

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MIKE SANTANA, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 WOODGRAIN MILLWORK, INC., )  
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 Employer, )  
 )  
 and )  
 )  
 NEW HAMPSHIRE INSURANCE )  
 COMPANY, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2010-005597**

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

Filed January 27, 2012

**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 Boise on May 26, 2011. Claimant was present and represented by Richard S. Owen of Nampa. Max M. Sheils, Jr., of Boise represented Employer/Surety. Oral and documentary evidence was presented and no post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on September 19, 2011.

**ISSUE**

By agreement of the parties, the sole issue to be decided is whether Claimant is entitled to total temporary disability (TTD) benefits from September 17, 2010 to February 9, 2011.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that he is owed TTD benefits from September 17, 2010, the date his treating physician informed him that he needed cervical surgery, until February 9, 2011, the day prior to said surgery. He reasons that even though Defendants initially denied Claimant's neck claim, once accepted they should have, but failed to, commence either TTD benefits or offer Claimant light-duty work. Even though Employer had a policy requiring a full-duty work release for non-industrial injuries, that policy should not apply to industrial injuries.<sup>1</sup> In support of his contention, Claimant relies upon a letter authored by his treating physician for his industrial neck injury indicating that Claimant could have performed the light-duty job as a grader in September 2010, but the job was not offered at that time.

Defendants contend that Claimant's treating physician never took Claimant off work on September 17, 2010, so they are not liable for any TTD benefits pre-neck surgery. Further, Claimant returned to work after his January 2010 industrial neck injury until his bilateral TKA surgery. Presumably, but for that surgery, Claimant would have been able to work up until the time of his cervical surgery. Moreover, Claimant should not be allowed to collect FMLA and other benefits while also receiving TTD benefits. Finally, as stated by Defendants in their closing brief, "In effect, the claimant is urging the Industrial Commission to force Woodgrain, and every other company in the state of Idaho, to bring an employee back to employment following a work related injury (to avoid TTD liability) even though the same employee has previously been restricted from returning to work due to a non-work related physical abnormality." Post-Hearing Brief of Employer and Surety, p. 8.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, and Employer's Human Resources Manager, Judy Wise, taken at the hearing.

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<sup>1</sup> Claimant underwent a non-industrial bilateral knee replacement surgery (TKA) on August 10, 2010 and was taken off work until released to sedentary work effective November 12, 2010. Claimant used FMLA, short-term disability, and vacation time during his period of recovery from his TKA.

2. Joint Exhibits 1-12, admitted at the hearing.

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

### **FINDINGS OF FACT**

1. Claimant was 55 years of age and resided in Nampa at the time of the hearing. He began working at Employer's door manufacturing facility in 1972. Claimant was considered a valuable employee and, throughout the years, had performed most every job at Employer's. At the time of the subject accident, Claimant worked as a forklift driver.

2. On January 25, 2010, Claimant was climbing onto his forklift when he felt pain between his shoulder blades. He sought medical attention February 16, 2010 from Kevin Chicoine, M.D., who diagnosed a cervical strain. He did not take Claimant off work at that time, but on February 25, 2010, did place restrictions on Claimant. Dr. Chicoine prescribed physical therapy. He also referred Claimant to a chiropractor whose treatment made Claimant's condition worse. On March 30, 2010, Dr. Chicoine referred Claimant to Michael Sant, M.D., a physiatrist, who Claimant first saw on April 15, 2010 with the continued diagnosis of a cervical strain. Dr. Sant released Claimant to full-time work with restrictions.

3. Before Claimant could begin a treatment regime with Dr. Sant, Surety arranged for an independent medical examination on May 10, 2010 with Rodde Cox, M.D., another physiatrist. Dr. Cox concluded that Claimant was suffering from non-industrial bilateral carpal tunnel syndrome (CTS). Claimant was released to work without restrictions or permanent physical impairment.

4. Claimant, on his own, returned to Dr. Sant on June 21, 2010 because he was not improving. He was back to driving his forklift, which was aggravating his cervical sprain. Dr.

Sant recommended epidural steroid injections followed by physical therapy. As of June 21, 2010, Dr. Sant reiterated his release of Claimant to full-time work with restrictions. The record does not reflect that Dr. Sant ever modified these restrictions, and Claimant continued to perform modified work pursuant to these restrictions until the date of his knee surgery. After a failed trial of Lyrica, Dr. Sant, on August 2, 2010, referred Claimant to Paul Montalbano, M.D., a neurosurgeon.

5. On August 12, 2010, Claimant underwent bilateral TKA surgery on a non-industrial basis. His treating physician, John Smith, M.D., took Claimant completely off work until he was released to light duty effective November 12, 2010.

6. Claimant first saw Dr. Montalbano on September 8, 2010. At that time, Dr. Montalbano examined Claimant and ordered a new MRI study, in view of the age of the previous study of March 11, 2010. Following review of that study, Dr. Montalbano met with Claimant on September 15, 2010 and recommended that Claimant was a candidate for a C3-C7 anterior cervical decompression fusion and instrumentation. Notably, Dr. Montalbano did not revise any of the work restrictions issued by Dr. Sant as of June 21, 2010.

7. It was not until his letter of March 4, 2011, that Dr. Montalbano addressed Claimant's work capacity at the time of the September 2010 evaluation. In his March 4, 2011 letter, Dr. Montalbano stated that as of September 2010, it would have been difficult for Claimant to perform his normal and customary job as a Hyster operator. However, as of September 2010, Dr. Montalbano would have released Claimant to sedentary duty with a weight limit of approximately 25 pounds and no excessive bending, lifting or twisting maneuvers.

8. Surety investigated Dr. Montalbano's surgical recommendation, and eventually authorized surgery, which was performed on or about February 10, 2011.

## DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

9. Claimant's entitlement to TTD benefits is controlled in this case by the rule announced in *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986). In *Malueg*, the Idaho Supreme Court approved a test formulated by the Commission to determine when, and under what circumstances, TTD benefits can be curtailed by an employer. Affirming the Commission's approach, the Court stated:

We agree with the following test set forth by the Commission:

In the opinion of the commission, once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work and that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery or that (2) there is employment available in the general labor market which Claimant has reasonable opportunity of securing and which employment is consistent with the terms of this light duty work release.

10. As applied to the facts of the instant matter, the test could be paraphrased as follows: Once a claimant establishes by medical evidence that he is in a period of medical instability following an industrial accident, he is entitled to TTD/TPD benefits unless and until,

(1) it is demonstrated that he has been released to modified-duty work and (2) his employer has offered claimant work consistent with his limitations which is likely to continue during his period of recovery.

11. Applying this test to the facts of this case is not difficult, although it is complicated by the fact of Claimant's non-work related period of temporary total disability from August 12, 2010 to November 12, 2010, as he recovered from knee surgery.

First, the evidence clearly establishes that Claimant has been in a period of recovery following the accident of January 25, 2010, and extending to an unspecified point in time following Claimant's February 2011 spinal surgery. In fact, as far as the record reflects, Claimant may still be in a period of recovery for the effects of the January 25, 2010 accident. Accordingly, Claimant has met his prima facie burden of proving entitlement to TTD benefits. Having done so, he is entitled to temporary total disability benefits under I.C. § 72-408 "unless and until," Employer satisfies its burden of demonstrating (1) that Claimant has been released to modified-duty work and (2) that a job consistent with the modified-duty restrictions has been offered to Claimant.

12. Here, the evidence demonstrates that until February 25, 2010, Claimant had not been given any limitations/restrictions as the result of his industrial accident. In fact, until February 25, 2010, Claimant had been performing the normal aspects of his time of injury job.

13. On February 25, 2010, Dr. Chicoine placed Claimant on modified-duty restrictions in view of his ongoing neck and upper extremity complaints. Claimant returned to work at modified employment offered by Employer with no loss in pay.

14. Dr. Sant released Claimant to full-time work with certain restrictions on or about June 21, 2010. Claimant continued to work at the modified-duty job provided by Employer, with no loss in pay.

15. As noted, Dr. Sant eventually referred Claimant to Dr. Montalbano for surgical evaluation. Repeat MRI studies, correlated with Claimant's clinical presentation, led Dr. Montalbano to propose on September 15, 2010, that Claimant was a surgical candidate. However, Dr. Montalbano's September 17, 2010 letter is altogether silent on the question of whether, having made a surgical recommendation for Claimant, Dr. Montalbano felt it appropriate to modify the June 21, 2010 restrictions.

16. As of September 15, 2010, Claimant was assuredly still within a period of recovery following the industrial accident. Therefore, Claimant's entitlement to I.C. § 72-408 benefits is established, and Claimant is entitled to those benefits "unless and until" Employer meets its burden of establishing: (1) that Claimant has been allowed to return to modified-duty work, and (2) such modified-duty work has been offered to Claimant. Employer has met its burden in this regard since there is no evidence that as of the date of Dr. Montalbano's surgical recommendation, it was Dr. Montalbano's view that Dr. Sant's June 21, 2010 pronouncement on Claimant's ability to perform modified-duty work was in need of revision. Although it is clear that in a letter dated March 4, 2011, Dr. Montalbano retrospectively tightened the limitations/restrictions Claimant should have had in September 2010, the Referee finds this after-the-fact analysis far less persuasive than Dr. Montalbano's silence in September of 2010. At the time of his exam, Dr. Montalbano did not denigrate Dr. Sant's release of Claimant to modified-duty work. Nor did he evidently see fit to independently impose any limitations on Claimant in order to protect him pending surgery.

17. Therefore, following the September 15, 2010 visit, Claimant was still in a period of recovery, but inasmuch as Dr. Montalbano's surgical recommendation did not change the June 21, 2010 work release, Claimant was entitled to TPD benefits at most, since Employer had provided Claimant with work consistent with his restrictions.

18. Next, consider the impact of Claimant's period of total disability during the period August 12, 2010 through November 12, 2010 following his bilateral total knee replacement procedures. Between August 12, 2010 and November 12, 2010, Employer had met its *Malueg* burden and was obligated to pay Claimant TPD benefits, at most, depending on the wage he earned in his modified-duty job. That Claimant was incapacitated by virtue of a non-work-related disability during that time frame is inapposite to the determination of Claimant's entitlement to time loss benefits for the effects of his work injury; Claimant had been released to modified-duty work, and such work had been provided by Employer. Claimant successfully performed that work and it would have continued but for the period of non-work-related disability. Therefore, assuming Claimant's modified-duty job paid him the same as his time of injury job, Employer had no obligation to pay any time loss benefits to Claimant for the period August 12, 2010 through November 12, 2010.

19. However, following the Claimant's release to return to work on November 12, 2010, Employer made no offer of modified-duty work to Claimant, and therefore, Employer has failed to meet one of the critical *Malueg* elements that must be satisfied before Claimant's right to time loss benefits can be curtailed. Accordingly, Claimant is entitled to TTD benefits from November 12, 2010 through February 9, 2011.



**CONCLUSION OF LAW**

Claimant is entitled to total temporary disability (TTD) benefits from November 12, 2010 through February 9, 2011.

**RECOMMENDATION**

Based upon the foregoing Findings of Fact, Conclusion of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this   19<sup>th</sup>   day of January, 2012.

INDUSTRIAL COMMISSION

      /s/        
Michael E. Powers, Referee

**CERTIFICATE OF SERVICE**

I hereby certify that on the   27<sup>th</sup>   day of   January  , 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

RICHARD S OWEN  
PO BOX 278  
NAMPA ID 83653

MAX M SHEILS JR  
PO BOX 388  
BOISE ID 83701-0388

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*Lina Espinoza*

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**IC 2010-005597**

**ORDER**

Filed January 27, 2012

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 conclusion 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 conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant is entitled to total temporary disability (TTD) benefits from November 12, 2010 through February 9, 2011.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 27<sup>th</sup> day of January, 2012.

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   27<sup>th</sup>   day of   January   2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN  
PO BOX 278  
NAMPA ID 83653

MAX M SHEILS JR  
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