

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAMIRO NIETO HERRERA,)
)
 Claimant,)
)
 v.)
)
 CONAGRA FOODS, INC.,)
)
 Self-Insured)
 Employer,)
)
 Defendant.)
 _____)

IC 2004-011882

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

Filed December 8, 2011

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 in Twin Falls on August 14, 2008. Claimant was present and represented by James C. Arnold of Idaho Falls. Paul J. Augustine of Boise represented the self-insured Employer at hearing and through the taking of a post-hearing deposition. Simon Rodriguez served as interpreter. Eric S. Bailey of Boise represented Employer on its post-hearing brief. Oral and documentary evidence was presented and the record remained open for the taking of one post-hearing deposition.

The parties submitted post-hearing briefs and this matter originally came under advisement on June 15, 2010. However, after having completed a review of the evidence, it became apparent to the Referee that the parties were working from and citing to a different set of exhibits than what was provided to the Referee at hearing. A telephone conference was held on September 2, 2010, at which time the parties agreed to coordinate the exhibits to correspond to the cites in their respective briefs. This was accomplished on November 14, 2011, at which time this matter was again placed under advisement.

ISSUES

As stipulated by the parties,¹ the issues to be decided are:

1. Whether Claimant's low back condition is causally related to his industrial accident of September 27, 2004;
2. If no to issue number 1, the extent of permanent partial impairment (PPI) from which Claimant suffers and which is causally related to the accident of September 27, 2004;
3. If no to issue number 1, the extent of permanent partial disability from which Claimant suffers and which is causally related to the accident of September 27, 2004; and
4. Whether Claimant refused suitable work.

The parties further stipulate that if the low back condition is determined to be related, then as of the date of the hearing Claimant was not medically stable and therefore determination of the issues of permanent impairment and permanent disability are not ripe.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Employer's safety manager, Mark Love, taken at the hearing.
2. Claimant's Exhibit 1, admitted at the hearing.
3. Joint Exhibits A-U and X, admitted at the hearing.
3. Joint Exhibit V, admitted by way of a post-hearing stipulation
4. The post-hearing deposition of Richard A. Wathne, M.D., taken by Claimant on January 27, 2009.

¹ See, Stipulation Regarding Issues filed June 1, 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 44 years of age and resided in American Falls at the time of the hearing. He is from Mexico and speaks little English. He has a 6th grade education. Claimant came to the United States in 1992 and began working for Employer as a general laborer and potato sorter.

2. On September 27, 2004, Claimant was using an iron bar to loosen frozen potatoes to get them out of a box when he felt a pop in his right shoulder and a “. . . real low pain in his neck . . .” Hearing Transcript, p. 27. Because Claimant thought he had just strained a muscle, he did not report his accident until the next day.

3. Claimant reported to Physicians Immediate Care (PIC) on September 28, 2004 complaining of right shoulder pain extending from his right elbow to the back of his neck. He was given medication and told to ice his shoulder after work. He was returned to regular duties. Claimant followed-up on October 1 and was placed on light duty with restrictions at that time. He was also prescribed physical therapy. Even though still participating in physical therapy, he was released for full-duty work on November 4, 2004.

4. In a December 13, 2004 office note, J. Warren Willy, D.O., of PIC reported that Claimant’s right shoulder was still hurting, and his main complaint was generalized weakness in his right arm as well as a pain between his shoulder blades. Dr. Willy also noted that in discussing Claimant’s case with his physical therapists, they were concerned regarding a lack of objective findings and that Claimant was doing well, then suddenly he was not.

5. On March 24, 2005, Employer arranged for an IME with Kevin S. Hill, M.D., a physiatrist. Claimant presented with chief complaints of right shoulder, neck, and thoracic pain. Claimant did not mention any back problems and Dr. Hill noted that he had full lumbar range of motion. Dr. Hill diagnosed a right shoulder strain with a possible rotator cuff tear and ordered a right shoulder MRI. He continued Claimant's work restrictions. After reviewing the MRI that showed no rotator cuff tear, Dr. Hill diagnosed, ". . . cystic lesion, right shoulder, secondary to labral cyst vs. post traumatic cyst." Exhibit A, p. 6. Dr. Hill related that condition to Claimant's accident, but would need a pre-accident MRI (which was nonexistent) for comparison to know for certain. He recommended a referral to an orthopedic surgeon. Dr. Hill continued Claimant's work restrictions.

6. On April 25, 2005, Dr. Willy recommended an orthopedic evaluation. On May 20, 2005, Claimant first saw Richard A. Wathne, M.D., an orthopedic surgeon. Dr. Wathne diagnosed a ganglion cyst with underlying SLAP lesion. On September 2, 2005, Dr. Wathne performed an arthroscopic SLAP lesion repair and debridement and decompression of a large spinoglenoid cyst. Claimant was prescribed physical therapy, and was eventually returned to work with restrictions.

7. On March 17, 2006 Dr. Wathne declared Claimant at MMI for his right shoulder² and assigned a 4% upper extremity PPI rating, which Employer has paid.

DISCUSSION AND FURTHER FINDINGS

The burden of proof rests with the claimant in industrial accident cases.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to

² Claimant had been seeing Dr. Wathne's partner, Benjamin Blair, M.D., for neck pain which Dr. Blair described as non-surgical "axial pain." Exhibit K, p. 5. Dr. Blair recommended a referral to a physiatrist.

an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony. *Hart v. Kaman Bearing & Supply*, 130 Idaho 269, 299 939 P.2d 1375, 1378 (1997) (internal citations omitted). “In this regard, ‘probable’ is defined as “having more evidence for than against.” *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

Low back

8. Claimant relies upon the medical opinions of a chiropractor, Henry G. West, Jr., D.C., and neurosurgeon, Scott Huneycutt, M.D., in support of his assertion that his low back condition is causally related to his industrial accident. Dr. West opined on November 21, 2006 that, “Although the original injury was a shoulder injury, it is certainly comprehensible that he had a concurrent low back injury from that accident.” Exhibit N, p.10. Dr. Huneycutt opined on February 20, 2007 that, “In regards to the fracture of the lumbar spine, this is clearly consistent with a traumatic injury to the spine. The patient denies previous back pain or trauma. It is conceivable that this fracture was a result of his on the job injury as described given no evidence to the contrary.”³ Exhibit Q, p. 1.

9. On June 8, 2006, Christian G. Gussner, M.D., a physiatrist, examined Claimant at Employer’s request. Claimant did not mention any back problems to Dr. Gussner.⁴ The first mention in the medical records of low back pain appears in Dr. West’s records some two years post-accident. Claimant saw Gary C. Walker, M.D., a physiatrist, on November 13, 2006, to review the results of a CT lumbar and thoracic myelogram he had previously ordered. Dr. Walker opined:

CT myelogram reveals multilevel changes in the lumbar spine. The most prominent findings are involving the disc at L5-6 with broad based disc bulging

³ Apparently Dr. Huneycutt had not reviewed Dr. Walker’s report referenced in finding number 9.

⁴ Dr. Gussner only related Claimant’s right shoulder injury to the industrial accident. Paul J. Montalbano, M.D., a neurosurgeon, agreed with Dr. Gussner in this regard.

and a left-sided disc protrusion, which clearly could cause low back and left greater than right lower limb radicular types of complaints. He has no definite neurologic deficits associated with this.

Also, on the CT myelogram, there is evidence of pars defects at L3 and L5. At L4, a fracture appears to pass from the right side through the lamina, into the pars region and then extends on the left side through the pedicle itself. The type of fractures at multiple levels, particularly this fracture at L4, would suggest a severe traumatic injury. I have never seen a “stress fracture/stress reaction” passing through the lamina and then through the pedicle. I would have difficulty attributing this to some injury to the patient’s shoulder two years ago. One would expect that he has had some history at some point of some traumatic event affecting L4. The other levels could be attributed to “stress fracture”, which could be chronic even since adolescence.

Exhibit P, pp. 10-11.

10. Given the nature of Claimant’s low back condition as revealed in the lumbar CT scan, one is hard-pressed to understand why Claimant complained of no low back pain and sought no treatment for the same for two years post-accident. While it may be “conceivable” or “comprehensible” that Claimant’s shoulder injury in 2004 somehow caused his low back pain in 2006, that is simply not the level of proof required. While “magic words” may not be necessary, a physician must nonetheless convey his/her causation opinions unequivocally. Claimant’s causation opinions are equivocal at best, especially in view of the timing of his symptoms as related to the date his accident.

11. The Referee finds that Claimant has failed to prove that his low back condition is causally related to his industrial accident of September 27, 2004.

PPI

“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 nonprogressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or

disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Claimant contends that his neck condition stems from his industrial accident, and asks the Commission to assign a PPI rating therefor as no physician has done so. Employer denies that this condition is causally related to Claimant's accident, and, even if it is, there is still no PPI awardable.

13. Employer argues that even if Claimant's neck condition is related to the accident, there can be no PPI because he has failed to prove that condition has resulted in any anatomical or functional loss. The Referee agrees. No physician has issued a PPI rating for Claimant's neck condition and the Referee is not inclined to do so. In any event, Claimant recognizes that ". . . any such impairment is subsumed into any award of permanent disability in excess thereof thereby rendering the permanent impairment award essentially moot." *See*, Claimant's Opening Post Hearing Brief, p. 14.

PPD

"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 impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease. Consideration is also to be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. However, when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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 non-medical 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).

Claimant contends that he is entitled to PPD of 60% inclusive of his PPI as opined by his vocational expert, Nancy Collins, Ph.D. Employer maintains that Claimant should be awarded no more than 16% in addition to his PPI for his right shoulder injury.

14. Claimant retained Dr. Collins to assist him with vocational issues. The Commission is well aware of Dr. Collins’ qualifications and they will not be repeated here. Dr.

Collins interviewed Claimant and reviewed pertinent medical and vocational records. She authored a report dated July 15, 2008 and an addendum dated June 23, 2009. In her 2008 report, Dr. Collins identified physical restrictions imposed by Dr. Gussner of no lifting of more than 50 pounds with the right arm above shoulder level and those of Dr. Walker of no lifting of greater than 25 pounds frequently, 50 pounds occasionally, no repetitive bending, twisting, or stooping, and no repetitive work with the right arm away from the body. Dr. Collins lists Claimant's many subjective complaints that are not objectively supported in the record such as difficulty combing his hair, talking on the phone, pain in his entire back from his neck to below his waist, pain down his left leg in to his foot, increased pain with prolonged sitting, standing, and walking more than 20 minutes. Dr. Collins noted that, "[h]e appears to be quite afraid of doing additional harm and avoids activities that increase his pain levels or that he thinks might be dangerous." Exhibit X, p. 3.

15. Claimant attended school through the sixth grade in Mexico and has no further formal education or training. He is not computer literate. He understands some English, but does not speak or write the English language on a functional level. Claimant has attended ESL classes, but, ". . . was distracted by his multiple medical conditions and was unable to get much from them." *Id.*, p. 4. His vocational history consists mainly of farm laborer in the medium-to-heavy work categories that required repetitive tasks, particularly with his upper extremities.

16. Regarding Claimant's earning capacity, Dr. Collins observed:

Mr. Herrera was earning \$10.48 per hour when he left his job with ConAgra. This is a high wage for an unskilled laborer. He is now unable to perform much of the work in the food processing industry because of the repetitive nature of the work and the need to use his right dominant arm for reaching and repetitive work. He can no longer do the dairy work or other heavy labor jobs as they are too heavy and require repetitive use of his upper extremities away from the body.

Id., p. 8.

17. Dr. Collins identified seasonal farm truck driver or farm equipment operator as jobs Claimant might be able to do with his language barriers and restrictions. She places Claimant's earning capacity at between \$7.00 and \$8.00 an hour. This translates into a loss of earning capacity at 28%.

18. Dr. Collins concludes that when considering only the restrictions regarding Claimant's right shoulder, Claimant has lost access to 98% of his pre-injury labor market considering the occasional reaching limitation, and 30% using the frequent reaching limitation. Dr. Collins opined that Claimant's loss of access to the labor market is between 60% and 70% and, when considering his language issues, the higher end of that range is probable. With a 28% loss of earning capacity, Claimant's whole person PPD is 49%.

19. In her 2009 addendum, Dr. Collins indicated that she relied on wage information in her 2008 report that underestimated Claimant's earnings and earning capacity. Based upon the new wage information, Dr. Collins increases Claimant's loss of wage earning capacity to 50%. Based on the larger decrease in wage earning capacity, Dr. Collins now places Claimant's whole person PPD at 60% inclusive of his PPI.

20. Other than a few non-productive appointments with an ICRD consultant, Claimant has not attempted to return to work for Employer or find work elsewhere. He has not renewed his attempts to learn the English language. He may be more restricted by non-industrially related physical maladies than his right shoulder alone. According to Claimant, he quit his job at Employer's because they told him he had to quit to obtain his 401 K money. He also testified that he was returned to work against his will.

21. It is apparent from the record as a whole, including Claimant's hearing testimony, that he is very conscious of physical problems that have no objective bases. The Referee noted

that Claimant came across at hearing as a complainer/whiner. He admitted that he does not believe he has received appropriate medical care and, on occasion, has demanded more testing than his physicians may have otherwise conducted. Claimant has not demonstrated any sincere motivation to return to work.

22. When considering Dr. Collins' opinions, Claimant's apparent lack of motivation to return to work or otherwise help his economic situation, his age, lack of English speaking skills, his lack of any meaningful transferrable skills, his education, his physical restrictions for his right shoulder⁵, his loss of earning capacity, and his loss of his pre-injury labor market, the Referee finds that Claimant is entitled to whole-person PPD benefits equaling 35% inclusive of his PPI.

Refusal of suitable work

23. Claimant quit his job with Employer in October of 2006. The exact reason or reasons for his quitting is not apparent. At one point Claimant testified that he was told by Employer that he needed to quit to obtain his 401K funds. At another point he testified that he quit because Dr. West told him to. There is also some confusion regarding whether Claimant quit due to his back injury versus his right shoulder, neck, and upper back injuries. Claimant was working as a sorter on light duty at the time he quit. He was required to frequently reach at or above shoulder level, exceeding the restrictions imposed by Drs. Wathne and Walker, and the Referee has already determined that Dr. Gussner's restriction was not realistic. In any event, Claimant's motivation to return to the work force was considered in arriving at a PPD figure. The Referee finds that Claimant did not refuse suitable work.

⁵ The Referee is more persuaded that the restrictions regarding Claimant's right shoulder given by Dr. Walker are more realistic than those given by Dr. Gussner.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that his back condition is causally related to his September 27, 2004 industrial accident.
2. Claimant has failed to prove he has suffered any PPI for conditions (other than his right shoulder) causally related to his September 27, 2004 industrial accident.
3. Claimant has proven his entitlement to whole-person PPD of 35% inclusive of his PPI.
4. Claimant did not refuse suitable work with Employer.

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 __2nd__ day of December, 2011.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 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:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403-1645

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

ge

Gina Espinoza

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAMIRO NIETO HERRERA,)	
)	IC 2004-011882
Claimant,)	
)	ORDER
v.)	
)	
CONAGRA FOODS, INC.,)	Filed December 8, 2011
)	
Self-Insured)	
Employer,)	
)	
Defendant.)	
_____)	

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 his back condition is causally related to his September 27, 2004 industrial accident.
2. Claimant has failed to prove he has suffered any permanent partial impairment (PPI) for conditions (other than his right shoulder) causally related to his September 27, 2004 industrial accident.
3. Claimant has proven his entitlement to whole person permanent partial disability (PPD) of 35% inclusive of his PPI.

4. Claimant did not refuse suitable work with Employer.

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

DATED this 8th day of December , 2011.

INDUSTRIAL COMMISSION

 /s/
Thomas E. Limbaugh, Chairman

 /s/
Thomas P. Baskin, Commissioner

 /s/
R. D. Maynard, Commissioner

ATTEST:

 /s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403-1645

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

ge

 /s/