

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVE SNOW,

Claimant,

v.

QWEST CORPORATION,

Employer,

and

INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA,

Surety,
Defendants.

IC 2007-009053

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

FILED 09/28/2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls, Idaho on February 17, 2011. Claimant, Steve Snow, was present in person and represented himself pro se. Defendant Employer, Qwest Corporation, and Defendant Surety, Insurance Company of the State of Pennsylvania, were represented by Eric S. Bailey, of Boise, Idaho. The parties presented oral and documentary evidence. Post-hearing briefs were later submitted. The matter came under advisement on July 10, 2012.

ISSUES

The issues to be decided are:

1. Claimant's entitlement to additional medical care;
2. Claimant's entitlement to additional temporary partial and/or temporary total disability benefits;

3. Claimant's entitlement to additional permanent partial impairment;
4. Claimant's entitlement to permanent partial disability benefits; and
5. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant suffered bilateral carpal tunnel syndrome caused by his work for Employer. Defendants acknowledged his condition and have provided Claimant medical treatment, including medications and bilateral carpal tunnel release surgery, and temporary disability benefits. Defendants also paid Claimant permanent partial impairment benefits of 1.67% of the whole person. Claimant now seeks additional medical benefits for ongoing neuropathic arm pain, temporary disability benefits, and permanent partial impairment and disability benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Defendants' Exhibits 1-24, admitted at hearing; and
3. The testimony of Claimant, taken at the February 17, 2011 hearing.

After having considered the above evidence and the arguments 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 born in 1955. He was 55 years old and had resided in Idaho Falls for 37 years at the time of the hearing.
2. While in his teens, Claimant injured his back in an automobile accident. He has taken prescription medication for his ongoing back pain for many years.

3. In 1976, Claimant moved from Utah to Idaho Falls and obtained his GED. In 1979 he began working at the INEL. In 1981, Claimant was a passenger in another automobile accident and sustained multiple rib fractures. In 1990, Claimant injured his right knee while working for Gem State Rentals. He underwent meniscus surgery and was off work for a time. In 1994, Claimant earned his bachelor of arts degree in business administration with emphasis in management, human resources, and accounting. He worked as a warehouse supervisor for Sterns Catalytic at the INEL site.

4. From 1995 until 1997, Claimant worked at Color Tile. In 1997, he worked as a furniture supervisor and receiving supervisor at Office Max. In 1998, he worked as a furniture supervisor at Staples. Claimant next worked at Home Depot in floor and wall furnishing sales. In November 1998, Claimant injured his left knee at Home Depot. He was off work briefly. In approximately 1999, Claimant worked as a circulation manager for the Post Register. Thereafter, Claimant worked as an insurance sales representative for Combined Insurance.

5. In 2000, Claimant commenced working as a sales consultant for Qwest. His duties included handling inbound calls for residential and cell phone service and various aspects of sales and customer service. He worked with multiple computer systems and used a keyboard frequently. He earned more than \$17.00 per hour.

6. In approximately 2004, Claimant injured his neck and noted right arm, but not hand, symptoms. He underwent a C5-6 discectomy and his right arm symptoms resolved. Thereafter, Claimant noted some ongoing neck pain and regularly took prescription pain medication.

7. In March 2007, Claimant noted the onset of numbness and tingling in his hands. He had no prior similar symptoms. Claimant's hand symptoms worsened and he sought medical

treatment from Mark Gehmlich, M.D., who diagnosed bilateral carpal tunnel syndrome. On March 19, 2007, Claimant was taken off of work.

8. Claimant subsequently came under the care of David Simon, M.D., who, after diagnostic testing, confirmed that Claimant had bilateral carpal tunnel syndrome. Dr. Simon concluded that Claimant's work at Qwest caused his carpal tunnel syndrome. Claimant was referred to John Andary, M.D., for surgery.

9. On May 24, 2007, Dr. Andary performed right carpal tunnel release. On June 26, 2007, he performed left carpal tunnel release. Dr. Andary then prescribed physical therapy; however, Claimant ceased physical therapy after three weeks due to increasing arm symptoms. Claimant reported that his hand pain largely resolved, but he noted persistent aching in both arms. Dr. Andary released Claimant back to work part-time and directed him to take periodic breaks. On July 23, 2007, Dr. Andary encouraged Claimant's return to work the next day with a 15-pound lifting restriction and no repetitive grasping. Dr. Andary noted that Claimant should be allowed 15 minutes to rest for every hour of work. On September 19, 2007, Dr. Andary provided Claimant a full return to work. On October 17, 2007, Dr. Andary found Claimant medically stationary, without impairment, and released him to work without restrictions. Defendants paid Claimant temporary disability benefits.

10. Claimant testified that after his bilateral release surgeries, he developed aching in both arms, from his wrists to his shoulders. He affirmed that the release surgeries relieved his hand numbness; however, the aching in his arms never subsided. Dr. Simon resumed Claimant's care. Dr. Simon suspected neuropathic arm pain and prescribed Neurontin and Cymbalta.

11. In December 2007, Dr. Simon performed repeat electrodiagnostic testing which revealed persisting bilateral nerve conduction abnormalities, consistent with carpal tunnel

syndrome, in spite of bilateral carpal tunnel release surgery. Dr. Simon's studies ruled out cervical neuropathy.

12. On February 17, 2008, Qwest terminated Claimant's employment, ostensibly because Claimant did not meet sales goals. Claimant has searched for other employment, but has not worked since that time.

13. On June 4, 2008, Claimant was examined by William Lenzi, M.D., at Defendants' request. Dr. Lenzi concluded Claimant was medically stable, had no impairment, and could return to his regular employment without restrictions.

14. On July 15, 2008, Dr. Simon found Claimant had reached maximum medical improvement and rated his permanent impairment at 5% of the whole person.

15. At hearing, Claimant testified that his arms continue aching and that he drops items like pieces of paper and glasses. Claimant understands that he may need prescription medications, including Neurontin and Cymbalta, for his neuropathic arm pain for the rest of his life.

16. Having observed Claimant at hearing, and compared his testimony with other evidence in the record, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

17. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

18. **Additional medical care.** The first issue is Claimant's entitlement to additional medical care. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1). The employer is only obligated to provide medical treatment necessitated by the industrial accident and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997).

19. In the present case, Claimant asserts his entitlement to ongoing medical benefits for Cymbalta and Neurontin, as prescribed by Dr. Simon for the treatment of his bilateral neuropathic arm pain.

20. After electrodiagnostic testing on December 17, 2007, Dr. Simon concluded that there was objective evidence of residual nerve conductivity abnormalities at Claimant's wrists bilaterally, but no evidence of cervical radiculopathy. In response to Surety's adjustor's letter of February 11, 2008, Dr. Simon opined that Claimant's need for continued medical treatment was due to his carpal tunnel syndrome rather than his prior neck issues. Dr. Simon recommended further medical treatment to include "Continue Neurontin for a while then try to wean him off at some point." Defendants' Exhibit 7, p. 164.

21. On July 15, 2008, Dr. Simon found Claimant medically stable and rated his permanent impairment. Dr. Simon also noted that Claimant was continuing to take Neurontin as prescribed by Dr. Rencher and that Claimant had apparently recently obtained a prescription for

Cymbalta, also from Dr. Rencher. Dr. Simon then provided his final treatment recommendations:

I have no further treatment recommendations for him other than continuing his current medications. Although he has likely reached MMI status, he needs to remain under medical supervision for his prescription medications. Anyone on prescription medications needs to remain under the care of a physician although I do not need to continue to see him if Dr. Rencher is willing to prescribe the Cymbalta.

Defendants' Exhibit 7, p. 170 (emphasis supplied). At the time of the hearing, Dr. Rencher continued to prescribe Neurontin and Cymbalta. There is no other medical evidence that Claimant's need for these medications due to his carpal tunnel condition has ceased.

22. Claimant has proven his entitlement to additional medical benefits including continuing Neurontin and Cymbalta prescriptions and medical supervision of these prescriptions.

23. **Additional temporary disability benefits.** The next issue is Claimant's entitlement to additional temporary partial and/or temporary total disability benefits. Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as 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 for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical 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, 605 P.2d 939 (1980).

24. In the present case, Defendants paid Claimant temporary disability benefits for time loss for his carpal tunnel surgeries. Claimant acknowledged in his discovery responses that he did not claim any additional temporary disability benefits. At hearing, Claimant testified that

he had received total temporary disability benefits for his time lost from work due to his carpal tunnel syndrome.

25. Claimant has not proven his entitlement to any additional temporary disability benefits.

26. **Permanent partial impairment.** The next issue is Claimant's entitlement to additional permanent partial impairment benefits. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized 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).

27. In the present case, on October 17, 2007, Dr. Andary reported that Claimant had reached maximum medical improvement and had no restrictions or impairment. On June 4, 2008, Dr. Lenzi found Claimant was medically stable and had no permanent impairment. Dr. Simon opined that Claimant suffered a 5% permanent impairment of the whole person due to his bilateral carpal tunnel syndrome. Defendants averaged the three ratings and paid Claimant permanent impairment benefits equal to 1.67% of the whole person.

28. Dr. Simon rated Claimant's permanent impairment at 5% of the whole person pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, p. 495, given Claimant's residual electrodiagnostic abnormalities. Significantly, Dr. Simon retested Claimant's nerve conduction velocities at his wrists and found persisting increased latencies even after Claimant's recovery from his bilateral release surgeries. Claimant testified that he now

drops glasses and pieces of paper, has limited stamina for sustained gripping, and loses his grip if he tries to hold things for very long. Dr. Simon's rating takes into consideration Claimant's residual limitations, is supported by the record, and persuasive.

29. Claimant has proven he suffers permanent impairment of 5% of the whole person due to the persisting effects of his bilateral carpal tunnel syndrome. Defendants are entitled to credit for amounts already paid for permanent partial impairment.

30. **Permanent partial disability.** The next issue is Claimant's entitlement to permanent partial disability benefits. "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 permanent impairment and by pertinent nonmedical 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 accident causing the injury, or manifestation of the occupational disease, consideration being 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. 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). The proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

31. In the present case, evaluation of Claimant's permanent disability must consider any permanent physical limitations resulting from his carpal tunnel syndrome. As already noted, Dr. Andary and Dr. Lenzi both found Claimant medically stable and opined he had no physical restrictions. Dr. Simon rated Claimant's permanent impairment at 5% of the whole person due to his bilateral carpal tunnel syndrome but placed no restrictions on Claimant's activities. Claimant believes he has physical limitations due to his bilateral arm neuropathy; however, no physician has so opined.

32. Claimant has not worked since leaving Qwest. He has applied online for various jobs in Boise and Idaho Falls; however, he has not applied for any physically demanding positions. At hearing he estimated that he had submitted 40-50 applications during the prior six months.

33. Claimant noted that many of his prior jobs required lifting, stocking, and various types of hand-intensive physical labor which he testified that he can no longer perform due to his arm aching and loss of stamina in sustained gripping. Claimant therefore asserts that he is not competitive for manual labor positions. However, no physician has restricted Claimant's work activities. Claimant has a college degree and many years of extensive and varied work experience in business administration and management. Furthermore, Claimant readily acknowledged at hearing that he could still perform all of his prior job duties at Qwest, including the computer and telephone answering responsibilities. Claimant earned \$45,000 or more per year over a period of several years at Qwest—more than in any other prior work.

34. Based on Claimant's impairment of 5% of the whole person, complete absence of any medical restrictions, and considering his non-medical factors including his age of 51 at the time of the accident, college education, highly developed computer literacy, extensive business management experience, and ability to return to most of his prior occupations, including his time of injury occupation, the Referee finds that Claimant has not proven he suffers any permanent disability in excess of his 5% permanent impairment.

35. **Idaho Code § 72-406(1) apportionment.** The final issue is whether apportionment is appropriate. Idaho Code § 72-406(1) provides:

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.

36. In the present case, no medical expert has opined that Claimant suffered permanent impairment of his upper extremities prior to his industrial accident. Claimant consistently testified that he had no hand pain or limitations prior to his carpal tunnel condition. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

CONCLUSIONS OF LAW

1. Claimant has proven his entitlement to additional medical benefits including continuing Neurontin and Cymbalta prescriptions and medical supervision of these prescriptions.

2. Claimant has not proven his entitlement to any additional temporary disability benefits.

3. Claimant has proven he is entitled to permanent impairment benefits of 5% of the whole person due to his industrial accident. Defendants are entitled to credit for all amounts previously paid for permanent impairment benefits.

4. Claimant has not proven he suffers any permanent disability in excess of his 5% permanent impairment.

5. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

RECOMMENDATION

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

DATED this 20th day of September, 2012.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2012, 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:

STEVE SNOW
745 HANSEN AVE
IDAHO FALLS ID 83402-2544

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

sb

/s/

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Claimant,

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ORDER

FILED 09/28/2012

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 recommendations 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 proven his entitlement to additional medical benefits including continuing Neurontin and Cymbalta prescriptions and medical supervision of these prescriptions.
2. Claimant has not proven his entitlement to any additional temporary disability benefits.
3. Claimant has proven he is entitled to permanent impairment benefits of 5% of the whole person due to his industrial accident. Defendants are entitled to credit for all amounts previously paid for permanent impairment benefits.

4. Claimant has not proven he suffers any permanent disability in excess of his 5% permanent impairment.

5. No apportionment pursuant to Idaho Code § 72-406 is appropriate.

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

DATED this 28th day of September, 2012.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

Recused
Thomas P. Baskin, Commissioner

/s/
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STEVE SNOW
745 HANSEN AVE
IDAHO FALLS ID 83402-2544

ERIC S BAILEY
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BOISE ID 83701-1007

sb

/s/