BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SALIH POLJAREVIC, Claimant, v. INDEPENDENT FOOD CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2006-510910** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** filed January 13, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on June 25, 2009. Keith E. Hutchinson of Twin Falls, Idaho represented Claimant. E. Scott Harmon of Boise represented Defendants. The parties submitted oral and documentary evidence. There were no post-hearing depositions and the parties waived post-hearing briefs in favor of oral closing argument. The matter came under advisement on August 24, 2009 and is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact and conclusions of law.

ISSUES

In a Notice of Hearing filed March 10, 2009, the Commission identified the following issues to be heard at the time of the June 25, 2009 hearing:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;
3. Whether and to what extent Claimant is entitled to the following benefits:
    a. Medical care;
    b. Permanent partial disability in excess of impairment, including the total permanent disability pursuant to the *odd-lot* doctrine; and,
    c. Attorney's fees; and,
4. Whether Claimant is totally and permanently disabled.

However, at hearing it appears that following an off the record discussion, the parties agreed that the only remaining issue before the Industrial Commission was Claimant's disability, inclusive of impairment. (*See*, Transcript 4/7-6/4). Per the colloquy referenced above, the parties appear to have specifically waived the noticed issue of whether or not Claimant's condition is due in whole, or in part, to a pre-existing condition, i.e. whether Claimant's disability should be apportioned between the subject accident and a pre-existing condition pursuant to Idaho Code § 72-406. Indeed, the Commission has historically held that the evaluation of Claimant's disability is an exercise distinct from a determination of whether that disability should be apportioned between an accident and some other condition. *See*, Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008).

It is puzzling, then, to consider the parties' closing arguments, submitted in lieu of formal briefing. Those arguments demonstrate that there is fairly close agreement between the parties as to the extent and degree of Claimant's disability. The issue that separates the parties,

however, appears to be whether, or to what extent, Claimant's disability is referable to a pre-existing condition, i.e. 1998 low back injury and surgery, versus the subject 2006 accident. Ordinarily, we are guided by the parties' familiarity with their case to determine the issues that need to be heard. We are also obligated to give the parties at least 10 days written notice of the issues to be heard, in order to prevent surprise and unfairness. *See*, Idaho Code § 72-713. Here, after identifying disability as the only issue to be heard, the parties appear to have come to agreement that although disability is at issue, the principal dispute surrounds the extent and degree to which Claimant's disability is assignable to the subject accident versus some other condition. If, during closing arguments, either party had raised objection to consideration of the issue of apportionment, the Commission would be bound to reject that issue for consideration, inasmuch as the parties had, presumably, prosecuted/defended the case at hearing under the assumption that the only issue for determination was the extent and degree of Claimant's disability.

However, since it seems clear that the parties have acceded to the submission of the issue of apportionment to the Commission, the Commission will entertain this issue, as well as the stated issue of disability.

CONTENTIONS OF THE PARTIES

Claimant asserts that he has sustained PPD of 40% *inclusive* of his PPI. Claimant admits that he has received compensation for his PPI.

Defendants assert that Claimant has sustained no PPD in addition to his PPI, which was paid.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing; and

2. Joint Exhibits A-C, admitted at hearing.

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

FINDINGS OF FACT

1. Claimant was 54 years old at the time of hearing. He was born and raised in the former Yugoslavia, and lived or worked in Russia, Iraq, and Germany before coming to the United States in November 1998.

2. Claimant completed eight years of academic schooling in Yugoslavia and four years of vocational training in the construction trades. He understands some simple English, but is not a fluent speaker of the language. He is fluent in Bosnian, German, and Russian.

3. Claimant's father was a butcher, and Claimant learned meat-cutting skills at an early age. His work after high school, and until coming to the United States, was in the construction trades—primarily putting together prefabricated components and masonry work. After coming to the Magic Valley, he worked briefly in a fish processing plant and in a factory that built roof trusses. Claimant testified that it had always been his dream to be a meat cutter, and, in March 2000, he went to work for Employer as a boner in the pork-cutting section. Claimant continued to work for Employer, performing the heavy work of cutting meat, until his May 5, 2006 industrial injury.

4. In 1998, while working in Germany, Claimant sustained an injury to his low back that resulted in surgery, probably a laminectomy at L4-5. None of the medical records relating to Claimant's treatment in Germany were available. Claimant testified that after surgery and a period of physical therapy, he recovered completely. He did not attempt to return to work in

Germany because he was in the process of immigrating to the U.S. Upon arriving in the U.S., Claimant returned to heavy work—first at the fish processing facility, then building trusses, and eventually as a meat cutter for Employer.

5. On March 23, 2001, while working for Employer, Claimant injured his low back moving a large container of product. Diagnosed with a lumbosacral sprain with moderately severe spasm of the right paraspinal muscles, Claimant received conservative treatment through mid-July of 2001. As summarized in the report of Douglas N. Crum, CDMS, Claimant's treating physicians were concerned about his slow recovery and evidence of symptom magnification.

6. Following his March 2001 injury, Claimant continued to work for Employer as a meat cutter boning pork loins until May 5, 2006. On that date, Claimant was moving a pallet jack loaded with meat when he felt an acute pain in his low back on the left side. He was able to finish his shift, but was in bed all weekend. On May 8, Claimant was unable to go to work and sought medical care.

7. Claimant received conservative care, including physical therapy, medication, steroid injections, and chiropractic care without reported improvement through December 2006.

8. In December 2006, Claimant saw David Verst, M.D., for a surgical consult. Dr. Verst recommended surgery, and performed an L4-5 laminectomy on February 20, 2007. By Claimant's report, the surgery provided no relief. Dr. Verst continued to treat Claimant postoperatively through mid-July 2007, ruling out any objective pathology that accounted for Claimant's continued pain complaints. When Dr. Verst ran out of treatment options, he referred Claimant to David Jensen, M.D., for evaluation.

9. Dr. Jensen opined that Claimant had received appropriate care, and that he had nothing more to offer Claimant other than the suggestion of attending the LifeFit program at the

Idaho Elks Rehabilitation Hospital. Claimant returned to Dr. Verst, who basically stated he was out of options, and it was either time for an independent medical evaluation (IME) or LifeFit.

10. Dr. Jensen conducted an IME of Claimant on January 21, 2008. In addition to the objective medical findings, Dr. Jensen observed a "significant functional overlay" to Claimant's symptoms, and noted similar concerns raised by Claimant's former treating physicians. Dr. Jensen found Claimant to be at maximum medical improvement (MMI), calculated Claimant's PPI, and imposed a *permanent* restriction against lifting anything greater than forty pounds.

11. On February 11, 2008, Dr. Jensen provided additional information regarding Claimant's work restrictions, including:

- May sit up to six hours consecutively per day;
- May stand up to six hours per day;
- May walk up to four hours per day;
- May sit or stand up to a total of eight hours per day;
- May occasionally bend or twist;
- May rarely squat or climb;
- May frequently reach above shoulder level;
- May not crawl;
- May use upper extremities without restriction;
- May use feet as in operating foot controls, ten pounds bilaterally and combined;
- May work at unprotected heights with moderate restrictions; and,
- May work near moving machinery with mild restrictions.

Dr. Jensen opined that Claimant's capacity for performing the identified activities would increase over time.

12. Claimant participated in a functional capacity evaluation (FCE) on April 14, 2008.[1] The physical therapist who conducted the FCE noted that Claimant "self-limited most

[1] Although the date included in Mr. Crum's summary appears as 4/14/05, the Referee presumes it was actually conducted on 4/14/08.

activities prior to objective signs of maximum performance due to reports of significant low back and lower extremity pain." *Id.,* at p. 7. Subsequent to the FCE,[2] Dr. Jensen opined that Claimant's condition should not require him to take time off work, change occupations, move to another area, or discontinue working. Dr. Jensen imposed two restrictions: no lifting greater than fifty pounds, and no prolonged repetitive lifting.[3]

13. Claimant completed and was discharged from the LifeFit program on December 19, 2008. On December 17, Robert Friedman, M.D., the director of the program, offered his opinions on Claimant's condition:

- Claimant was functioning at a light to medium work duty of twenty pounds frequently and thirty-five pounds occasionally. With three months of gym workouts, Claimant will be at medium to heavy work level of thirty-five pounds frequently and fifty pounds occasionally. This represents a ten percent increase in physical capacity over a ten-week period;
- An FCE performed as part of the LifeFit program is invalid because Claimant manipulated his effort;
- Restrictions:

  Temporary. Time of discharge to February 25, 2009 (ten weeks): Light to medium work level—thirty pounds occasionally, twenty pounds repetitive. No twisting or torquing maneuvers to low back *secondary to his 1998 lumbar surgery*;
  Permanent. After February 25, 2009: Medium work level—fifty pounds occasionally, twenty-five pounds repetitive. No torquing or twisting to the low back *secondary to his 1998 lumbar surgery*.

14. Both parties retained vocational experts: Douglas N. Crum, CDMS, for the Claimant and Mary Barros-Bailey, Ph.D., CRC, CDMS, CLCP, NCC, D/ABVE, for Defendants.

---

[2] Again, the dates are confusing. Mr. Crum identifies the visit with Dr. Jensen as 4/2/08, which is before the FCE. Again, on the assumption that Mr. Crum's summary of medical records is in chronological order, the date was probably later in the month.

[3] Dr. Jensen's April 2008 restrictions are something of a conundrum: Why did he increase Claimant's lifting restriction from a *permanent* forty-pound lifting restriction to fifty pounds? Did he rely on the FCE that Dr. Friedman found invalid? How could Dr. Jensen state that Claimant could return to his job as a meat cutter, which required Claimant to lift up to ninety pounds, when he had imposed a fifty-pound lifting restriction?

Both experts reviewed the medical records, with Mr. Crum including a thorough précis of the records. Both experts met with the Claimant. Both Mr. Crum and Ms. Barros-Bailey used Dr. Jensen's functional restrictions in reaching their opinions as to Claimant's disability. Mr. Crum determined that Claimant sustained 35% PPD inclusive of impairment. Ms. Barros-Bailey opined that Claimant sustained 40% PPD inclusive of his impairment.

DISCUSSION AND FURTHER FINDINGS

Impairment

15. The parties do not dispute that Claimant suffered permanent physical impairment as a consequence of the 2006 accident. Dr. Friedman has proposed that Claimant's total impairment for his low back condition is in the range of 15%. However, Dr. Friedman assigned only a 3% rating to the subject accident, with a 12% rating assignable to Claimant's documented pre-existing condition.

Disability

16. The degree of an injured worker's permanent disability, and the cause or causes of a disability, are factual questions committed to the discretion of the Industrial Commission. A claimant has 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 reasonably be expected. *See*, Idaho Code § 72-423. A permanent disability rating is the appraisal of the claimant's present and probable ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors as provided in Idaho Code § 72-430. Per Idaho Code § 72-425, the central focus of the disability evaluation is on the ability to engage in gainful activity. *See*, Smith v. Payette County, 105 Idaho 618, 671 P.2d 1081 (1983); Baldner v. Bennett's, Inc., 103 Idaho 458,

649 P.2d 1214 (1982).

17. In assessing Claimant's permanent partial disability, it is first helpful to understand whether Claimant's permanent impairment has caused a loss of functional capacity which impacts his ability to engage in physical activity. Indeed, a loss of functional capacity figures prominently in all cases involving a determination an injured worker's disability in excess of physical impairment. Absent some functional loss, it is hard to conceive of a factual scenario that would support an award of disability over and above impairment; if the injured worker is physically capable of performing the same types of physical activities as he performed prior to the industrial accident, then neither wage loss nor loss of access to the labor market is implicated.

18. In this case, both Mary Barros-Bailey and Douglas Crum relied upon the permanent limitations/restrictions authored by Dr. Jensen as the starting point in their analysis. However, it is important to recognize that physician imposed permanent limitations/restrictions are not typically intended to be a measure of an injured worker's functional capacity. Rather, it is the experience of the Industrial Commission that physician imposed limitations/restrictions are intended to be prophylactic in nature. In giving permanent limitations/restrictions, it is typically the intention of the treating/evaluating physician to make recommendations to the injured worker that will protect the worker from future injury. An injured worker to whom such limitations/restrictions have been given may be physically capable in engaging in work activities that exceed those limitations/restrictions, but in so doing, he subjects himself to the risk of further injury to the affected body part.

19. In this case, both Dr. Jensen and Dr. Friedman have hazarded a guess as to Claimant's permanent limitations/restrictions. The Commission agrees that the vocational

experts' reliance upon the limitations authored by Dr. Jensen is appropriate. Although Dr. Friedman authored limitations/restrictions following the completion of the work fit program, he proposed limitations/restrictions that he expected to become permanent some weeks after the limitations were actually authored. Dr. Friedman proposed that Claimant would continue to improve, and that this would justify permanent limitations somewhat less onerous than those imposed by Dr. Jensen. However, the record does not contain any medical evidence that Dr. Friedman was correct in his supposition. Indeed, per Claimant, he has experienced no additional improvements since his discharge from the work fit program. Accordingly, it seems more appropriate to rely upon the limitations/restrictions authored by Dr. Jensen.

20. This case is unusual for the high degree of congruence between the opinions of Ms. Barros-Bailey and Mr. Crum. The difference in disability calculated by the two experts is only 5%. Based on the physician recommendation that Claimant limit himself to light to medium work in the future in order to protect his back from further injury, an in view of Claimant's age, language difficulties, his limited transferrable job skills, and his modest educational accomplishments, the Commission finds that Claimant has a current disability of 40%.

Apportionment

21. Next, it is necessary to address what the Commission perceives to be the central issue in dispute, the question of the extent and degree to which Claimant's current disability is referable to the subject acts versus the documented pre-existing condition. As noted, Claimant suffered a low back injury in 1998 while working in Germany. The Commission is not privy to those medical records. However, from the reports generated in connection with the subject accident, it seems likely that Claimant suffered an L4-5 disc herniation in 1998, which resulted

in surgical treatment at that level, probably involving an L4-5 diskectomy. This is the same level implicated in connection with the subject accident.

22. As well, Claimant suffered a low back injury in 2001, for which he received treatment over a period of several months. Those records reveal that Claimant complained of low back pain, and lower extremity discomfort, consistent with radiculopathy. When seen by Dr. Stagg on July 2, 2001, it appears that Dr. Stagg continued to recommend limitations against lifting more than 10 pounds. The medical record synopsis prepared by Mr. Crum (which is the only medical evidence before the Commission) does not reflect that those limitations were ever lifted by Dr. Stagg. Mr. Crum's synopsis also reflects that Claimant underwent an independent medical evaluation performed by Dr. Phillips sometime in July of 2001. However, Mr. Crum's synopsis does not reflect what recommendations, if any, Dr. Phillips made concerning his agreement or disagreement with the limitations imposed by Dr. Stagg, much less whether Dr. Phillips considered Claimant to be a candidate for permanent limitations/restrictions. At the end of the day, the limited medical information available to the Commission, leaves the Commission unable to appreciate whether there were, in fact, any permanent physician imposed limitations/restrictions in place prior to the subject 2006 accident.

23. However, the Commission does not agree with the proposition stated by Claimant that the absence of pre-existing physician imposed permanent limitations/restrictions requires our finding that all of Claimant's current disability is referable to the subject accident.

24. The Commission's evaluation of permanent disability requires the evaluation of multiple factors, both medical and non-medical, that impact a Claimant's earning capacity. Similar considerations are at issue when considering apportionment under Idaho Code § 72-406. That section provides:

"**72-406 – Deductions for preexisting injuries and infirmities. –**

(1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

(2) Any income benefits previously paid an injured workman for permanent disability to any member or part of his body shall be deducted from the amount of income benefits provided for the permanent disability to the same member or part of his body caused by a change in his physical condition or by a subsequent injury or occupational disease."

25. Although the employer assuredly takes a claimant as it gets him, it is equally axiomatic that an employer can only be held responsible for the additional disability that is causally related to the subject accident. Here, if the medical evidence demonstrated that Claimant had been given permanent limitations/restrictions on a pre-injury basis, this would be evidence that the Commission would necessarily consider in assessing whether some portion of Claimant's disability pre-dated the subject accident. However, that permanent limitations/restrictions may not have been given to Claimant on a pre-injury basis, does not preclude the Commission from determining that some part of Claimant's disability should be apportioned to a pre-existing condition. Whether a claimant has been given physician-imposed limitations/restrictions on a pre-injury basis is relevant to, but is not determinative of, the question that we are most interested in, i.e. whether the Claimant suffered from a physical condition which detrimentally affected his ability to engage in gainful activity prior to the subject accident. Much has been made of the Commission's opinion in the recent case of Flores v. Boise Cascade, LLC., 2008 IIC 0240 (June 2008), in which the Commission concluded that the retroactive imposition of limitations/restrictions by a retained defense expert carries little weight in evaluating whether or not the injured worker did, in fact, have disability which pre-dated the subject accident. Flores, *supra*, was decided on its own peculiar facts, and should not be read as

supporting the blanket conclusion that unless limitations/restrictions have been given by a physician to an injured worker prior to the industrial accident, the Commission must conclude that no portion of Claimant's disability is assignable to a pre-existing condition under Idaho Code § 72-406. For example, if the pre-existing condition at issue was the double amputation of Claimant's lower extremities, we would not feel constrained to look for physician imposed permanent limitations/restrictions issued prior to the subject industrial accident in order to conclude that on a pre-injury basis Claimant was incapable of performing work that required him to spend eight hours a day on his feet. In summary, the *sine qua non* of a decision to apportion disability under Idaho Code § 72-406 is a determination that Claimant suffered from a pre-existing physical impairment that detrimentally impacted the Claimant's ability to engage in gainful activity. A physician's opinion concerning the injured workers' pre-injury permanent limitations/restrictions, whether issued before or after the subject accident, is but one (of many) factors the Commission will consider in performing the Idaho Code § 72-406 evaluation.

26. Here, the medical record is ambiguous on the question of whether or not Claimant did have an impaired ability to engage in gainful activity prior to the subject accident. It is the experience of the Industrial Commission that lumbar spine surgeries such as the one Claimant underwent in 1998, typically produce physician recommendations against certain types of future activities in order to protect the already injured low back from further injury. Again, the instant record does not reflect whether such recommendations were made prior to the subject injury. Dr. Friedman, however, has proposed that such limitations/restrictions would have been reasonable subsequent to the 1998 surgery. Of course, because such limitations/restrictions are ordinarily intended to be prophylactic only, there is nothing about Dr. Friedman's retroactive recommendations that is necessarily inconsistent with the fact that Claimant evidently continued

to work at jobs in the medium to heavy work categories following his recovery from the 1998 accident. However, the fact that Claimant suffered another low back injury in 2001 and the subject low back injury in 2006 may suggest that the 1998 low back surgery did not "cure" Claimant's low back condition; lighter duty work might well have prevented Claimant from hurting his back in 2001 and 2006. These facts of record might suggest that Claimant's functional capacity was limited by his pre-existing impairment.

27. However, even though we have decided that the absence of physician-imposed limitations/restrictions prior to the subject accident is not decisive on the issue of Claimant's pre-existing disability, we are persuaded by the other facts of record that Claimant's disability is entirely referable to the subject accident. Although Claimant did have a 1998 L4-5 surgery, the medical synopsis suggests that but for the 2001 flare-up, Claimant got along very well, and without any apparent low back symptomatology, between 1998 and the date of the subject accident, even though he performed physically demanding work in the interim. Since the record altogether fails to demonstrate that Claimant had any difficulty whatsoever with his low back between 2001 and 2006, and since the record surely demonstrates that Claimant is now wholly unable to perform almost all of the work that he did with no difficulty on a pre-injury basis, we conclude that the entire 40% disability rating is referable to the 2006 accident.

ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant has current disability inclusive of impairment of 40%.

2. No apportionment of the Claimant's 40% disability to a pre-existing condition is indicated.

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

DATED this __13th_ day of ___January_____, 2010.

INDUSTRIAL COMMISSION

_/s/_____
R.D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _13th__ day of ___January_____, 2010, 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:

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

E SCOTT HARMON
PO BOX 6358
BOISE ID 83707-6358

cjh ____/s/_____