

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD GADSBY,)	
)	IC 2005-518340
Claimant,)	2007-008459
)	
and)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF IDAHO, INDUSTRIAL)	AND RECOMMENDATION
SPECIAL INDEMNITY FUND,)	
)	Filed June 3, 2011
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing on November 19, 2010 in Twin Falls. Claimant was present and represented by Keith E. Hutchinson of Twin Falls. Thomas B. High, also of Twin Falls, represented the only remaining Defendant, State of Idaho, Industrial Special Indemnity Fund (“ISIF”). Snug Outfitters, Inc. and Sun Valley Company settled with Claimant prior to hearing. Oral and documentary evidence was presented and the record remained open for the taking of one post-hearing deposition. The parties then submitted post-hearing briefs, and this matter came under advisement on March 2, 2010.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether Claimant is totally and permanently disabled; and, if so
2. Whether ISIF is liable; and, if so
3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled as an odd-lot worker as the result of pre-existing physical impairments combined with injuries and impairments received in an accident in 2007. He relies on the expert opinions of vocational consultant Douglas Crum to support his position.

ISIF contends that Claimant is not totally and permanently disabled and, thus, they bear no responsibility in this matter. Their retained vocational consultant, Dr. Nancy Collins, provides the support for its position.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Nancy Collins, Ph.D., taken at the hearing;
2. Joint Exhibits 1-26, admitted at the hearing; and
3. The post-hearing deposition of Douglas Crum, taken by Claimant on December 10, 2010.

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 Commission.

FINDINGS OF FACT

1. Claimant was 66 years of age and was a 40-year Wood River Valley resident at the time of the hearing. Claimant was born in England and moved to Canada at age 9. From there he went to Seattle in 1957. He graduated from Franklin High School in 1961. From there he went to the University of Washington where he obtained a BA degree in French language and literature in 1966. Claimant did some graduate work and only lacks his thesis to obtain a master's degree. He received training in industrial engineering and physical chemistry while employed by Boeing. Claimant served in the National Guard from 1963 to 1969 as an artillery mechanic.

2. Claimant moved to the Sun Valley area in 1967. His work experience there consisted of bartending, carpentry,¹ ski instruction,² and fly fishing instructor.

3. On August 2, 2005, while employed by Snug Outfitters, Inc., Claimant injured his left knee while attempting to keep a client from falling while crossing a stream. This injury eventually resulted in a left knee replacement.

4. On February 23, 2007, while employed by Sun Valley Company, Claimant was hit from behind by another skier and injured his neck and reinjured his right knee. The cervical injury resulted in surgical repair. His right knee re-injury resulted in a right knee arthroplasty.

DISCUSSION AND FURTHER FINDINGS

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one “so injured the 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 of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). 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

¹ Claimant started as a carpenter’s helper in 1969 and described himself as a master carpenter at hearing. That is, he could build a house from the ground up, with the exception of electrical and plumbing.

² Claimant is a Level III instructor, which is the highest level attainable.

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), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963)

Total and Permanent Disability: Odd-Lot

Claimant is not contending that he is 100% totally and permanently disabled. Rather, he is claiming that he is an odd-lot worker. An injured worker may prove that he or she is an odd-lot worker in one of three ways: (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

Douglas Crum, C.D.M.S.

5. Claimant retained Mr. Crum to assess his employability in the Wood River Valley area labor market. Mr. Crum interviewed Claimant, reviewed vocationally relevant medical records, authored a report, and was deposed. At his deposition, Mr. Crum described Claimant’s labor market immediately prior to his February 2007 neck and knee injuries considering his preexisting conditions and what was left thereafter:

It was limited in part - - well, in part because of physical restrictions that he was operating under. He had a six-hour per day restriction given by Dr. Widell. I think he was - - he was restricted from certain types of skiing and certain parts of carpentry work, at least he said that - - yeah, because of the back problems, he was limited to six hours a day of carpentry work.

Q. (By Mr. Hutchinson): So what would have been left for Mr. Gadsby immediately prior to February 23rd, 2007?

A. Well, first of all, he’d be a part-time worker with those restrictions, if he’s limited to six hours a day. He actually was also limited to only a half a day of skiing. So I mean, he was just limited in terms of the amount of time that he could spend in any of those activities.

If you just - - if you assume that his pre-2007 injury labor market consisted only of jobs that he could do six hours a day, it was a fairly limited labor market. Most employers typically want full-time employees, not all, obviously. But I would - - you know, I would say that he had a substantial reduction in the number of jobs that he might have otherwise performed before the 2007 injury.

Q. And then after the 2007 injury, with the list of problems that you indicate have arisen from the cervical problem - - or that cervical injury, how has that list of problems affected his ability to be gainfully employed?

A. I believe that the combination of what went before 2007 and results of the 2007 injury all kind of conspired to make him unemployable - - not "kind of," they do.

Crum Deposition, pp. 16-18.

6. Claimant has not made any meaningful work attempt, and has made no effort in obtaining employment since his 2007 injury. In that regard, Mr. Crum opined, "It's my opinion that that the whole package of his age, education, skills, work history, physical capabilities are all going to conspire to make a work search futile." *Id.*, p. 20.

7. Mr. Crum noted that in October 2009, Blaine County had a 7.7 % unemployment rate. As of October 2010, Blaine County's unemployment rate was 10 %, which represents a 28 % increase in just one year.

Nancy Collins, Ph.D.

8. ISIF retained Dr. Collins to assess Claimant's employability. She interviewed Claimant, reviewed pertinent vocationally relevant medical records, authored a report and testified at the hearing. After preparing her report, she had the opportunity to read Mr. Crum's report and reviewed Claimant's FICA earnings.

9. Regarding Claimant's physical restrictions that pre-existed his 2007 accident, Dr. Collins testified:

And Mr. Gadsby had pretty significant preinjury medical records. But the only restrictions he had were in 2000 from Dr. Widell. And, apparently, Mr. Gadsby didn't remember having those restrictions. He didn't limit work because

of those. And they're kind of funny restrictions anyway.³ They're - - you know, he can still work as a fishing guide for six hours, he can still teach skiing for half a day, but not - - I've never seen restrictions like this. But Mr. Gadsby is pretty unique. Heavy snow, ungroomed runs, they're pretty specific to skiing, and then carpentry. But it was basically six hours a day for work.

Hearing Transcript, p. 110-111.

10. Dr. Collins placed Claimant in the sedentary/light work categories. She identified the following jobs that Claimant might be able to perform on a part-time basis:

Well, based on what he actually does in a day and based on the restrictions that doctors have indicated, he should have - - I think any kind of customer-service job or retail job on a part-time basis. I would think he would be really good at working in an outfitter shop or a fishing store or a skiing shop. And there are a number of those in Hailey, Bellevue, Ketchum, you know, on a part-time basis, and then still do the fishing-guide work when he has the - - has the clients. Working for Sun Valley Company, you now, selling tickets, customer service, front-desk kind of jobs.

Id., p. 113.

11. Regarding Claimant's ability to compete for jobs in the Wood River Valley labor market, Dr. Collins testified:

Q. (By Mr. Hutchinson): Now, Mr. Gadsby is 66 years old. He's had bilateral knee replacements, one hip gone, lumbar surgery and cervical surgery. Do you believe that Mr. Gadsby is competitive in the open competitive labor market in the Wood River Valley?

A. I think if he were going to a fly-fishing shop or ski shop or Sun Valley Company, that he would have the customer-service skills. And he knows a lot of people. I think he would be competitive with those types of jobs on a part-time basis.

Id., p. 120.

12. Dr. Collins acknowledged on cross-examination that Claimant would probably not be competitive in the carpentry trades or as a ski instructor. He might be able to do some fly-

³ The restrictions assigned by Dr. Widell were merely parroting what Claimant thought his restrictions should be, rather than the exercise of independent medical judgment. *See*, Exhibit 3, November 15, 2000 letter to Surety.

fish guiding if the clients knew him. Dr. Collins conceded that she did not contact any outfitters regarding Claimant's potential for referrals.

13. The Referee is not convinced Claimant can continue fly fish guiding even if he could obtain clients. Even though Claimant is a licensed fishing guide, he would still have to go through an outfitter to charge for his services even if he was guiding his own clients. Dr. Collins doubted whether an outfitter would allow Claimant to provide guiding services to clients that Claimant did not already know, due to his physical condition. Further, as Claimant observes, many people who live in the Wood River Valley, where the unemployment rate is 10%, are skiers and engage in all varieties of outdoor activities. Such individuals would no doubt provide serious competition to Claimant for the jobs of ski instructing, retail ski sales, retail fly fishing shop customer service, and fishing guide.

14. The Referee is persuaded that Claimant is totally and permanently disabled under the odd-lot doctrine. Consideration is given to his age, restrictions, labor market, physical impairments and physical condition, and the fact that he would be competing with much younger and more physically able individuals for the few jobs in his labor market that he might be able to perform. While Claimant has engaged in various physical activities after 2007 such as snow shoveling, gardening, mowing, limited fishing and hunting, some skiing, and household chores, that does not mean that he could do so in an employment setting on a competitive basis even part-time. "The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability, or quantity that a reasonably stable labor market for them does not exist. [Internal citation omitted]. Such workers need not be physically unable to perform any work at all. They are simply 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. [Internal citation omitted]. *Christensen v. S.L. Start & Associates*, 147 Idaho 289, 292-293, 207 P.3d 1020, 1023-1024 (2009). Here, as in *Christensen*, “Claimant is the odd-lot worker personified.”

ISIF Liability

Idaho Code § 72-332 provides:

Payment for second injuries from industrial special indemnity account, -- (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his [or her] employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

(2) “Permanent physical impairment” is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

There are four elements that must be proven in order to establish liability of ISIF:

1. A pre-existing impairment;
2. The impairment was manifest;
3. The impairment was a subjective hindrance to employment; and
4. The impairment combines with the industrial accident in causing total disability.

Dumaw v. J.L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990).

Pre-existing and current physical impairments

15. Claimant was seen in Independent Medical Evaluation at Sun Valley Company's request by Christian Gussner, M.D., a physiatrist, on June 3, 2010. In his report, Dr. Gussner references a December 3, 2008 IME wherein the panel assigned certain impairment ratings. The Referee finds that Claimant has incurred the following impairment ratings:

1. Cervical spine: 29% whole person impairment; 24% apportioned to pre-existing spinal cord compression, cervical malacia, and severe degenerative changes; 5% whole person impairment related to injury of 02/23/07.
2. Right Knee: 8% whole person impairment attributed to pre-existing advanced degenerative joint disease.
3. Left Knee: 8% whole person impairment attributed to pre-existing severe degenerative joint disease.⁴
4. Left Hip DJD: 8% whole person impairment attributed to pre-existing severe degenerative joint disease.
5. Lumbar Spine: 6% whole person attributed to pre-existing lumbar spine condition.
6. Right Carpal Tunnel Release: No impairment.
7. Colitis: 5% whole person impairment, which is not attributable to injury of 02/23/07.
8. DVT: No impairment.

Exhibit 2, pp. 8-9.

16. Dr. Gussner restricted Claimant (as of June 2010) as follows based on multiple degenerative conditions resulting in multiple surgeries:

1. I recommend maximum lifting not to exceed 25 pounds occasionally, 10 pounds repetitive. He should avoid repetitive turning of the head, he should avoid forceful, repetitive, push/pull activities.
2. In regards to the left shoulder, he should avoid repetitive above-shoulder activities.

⁴ This is not a pre-existing impairment for analyzing ISIF liability or for *Carey* apportionment, because Claimant was not at MMI regarding his left knee at the time of Claimant's last accident. *See, Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001), wherein the Court held that, "Stability is the key factor to consider when determining if a pre-existing impairment exists." *Id.*, p. 6.

3. In regards to the lumbar spine, he should avoid repetitive bending, twisting, torquing maneuvers to the low back.

4. In regards to the hip and knee degenerative joint conditions and subsequent surgeries, he should avoid repetitive forceful movements of these joints. He should avoid frequent bend, stoop, creep, crawl, stairs, and ladders. Occasional, i.e., less than 33% of work shift is okay. He should avoid impact activities to these joints.⁵

Id., p. 9.

17. As previously mentioned, Dr. Widell restricted Claimant to a six-hour work day with a one-half work day for ski instructing. Even though it was Claimant himself that suggested those restrictions, he testified that he was unaware of them, or any other restrictions pre-dating his 2007 accident.

Subjective hindrances

A pre-existing condition can satisfy the statutory requirement depending upon whether the impairment was a subjective hindrance or obstacle to employment for the particular claimant. See *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

18. Claimant reported to Dr. Gussner on June 3, 2010 that he was experiencing constant neck pain without relief. He also reported intermittent left shoulder pain he attributed to arthritis. Claimant also experiences bilateral hand and progressive bilateral feet numbness resulting in balance difficulties. Claimant also reported intermittent low back pain when lifting over 50 pounds. Claimant's left hip will occasionally "pop out" of joint after his total hip arthroplasty. He has persistent right knee pain with walking long distances, and it is difficult for him to walk up hills.

⁵ In their December 3, 2008 IME, Drs. Cox and Hajjar restricted Claimant from repetitive head turning, avoid stair climbing and unprotected heights, and can lift up to 25 pounds occasionally. These restrictions are for conditions pre-dating Claimant's last industrial accident.

19. After Claimant injured his back he never went back to working for a contractor, but started building and selling his own houses. He could work on them at his own pace.⁶ Claimant's wife at the time was in real estate, and made enough money so that Claimant did not have to earn as much, had that not been the situation. After his 2005 left knee injury, his right knee injury,⁷ and his left hip injury, Claimant would avoid "big bumps and really crappy snow." Hearing Transcript, p. 53. Claimant would also try to avoid quick, fast water due to the problems with his knees and hip. His knees and hip also affected Claimant's ability to stand for long periods of time which, in turn, made carpentry more difficult. Between his left knee injury in 2005 and his ski accident in 2007, Claimant continued to hunt, ski, and fish.

20. To satisfy the "combined effects" requirement of Idaho Code § 72-332(4), Claimant must show that *but for* his pre-existing impairments, he would not have been totally and permanently disabled. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989). (Emphasis added). Claimant's last accident resulted in serious injuries including a cervical fusion,⁸ as well as the aggravation of underlying orthopedic and neurologic conditions that were previously asymptomatic. He also injured his right knee and testified that he might need a re-do on the replacement. Claimant's neck hurts constantly and, significantly, his hands are numb affecting his ability to grip and his feet are numb which affects his balance. He was assigned a 29% whole person PPI rating with 24% apportioned to a previously asymptomatic degenerative disk disease of the cervical spine. The aforementioned conditions arose solely from Claimant's

⁶ While he could work at his own pace, Claimant testified that there were occasions when he would work 10 hours or longer at a time. He might leave early if he had a fish-guiding trip.

⁷ Claimant had bilateral knee replacements after his last accident.

⁸ Claimant testified that his treating neurosurgeon had informed him that he may need yet another cervical surgery.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 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
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THOMAS B HIGH
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ge

Gena Espinosa

/s/
Thomas P. Baskin, Commissioner

Participated but did not sign.
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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

THOMAS B HIGH
PO BOX 366
TWIN FALLS ID 83303-0366

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Gena Espinoza

ORDER - 2