

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MIGUEL RIVERA,)	
)	
Claimant,)	
)	
v.)	IC 2007-010671
)	2007-010672
MOUNTAIN STATES ROOFING, INC.,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
and)	AND RECOMMENDATION
)	
CONTINENTAL CASUALTY CO.,)	Filed: February 18, 2010
)	
Surety,)	
Defendants.)	
_____)	

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 Boise, Idaho on July 15, 2009. Bruce D. Skaug of Nampa represented Claimant. Glenna M. Christensen of Boise represented Defendants. The parties submitted oral and documentary evidence and took two post-hearing depositions. Mark C. Peterson substituted for Ms. Christensen and prepared Defendants’ post-hearing brief. The matter came under advisement on December 8, 2009 and is now ready for decision.

ISSUES

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

1. Whether and to what extent Claimant is entitled to disability in excess of impairment, but less than total; and

2. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant asserts that he has lost access to a substantial portion of the labor market and has sustained a significant loss of earning capacity as a result of his industrial accident. Claimant contends that he is entitled to 56% disability inclusive of his impairment.

Claimant argues that he is entitled to an award of attorney fees because Employer refused to file a notice of injury regarding his claim, provide reasonable medical care, or pay time loss benefits. Employer's failure to act in accordance with the workers' compensation statutes necessitated that Claimant obtain legal counsel and file a complaint. Once his claim was accepted, Claimant asserts that Surety unreasonably delayed payment of benefits.

Defendants agree that Claimant is entitled to some disability in excess of his impairment, but contend that Claimant's loss of access to the labor market and loss of earning capacity entitled him to no more than 20% disability inclusive of impairment.

Defendants deny that an award of attorney fees is appropriate and assert that Employer paid for reasonable medical care and provided light-duty work to Claimant so he suffered no time loss as a result of his injury. Finally, Defendants contend that any delay in the payment of other benefits was the result of improperly submitted reimbursement requests.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

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

¹ At the time of hearing, Claimant was residing in Florida and, by agreement of the parties and the Referee, testified via telephone.

2. Claimant's Exhibits 1 through 4 and 6 through 15, admitted at hearing;
3. Defendants' Exhibits 1 through 4 and 6, admitted at hearing;
4. Claimant's Exhibit 5 and Defendants' Exhibit 5, admitted at the time the experts were deposed; and
5. The depositions of Terry Montague, taken July 20, 2009, and William C. Jordan, taken August 18, 2009.

Objections made during the course of the post-hearing depositions are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was forty-two years of age at the time of hearing, and was living in Fairmont (Miami/Dade County), Florida with his brother.
2. Claimant was born and raised in Florida. He dropped out of school before completing tenth grade. Claimant did not have any further schooling and did not obtain a GED. Claimant has no keyboarding skills, and extremely limited computer skills. There is no evidence that he is proficient with any commonly used software packages.
3. Claimant is bilingual in English and Spanish, with English being his first language. Claimant stated that his Spanish writing skills were not strong.
4. Claimant primarily worked as a roofer from the time he left school. He started as a laborer for a roofing contractor in Florida, and eventually learned to install a number of types of roofing in both residential and commercial applications.
5. Claimant left the roofing business for short periods of time. During one hiatus

from roofing, Claimant worked for a painting contractor where he pressure washed buildings in preparation for painting. During a second break, he was a local delivery driver.

6. Claimant came to Idaho in 1996 to escape the big city and a former girlfriend. He found work almost immediately working for Employer. Except for a brief period when he left to work for Quality Roofing, Claimant remained with Employer until shortly after the industrial injury that is the subject of this proceeding.

ACCIDENT/INJURY

7. On January 9, 2007, Claimant was working for Employer on a commercial job in Lebanon, Oregon. He was rolling out the rubber sheeting used on flat roofs when he felt a sharp pain “in my chest, to my shoulder, to my neck.” Tr. p. 40. Claimant immediately reported the incident and his supervisor (Mack) had him perform light-duty for the remainder of the day. Claimant continued to work light-duty the following two days and again told Mack that the pain was getting worse each day. Mack called the owner of the company and told him of Claimant’s complaints. Mack told Claimant to continue working light-duty.

8. On January 12, Claimant was still performing light-duty work when he was re-injured. At the time of the accident, Claimant was using a forklift to place materials on the roof. When Claimant attempted to adjust the forks on the lift to accommodate a load, he “felt a sharp pain hit me in my shoulder, my neck, and my arm, and my chest.” *Id.*, p. 42. The pain was so severe Claimant feared he was having a heart attack. He told Mack of his condition and Mack sent him to a local hospital. The hospital tested and monitored Claimant, and ultimately determined that he probably had a pulled muscle in his chest wall. Claimant received morphine and a work release for several days.

9. At the time of his work injuries, Claimant earned \$16.50 per hour when working

out of state and \$14.50 when working in state. Claimant regularly worked more than forty hours per week.

POST-INJURY COURSE OF EVENTS

10. Despite the work release, Claimant returned to work the following day and continued to work performing light-duty until the job in Lebanon was finished. When Claimant returned to Idaho around January 20, Employer told him to take a couple of weeks off to heal. When Claimant had not improved after the time away from work, Employer sent him to Boise Family Medical Center, where he saw Juli Schurmann, APPN, BC, on January 26.² Under the heading “Assessment,” the chart note lists left-side chest pain. According to the note, Ms. Schurmann counseled Claimant to get a cardiac consult, which he refused. Dale L. Mock, M.D., signed off on the chart note. Claimant returned to Dr. Mock for follow-up on February 27, 2007.

11. Claimant continued to work and continued to experience left chest, neck, shoulder, and arm pain. Employer sent him to a friend who was a chiropractor. Claimant saw Daren L. Sayers, D.C., for six treatments between March 7 and March 19, 2007. By letter dated March 13, 2007, D.C. Sayers stated:

[Claimant] is suffering from neck sprain/strain and [left] rotator cuff strain. He also is displaying signs of a herniated disc lower cervical spine. If no valuable *[sic]* improvement takes place with 2 weeks of conservative care we will need to order an MRI to determine level of disc bulge.

Defendants’ Ex. 10, p. 12. The hand-written note is addressed “Dear Sirs,” presumably to Employer.

12. On March 27, 2007, D. C. Sayers again wrote to “Dear Sirs” as follows:

² The name “Dr. Judy” of Boise Family Medicine appears throughout the medical records and in Claimant’s testimony. It appears that Dr. Judy is actually Juli Schurmann.

Please provide [Claimant] [with a] consultation and exam by Dr. O'Brien. He has failed to show extensive improvement [with] 2 [weeks] conservative chiropractic care. Would like 2nd opinion before continuing any further treatment [*sic*].

Id., p. 13. D.C. Sayers took Claimant off work on March 27, 2007.

13. It was at this point that Claimant once again approached Employer about the need to file a workers' compensation claim for his injuries. Employer reportedly told Claimant that it would not file a notice of injury, and that workers' compensation would not pay for Claimant's care or time loss. Claimant testified that he retained counsel, and the legal files show that the Complaints were filed March 29, 2007.

14. Claimant saw Michael O'Brien, M.D., on referral from D.C. Sayers on April 3, 2007. Dr. O'Brien was most concerned about the possibility of a C7 disc bulge and ordered an MRI. The MRI, performed the following day, showed only mild degenerative pathology—nothing that would account for Claimant's upper left extremity symptoms. Dr. O'Brien tried a fluoroscopically guided nerve block on April 12, which provided only temporary relief. Dr. O'Brien saw Claimant again on April 18, and April 25, 2007. Chart notes indicate he was at a loss regarding Claimant's treatment.

15. Defendants took Claimant's deposition on April 30, 2007. By letter dated May 10, Surety advised Claimant that it had accepted his claim. His average weekly wage was \$835.50, and Surety paid income benefits for the period of March 27, 2007 through May 10, 2007 in a lump sum. The letter also directed Claimant to attend an independent medical evaluation on May 25, 2007.

16. On May 25, 2007, Rodde D. Cox, M.D., conducted an independent medical evaluation (IME) of Claimant at the request of Defendants. Dr. Cox's primary finding was that Claimant had rotator cuff tendinitis or a rotator cuff tear. Although it appears that Dr. Cox's

IME report was prepared within days of the examination, it was not until July 2, 2007, that Claimant received a referral to Gary Botimer, M.D., an orthopedic surgeon, regarding his shoulder.

17. Dr. Botimer performed an open exploration of Claimant's left shoulder on August 16, 2007. He found and repaired an extensive full-thickness tear in the supraspinatus portion of the rotator cuff. When seen for follow-up on August 30, 2007, Claimant was making a normal recovery. Claimant advised Dr. Botimer that he was moving back to Florida the following week.

18. Claimant returned to Florida, and received a referral to Paul I. Meli, an orthopedic surgeon in Fort Lauderdale. Claimant saw Dr. Meli for his initial visit on October 15, 2007. Dr. Meli ordered additional physical therapy and continued to follow Claimant's progress. Dr. Meli performed a second left shoulder surgery in late 2007 to remove scar tissue, repair a small muscular tear, and install a titanium plate in the anterior shoulder. Dr. Meli declared Claimant at maximum medical improvement (MMI) on March 6, 2008, released him without restrictions, and assigned 5% whole person impairment as a result of the January 2007 shoulder injuries.

19. Claimant returned to Dr. Meli with left shoulder complaints in July 2008, and Dr. Meli performed a third arthroscopy on Claimant's left shoulder on September 26, 2008. Dr. Meli determined Claimant to be a MMI from the third surgery on December 8, 2008. He released Claimant to work with no restrictions, and awarded an additional 1% whole person impairment for the additional shoulder surgery.

20. Claimant returned to Dr. Meli in March 2009 with continued left shoulder complaints. Dr. Meli determined that Claimant was still at MMI and ordered Claimant to

undergo a functional capacity evaluation (FCE). On May 21, 2009, based on the results of the FCE, Dr. Meli imposed permanent work restrictions on Claimant; as follows;

- Lift—floor to waist—30 pounds maximum with left upper extremity;
- Lift—waist to overhead—20 pounds maximum with left upper extremity; and
- Push, pull, reach overhead—20 pounds maximum with left upper extremity.

21. Claimant's first full-time employment after his return to Florida was at a Burger King, where he earned \$7.00 per hour. Claimant left that job when he had his second shoulder surgery. At the time of hearing, Claimant was working for an animal transportation service, doing work that was within his restrictions. Claimant earned a salary of \$1,660 per month, but only worked twenty to twenty-five hours per week. Claimant testified that he wanted to work full-time to better his earnings, but was unable to find employment.³

VOCATIONAL EVIDENCE

22. Both parties retained vocational experts: Terry Montague of Nampa, Idaho for Claimant and William C. Jordan of Boise for Defendants. Because Claimant had relocated to Florida, both experts interviewed Claimant via telephone.

Mr. Montague

23. Mr. Montague opined that Claimant's permanent disability inclusive of impairment was 40%. Factors that led Mr. Montague to his conclusion include:

- Claimant's educational history—Claimant was a poor student, got mostly Ds and Fs, was often in trouble, was held back twice, and did not complete tenth grade;
- Claimant's work history—for all intents, Claimant's sole occupation throughout his life had been as a roofer, an occupation that provided little by way of transferrable skills;
- Claimant's physical restrictions—Dr. Meli's permanent restrictions limited Claimant to light-duty occupations, depriving him of access to 40% of all occupational titles based on physical restrictions alone;

³ In order for Claimant to increase his earnings *with full-time work*, he would have to find a job that paid more than \$10.38 per hour (his effective hourly rate for his current job if he worked 160 hours per month).

- Claimant's age;
- Economic conditions in the labor markets where Claimant might seek employment (Miami/Dade Florida, and the Boise MSA in Idaho); and
- Claimant's wage loss—Claimant was earning \$835.50 prior to his injury, and approximately \$383.08 per week at the time of hearing $[(1660 \times 12) \div 52 = 383.08]$.

Mr. Jordan

24. Mr. Jordan opined that Claimant's permanent disability inclusive of impairment ranged from 15% to 20%. Factors that led Mr. Jordan to his conclusion include:

- Claimant's educational history—Claimant completed 10th grade, was good at math, history, and art, had received As and Bs and had been on the honor roll;
- Claimant's work history—Claimant had a number of transferrable skills as a result of his years working with and installing all kinds of roofs, and three or more years each working as a painter and delivering medical supplies;
- Claimant's physical restrictions—Claimant's physical restrictions, particularly the 30-pound limit on floor-to-waist lifting, would allow Claimant to pursue both light and some medium-duty work; further, the physical restrictions applied only to Claimant's non-dominant left upper extremity, and he had no weight or positional limitations on his dominant right upper extremity;
- Claimant's current work—Claimant was working four to five hours per day and earning \$1660 per month, which was more than he had earned on an hourly basis as a roofer at the time of his injury. Nothing prevented Claimant from obtaining a second job to boost his monthly earnings, and the fact that he had found both his current employment and the job at Burger King prior to his second shoulder surgery is proof that Claimant is employable.

DISCUSSION AND FURTHER FINDINGS

DISABILITY

25. The definition of “disability” under the Idaho workers’ compensation law is:

. . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). 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. A 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. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the Commission. Idaho Code § 72-430.

26. Both vocational experts relied on Claimant's 6% whole person impairment resulting from the industrial accident as their starting point for a disability calculation. From that point forward, the experts diverged in their opinions. Each took care to point out flaws in the other's analysis. On balance, the Referee finds Mr. Montague's analysis of Claimant's permanent disability somewhat more persuasive than that of Mr. Jordan.

Education

27. With regard to Claimant's educational history, the record fails to establish whether Claimant was a good or bad student. Regardless, it is undisputed that Claimant is not a high school graduate, and that he may have completed the 10th grade at best. Claimant may have had the capacity to be a good student and further his education, but he made no effort to do so for more than twenty-six years.

Work History/Transferable Skills

28. Claimant's work history outside the roofing arena remains a mystery. Either he worked for much longer periods of time as a painter and delivering medical supplies than the record reflects, or there is a significant gap in his work history for which he cannot account.

Mr. Jordan's analysis made assumptions regarding Claimant's work history and transferrable skills not supported by the record or otherwise suspect. First among these assumptions is that Claimant had transferrable skills as a result of his years of work as a painter. In fact, for whatever amount of time Claimant worked for a painting contractor, all he did was use a pressure washer to prepare a surface for painting and clean up around the work site. He never painted or did any of the detailed preparatory work. Another area where Mr. Jordan seemed to believe that Claimant had transferrable skills was as an equipment operator. Claimant was "certified" as a forklift operator, but there was no evidence as to what the certification meant and what was required to be certified. Claimant testified that, with the exception of the forklift, his experience operating other equipment was limited. Claimant certainly never claimed to have had experience as an equipment operator, did not possess a CDL, and showed no interest in obtaining one. Finally, Mr. Jordan opined that Claimant had transferrable skills as a result of his work as a roofer. Claimant was a laborer for a roofing company. He was good at installing various types of roofing for a variety of applications as determined by the roofing contractor. He worked hard at a hard job and used basic tools. He did not bid projects, provide customer education regarding roofing options, or supervise other roofers. Claimant's skills were transferrable to another job as a roofer, but were limited outside the roofing industry, in which he could no longer work.

Physical Restrictions

29. Mr. Jordan correctly noted that Claimant's ability to lift up to thirty pounds from floor to waist exceeded the light-duty exertion limits, so Claimant could, conceivably, find employment in a job that was medium duty in some respects. Additionally, Mr. Jordan noted that the restrictions applied only to Claimant's left upper extremity, so he should be able to do heavier lifting using his right upper extremity. Further, as noted, because every job is different,

there may be some medium-exertion level jobs that do not require lifting more than thirty pounds from floor to waist, but if they require lifting that same weight above the waist, they are outside Claimant's restrictions. To conclude, as did Mr. Jordan, that a significant number of medium-exertion positions are available to Claimant is overly optimistic.

Available Jobs

30. Both experts agree that Claimant's labor market includes Miami/Dade, Florida, and southwestern Idaho, because Claimant expressed a willingness to return to the Treasure Valley. Mr. Jordan went so far as to provide a list of some twenty or more occupational titles for which he believed Claimant was suited. Mr. Montague took issue with Mr. Jordan's analysis of the types of jobs available to Claimant. Mr. Montague's concerns were twofold: That Mr. Jordan relied, in part, on the dictionary of occupational titles (DOT) to identify occupational titles rather than research the actual jobs that were open and available to Claimant; and that Mr. Jordan identified jobs and job titles for which Claimant did not meet the minimum qualifications.

DOT

31. Because the DOT is a nationwide compilation of job titles, particular occupational titles may or may not exist in a particular job market. Further, even if the positions do exist in a market, they are jobs that someone occupies, not job openings. Mr. Montague used Mr. Jordan's identified occupational titles to search for positions in the Idaho labor market. For some of the identified occupations (non-farm animal caretaker, parts salesperson, and sales representative-wholesale manufacturing) there was only one such position actually being advertised throughout the entire state of Idaho. Mr. Jordan testified that the average wages for the first two positions were \$14.96 and \$13.96 per hour. The openings identified by Mr. Montague paid \$7.50 and

\$6.55 per hour, respectively. Further, a review of the actual job descriptions clearly placed the positions outside of Claimant's physical restrictions.

Qualifications

32. As noted in the previous section, Mr. Montague found that many of the occupational titles identified by Mr. Jordan required physical exertion that was beyond Claimant's restrictions. Mr. Jordan also included in his report a list of jobs that were open and available around the time he prepared his report. Mr. Montague was concerned that Mr. Jordan grossly overestimated Claimant's ability to meet the minimum qualifications for many of the positions he identified whether actual openings or merely job titles. Mr. Jordan's suggestions included some of the following minimum requirements:

- Some college;
- Prior experience in the field (from several months up to five years);
- High school diploma or GED;
- A CDL;
- Basic typing skills;
- Computer skills (including spreadsheet and word processing)

Wage Loss

33. At the time of injury Claimant earned between \$14.50 and \$16.50 per hour depending on whether his work was within or without the State of Idaho. In the five years preceding the date of injury, Claimant's income averaged \$27,552 per year. In his time of injury job, Claimant also enjoyed certain benefits, including employer's matching contribution to Claimant's 401(k), as well as medical, dental and vision insurance. Post injury, Claimant worked for one-and-a-half to two months at a Florida Burger King earning \$7.00 per hour. This job provided no additional employer benefits. Following his second shoulder surgery, Claimant found part-time work as an animal handler for Animal Air Service. In this job, Claimant typically works 20-25 hours per week and is paid \$1660.00 per month. There is no evidence that

Claimant enjoys any other employer-provided benefits incident to this employment. On an hourly basis, this job pays Claimant approximately \$18.00-\$20.00 per hour, and, as Defendants have noted, leaves Claimant free to pursue other part-time employment.

ATTORNEY FEES

34. Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804. That section generally provides that the Commission may impose attorney fees as a punitive measure when an employer or surety acts unreasonably in contesting a claim, refusing to pay benefits, or discontinuing payment of benefits. The decision that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

35. Claimant identified a number of delays and failures to act that they believe support an award of attorney fees. Most notable among Claimant's litany is Employer's refusal to file a notice of injury as required by law. Claimant's assertion that Employer not only neglected, but categorically refused to file a notice of injury, is un rebutted. The consequences of Employer's refusal fell most onerously on Claimant. While it is true that Employer paid Claimant's medical bills for a period of time, Claimant received only intermittent and piecemeal medical care during that period. D.C. Sayer first attributed Claimant's pain complaints to his left shoulder, and referred Claimant to Dr. O'Brien. But Employer effectively cut off Claimant's access to medical care when it quit paying for Claimant's care. It was not until Claimant hired counsel and filed a complaint that Surety sent Claimant to Dr. Cox for an IME. It was Dr. Cox's

evaluation that finally led to a diagnosis and appropriate treatment.⁴ Thereafter, Surety paid income benefits in a timely manner. Surety provided Claimant with a referral for a Florida physician within a month of his leaving Boise. Claimant did experience some difficulty in obtaining his prescriptions and reimbursement, but the reasons for the delays were not entirely attributable to Surety.

36. The Referee finds that Employer's refusal to file a notice of injury is contrary to statute and deprived Claimant of the prompt and reasonable care to which he was entitled. Claimant continued to work, in pain, for months as a result of Employer's failure to act. Therefore, Claimant is entitled to an award of attorney fees. Defendants' position regarding permanent disability ultimately did not prevail, but was not so unreasonable as to justify an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant sustained permanent disability inclusive of his permanent partial impairment of 40%.

2. Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Employer's unreasonable actions.

⁴ To its credit, the Referee notes that once Claimant filed his complaint, the Surety investigated the claim, accepted the claim, and commenced paying benefits on the claim in just over thirty days.

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 18 day of February, 2010.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. *See, Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 900 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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

DATED this 18 day of February, 2010.

INDUSTRIAL COMMISSION

(Unavailable for signature)
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 18 day of February, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

BRUCE D SKAUG
GOICOECHEA LAW OFFICE
1226 E KARCHER RD
NAMPA ID 83687-3075

MARK C PETERSON
MOFFATT, THOMAS ET AL
PO BOX 829
BOISE ID 83701

/s/ _____