: No restrictions

Crouching: Avoid

13. At the hearing, Claimant testified that he could not lift 15 pounds frequently without extreme low back pain, shooting pain down his legs (right worse than left), heat in his legs and groin, and his feet falling asleep. He said he would not be able to walk. Claimant also asserted that he cannot kneel or crouch at all and he does not think he can climb a ladder. He climbs stairs in his house, sometimes with difficulty. He thinks he can only sit for 40 minutes without having to walk for at least ten minutes. He can only walk four-tenths of a mile before he has to sit down. Claimant also has trouble lifting from waist level to overhead, but he did not estimate his capability in this regard. Claimant also described other functional problems that he believes have significantly worsened since June 2012, not addressed by Dr. Frizzell in his restrictions.

14. **Pending surgical recommendation:** In October 2012, Claimant was having increased bilateral radicular symptoms, shooting pains in the backs of both legs, worse while toileting. His symptoms worsened significantly over a 36-hour period, so he sought emergent care. He was given injections of analgesics, muscle relaxers, and steroids which improved his condition. On the following day, Claimant returned for another MRI, which he took to Dr. Frizzell. Dr. Frizzell noted Claimant was unable to obtain employment because of his radiculopathy symptoms, and that Claimant had been symptomatic for six months. Dr. Frizzell

recommended a simple decompression at L3-4 with laminectomies, but no fusion. He understood that Claimant wished to undergo this procedure; however, Claimant testified that he decided not to due to concerns that it may worsen his condition because Dr. Frizzell did not explain the risks and benefits associated with the proposed surgery. Claimant did not seek a second opinion; he did call his attorney. “I’ve talked to Dennis about maybe seeing if I could maybe get a second opinion, but I don’t know where to go from there. Call my own doctor I guess.” TR-99. However, Claimant said he does not have a doctor.

15. **Peer review/document review.** On December 3, 2012, Michael Levy, M.D., through Medical Consultants Network, LLC, provided an opinion to Surety regarding Dr. Frizzell’s second surgical recommendation. Dr. Levy was unable to obtain the medical records he needed to provide an opinion.

#### ***CLAIMANT’S CREDIBILITY***

16. Claimant presented as a thoughtful, well-spoken, well-mannered, well-dressed and bright man. He demonstrated an ability to recall and articulate relevant facts clearly and persuasively. He was not defensive on questioning. Claimant is a credible witness.

#### **DISCUSSION AND FURTHER FINDINGS**

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). However, the Commission is not required to construe facts 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).



## ***PERMANENT DISABILITY***

17. “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.

18. 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 nonmedical 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).

19. **Maximum medical improvement.** As a prerequisite to determining Claimant’s PPI or PPD, the evidence must demonstrate that he is medically stable. To wit, “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. The statute does not contemplate that a claimant must be returned to his original condition to be considered medically stable, but only that the condition is not likely to progress significantly within the foreseeable future. Another important consideration is that workers’ compensation benefits are allocated

based upon injuries stemming from specific workplace accidents and occupational diseases. In this case, that means that only the conditions related to Claimant's July 2009 industrial injuries are compensable. Therefore, the Commission should focus upon Claimant's current diagnoses related to his subject industrial injuries to determine whether he is medically stable.

20. Claimant's permanent lumbar spine conditions resulting from his July 6, 2009 industrial accident were determined in May 2012, when Dr. Frizzell reaffirmed his May 2011 opinion that Claimant had reached MMI. Thereafter, Claimant's condition deteriorated. In October 2012, after shopping at Walmart, Claimant suffered severe pain for 36 hours before he sought relief at a hospital emergency room. He underwent a new MRI and examination by Dr. Frizzell, who recommended an L3-4 discectomy, thus establishing that Claimant's condition was no longer medically stable.

21. Claimant understands that the recommended surgery, if successful, would alleviate his debilitating radiculopathy. Nevertheless, he is not ready to undergo another surgery because he is concerned that it will worsen his condition.

22. Claimant did not know, when Dr. Frizzell made his recommendation, whether he wanted to undergo surgery or not.

I wasn't sure at the time [whether I wanted surgery], but I only spent like 80 seconds with Dr. Frizzell at that meeting. He must - - he was pretty busy that day or something. So we didn't get to spend much time discussing it or anything.

TR-88.

23. Claimant did not have a chance to adequately discuss the risks and benefits of the surgery with Dr. Frizzell at the time he made his recommendation.

24. Claimant would like a second opinion, but he does not know how to go about obtaining one.

25. No claimant is required to undergo recommended medical treatment. Along those lines, a claimant who refuses further treatment may be deemed medically stable. The facts presented here, however, do not establish that Claimant has refused further treatment such that the medical stability prerequisite to establishing permanent disability has been established. Instead, the evidence adduced at the hearing shows that Claimant may elect surgery, depending upon the outcome of a future consultation with Dr. Frizzell, another physician, or both. Further, Claimant asserts that such surgery would be related to his 2009 industrial injury.

26. Claimant has failed to prove that, at the time of hearing, he was medically stable. As a result, no permanent impairment or disability can yet be assessed.

27. All other issues are moot.

#### **CONCLUSIONS OF LAW**

1. Claimant was not medically stable at the time of hearing.
2. All other issues are moot.

#### **RECOMMENDATION**

Based on 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 22<sup>nd</sup> day of November, 2013.

INDUSTRIAL COMMISSION

/s/  
LaDawn Marsters, Referee

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 27<sup>th</sup> day of November, 2013, 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 R PETERSEN  
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sjw

/s/

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ALLEN CONSTRUCTION, INC.,

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**IC 2009-018051**

**ORDER**

November 27, 2013

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Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 was not medically stable at the time of hearing.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 27<sup>th</sup> day of November, 2013.

INDUSTRIAL COMMISSION

/s/  
Thomas P. Baskin, Chairman

/s/  
R.D. Maynard, Commissioner

/s/  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

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I hereby certify that on the 27<sup>th</sup> day of November, 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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