

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM DALE FORD,

Claimant,

v.

CONCRETE PLACING COMPANY, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE
COMPANY,

Surety,

Defendants.

IC 2005-518336

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

Filed December 13, 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a second hearing in Boise, over two days, on June 12, 2013 and July 2, 2013. No testimony was taken on the first day because Claimant was not present. The hearing was postponed upon Claimant's motion, over Defendants' objection. Claimant was present on the second day via telephone and represented by Richard S. Owen of Nampa. Kent W. Day of Boise represented Employer and Surety (collectively, Defendants). The parties presented oral and documentary evidence. No post-hearing depositions were taken. Claimant and Defendants then each submitted post-hearing

briefs, after which Claimant submitted a reply brief. This matter came under advisement on August 30, 2013.

PRIOR EVIDENTIARY HEARING AND ORDER

On January 19, 2010, Referee Powers conducted the initial evidentiary hearing in this case. The corresponding Order, issued by the Commission on June 10, 2010, held:

1. Claimant's 2005 shoulder injury was due to the industrial accident and not to his preexisting underlying degenerative condition.
2. Claimant is entitled to past and future medical benefits for his shoulder condition.
3. Claimant is entitled to temporary total disability benefits from February 25, 2009 through April 21, 2009.
4. Defendants are liable for permanent partial impairment in the amount of 12% of the whole person.
5. Claimant failed to prove that jurisdiction of this case should be retained by the Industrial Commission.
6. Pursuant to Idaho Code § 72-718, the decision is final and conclusive as to all matters adjudicated.

ISSUES TO BE DECIDED AFTER THE SECOND HEARING

By agreement of the parties, the issues to be decided are:

1. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise; and
2. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled under the 100% method due to his August 1, 2005 industrial injury to his left shoulder and his nonmedical factors, which include his education, experience, personality, criminal record, remedial computer skills and

appearance. He relies upon the opinions of Scott Humphrey, M.D., his current treating orthopedic surgeon, and Nancy Collins, Ph.D., vocational consultant.

Defendants contend that Claimant is not totally and permanently disabled as a result of his industrial injury. They argue that, as per the Commission's decision in *Benner v. The Home Depot, Inc.*, 2013 IIC 0002, Claimant's psychological conditions cannot be considered nonmedical factors because they were not incurred as a result of his industrial injury. Defendants rely upon the opinions of Mary Barros-Bailey, Ph.D., vocational consultant.

OBJECTIONS

All pending objections preserved in the deposition transcripts are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony taken at hearing of Claimant, Nancy Collins, Ph.D., and Mary Barros-Bailey, Ph.D.;
2. Claimant's Exhibits (CE) A through FF, admitted at the hearing; and
3. Defendants' Exhibits (DE) A, B, C, E, F, O, and S, admitted at the hearing.

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

FINDINGS OF FACT

1. Claimant was 44 years of age at the time of the hearing and residing in California. As a child, Claimant lived in foster homes. He was raised in California and Idaho.
2. Claimant has undergone four surgeries on his left shoulder, including arthroscopic repair by Dr. Hessing (January 2006), total shoulder replacement by Dr. Hassinger (February 2009); reverse total shoulder arthroplasty by Dr. Humphrey (April 2012), and, when the reverse

total procedure failed, an emergent hemiarthroplasty by Dr. Humphrey (August 2012). Following the last procedure, Dr. Humphrey advised Claimant not to attempt physical therapy due to the increased risk of further damaging what little bone is left in his left shoulder.

3. On December 5, 2012, Dr. Humphrey opined there was no further treatment he could offer Claimant and imposed a five-pound lifting restriction. Similarly, on December 6, 2012, Kevin Krafft, M.D., a physiatrist, opined Claimant had reached maximum medical improvement (MMI). Dr. Krafft assessed 24% whole person permanent partial impairment (PPI). No other physician has rated Claimant's PPI.

4. On April 22, 2013, Robert Calhoun, Ph.D., a psychologist, evaluated Claimant. He diagnosed anti-social personality disorder, heightened somatic focus, illness conviction, depression, and opined that Claimant was currently operating from a position of learned helplessness. "His prognosis is very poor in terms of improving functionality with the use of his left shoulder and arm given the aforementioned personality, cognitive, affective, behavioral factors impacting his current state of debilitation." CE-617. Dr. Calhoun recommended that Claimant "be referred [*sic*] Region IV Mental Health for more long term chronic treatment of mental illness, which includes antisocial personality disorder, dysthymia, which exacerbates into major depressive episodes when stressed, and polysubstance abuse." *Id.*

5. On May 31, 2013, Dr. Humphrey again examined Claimant's left shoulder. Claimant reported it had become increasingly painful, with deep burning pain and poor function, and that he was planning to move to Washington. At the hearing, Claimant testified that he is torn because he does not want to return to opiate usage, but he cannot stand the pain. He also described his sleep problems related to his shoulder pain. "I sleep in the car in my garage,

because I can't sleep on a bed or anywhere else. And I can't sleep very good in my car either. I get like an hour or two to sleep every night." TR-40.

6. Among other things, Dr. Humphrey noted from new x-rays that Claimant's hemiarthroplasty component appeared to be in good position, but there was also evidence of continued erosion of the glenoid bone. Dr. Humphrey discussed treatment options with Claimant, including a revision surgery, and ultimately recommended that Claimant seek another opinion. "I would recommend that he seek another opinion from a shoulder specialist, perhaps at the University of Washington. I mentioned to Dale that Dr. Winston Warne and Dr. Rick Matsen are excellent surgeons who might be able to help him." CE-562b. Dr. Humphrey elaborated:

Unfortunately, the results of my surgery on the left side have not been good, and I strongly feel that perhaps it would be best to have him evaluated by another physician at this point. I plan no further surgical intervention for Dale. I told Dale I was sorry that his results had not been better, and that I certainly understood that his shoulder was painful and that the result had not been what he had hoped for.

Id.

7. Claimant testified at the hearing that he would like to follow up on Dr. Humphrey's recommendation.

Q. Okay. Did - - have you been back to Dr. Humphries [*sic*] since he released you in December 2012?

A. I went back a couple months ago to - -

Q. Okay.

A. - - because my shoulder has been really acting weird.

Q. Did he offer you any extra help?

A. He was pretty bleak about it. There ain't nothing much they can do at this point.

Q. Okay. He wrote a report, Mr. Ford, and said that he would suggest that you see a couple doctors up in the Seattle area. Is that - -

A. Yeah.

Q. - - is that something you'd think about?

A. Yeah. Probably.

TR-24-25.

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

8. "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.

9. 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).

10. **Maximum medical improvement (MMI).** 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 August 2005 industrial injury are compensable. Therefore, the Commission should focus upon Claimant's current diagnosis related to his subject industrial injury to determine whether he is medically stable.

11. Claimant's permanent left shoulder condition resulting from his August 1, 2005 industrial accident was determined in December 2012, when Drs. Humphrey and Krafft both opined that Claimant had reached MMI. Thereafter, Claimant's condition deteriorated. In May 2013, Claimant sought additional treatment from Dr. Humphrey for worsening left shoulder symptoms. He underwent new x-rays, which demonstrated continued erosion of the glenoid bone, and an examination by Dr. Humphrey, who recommended consideration of revision surgery and, foremost and repeatedly, a second opinion.

12. Claimant would like to follow up on Dr. Humphrey's recommendation that he obtain a second opinion and, given his significant left arm limitations, such course of action would be reasonable.

13. Claimant's treating physician's recommendation for additional diagnostic treatment is supported by persuasive evidence that Claimant's left shoulder condition is deteriorating and that additional functional improvement may yet be obtained through medical intervention. The recommendation is unchallenged in the record, establishing a *prima facie* case that Claimant was not medically stable at the time of the hearing. A party may rebut this premise by proving that Claimant has refused additional medical treatment. 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 would like to consult with another physician to determine whether revision surgery, or any other treatment, is likely to improve his ability to use his left arm. Further, Dr. Humphrey opined that such treatment would be related to his 2005 industrial injury.

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

15. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he was medically stable at the time of the 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 27th day of November, 2013.

INDUSTRIAL COMMISSION

/s/
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 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:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

ge

Gina Espinoza

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ORDER

Filed December 13, 2013

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation 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 has failed to prove that, at the time of hearing, he was medically stable.

As a result, no permanent disability can yet be assessed.

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 13th day of December , 2013.

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 December 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

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 /s/