

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE KURT HANER,

Claimant,

v.

GLANBIA FOODS, INC.,

Employer,

and

AMERICAN ZURICH INSURANCE CO.,

Surety,

Defendants.

IC 2015-023179

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

Filed 4/22/19

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Twin Falls, Idaho, on October 5, 2018. Brian Tanner and Keith Hutchinson of Twin Falls represented Claimant. David Gardner of Pocatello represented Defendants. The parties produced oral and documentary evidence at the hearing, took post-hearing depositions, and submitted briefs. The matter came under advisement on March 5, 2019.

ISSUE

The issues stated in the Notice of Hearing were distilled down at the hearing and in briefing to the sole issue of determining the extent of Claimant's permanent partial

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 1

disability in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered a devastating, life changing injury to his dominant right hand (with additional permanent damage to his left hand) when his hand was caught in a machine at work. The result was traumatic amputation of his right fingers and severed tendons in his left hand. These injuries left Claimant with a permanent disability in the range of 87% to 94%.

Defendants acknowledge Claimant suffered permanent disability beyond his impairment rating as the result of a compensable accident. Claimant's permanent disability is in the range of 40% to 56%.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and witness Chris Schoolcraft, taken at hearing;
2. Joint exhibits (JE) 1 through 14 admitted at hearing; and
3. The post-hearing deposition transcripts of William Jordan and Nancy Collins, PhD, both taken on October 18, 2018.

Objections and Defendants' Motion to Strike portions of Dr. Collins' deposition are overruled and denied.

FINDINGS OF FACT

1. Claimant was a married man age fifty living in Gooding, Idaho at the time of hearing. He attended Filer High School until 11th grade, and obtained a GED thereafter. After high school, Claimant obtained additional training in welding and general

automotive repair. Claimant receives on-the-job maintenance, use, and repair training on an ongoing basis through Employer for equipment used in Employer's facility.

2. Claimant began working for Employer in February 2008. At the time of his accident in question, Claimant was a maintenance technician, repairing and servicing all the plant equipment. Prior to working for Employer, Claimant's employment history included dairy worker, agricultural field worker and mechanic, automobile technician and shop supervisor for two local tire stores, as well as volunteer first responder with Wendell Fire.

3. On August 24, 2015, Claimant was performing preventative maintenance on a piece of equipment as part of his normal work duties with Employer. As he was working on a fan pulley, the machine unexpectedly began running, pulling Claimant's right hand into the space between the pulley wheel and the belt. Due to the equipment's configuration, Claimant's right hand stuck in this space as the wheel and pulley belt continued to turn, abrading his fingers to the point of traumatic amputation.¹ In the process of freeing himself, Claimant also injured his left, non-dominant hand, albeit it to a lesser degree. Left hand injuries included bone fractures and lacerations, and long-term ligament injuries of his middle and ring fingers.

4. Claimant's post-accident medical care included seven surgeries, physical therapy, occupational therapy and related treatments. The parties agree Claimant suffered permanent disability over his 33% WP permanent impairment.² They also agree Claimant cannot return to his exact time-of-injury occupation, but acknowledge Claimant continues to work for Employer with no reduction in pay, and in fact pay increases at intervals,

¹ Claimant described it as "pulling and grinding and melting my hand." Photographs depict mangled finger stubs with bone protruding from at least one digit. Claimant's little finger was the least damaged of his four fingers; his thumb was intact after the accident.

² Claimant received a 26% WP impairment rating for his right hand and a 10% WP impairment for his left hand, for a combined whole person impairment rating of 33% for injuries sustained in the accident at issue.

with the same title of maintenance mechanic, although with somewhat modified duties, as discussed further below.

DISCUSSION AND FURTHER FINDINGS

5. Idaho Code § 72-422 defines permanent disability as “any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation.” One is under a 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 be reasonably expected.” I.C. § 72-423. As defined in I.C. § 72-425, “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....” Those “pertinent nonmedical factors” include that nature of the physical disablement, the disfigurement and its effect on procuring or holding employment, the cumulative effect of multiple injuries, the employee’s occupation and age at the time of the accident, the employee’s diminished ability to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, in addition to other factors the Commission may deem relevant. I.C. § 72-430.

6. The test for determining if a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Co.*, 115 Idaho 293, 294, 66 P.2d 763, 766 (1988).

The burden of establishing permanent disability is upon a claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

7. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The Idaho Supreme Court in *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012) iterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing.

8. Both parties hired vocational experts who rendered opinions regarding Claimant's permanent disability. Claimant utilized Nancy Collins, Ph.D, while Defendants hired William Jordan. Each expert prepared a written report and each was deposed. The methodology utilized by the two experts was not that different. Both heard from Claimant, reviewed records, considered Claimant's background and history, and utilized occupational data in a fashion appropriate to their profession. Each was deposed post hearing. Their reports and depositions each contain valid and useful information which will assist the fact finder in making a determination of Claimant's permanent disability.

Dr. Collins

9. Dr. Collins focused on the results of a functional capacity evaluation which found Claimant had difficulty lifting from waist to head height due to the angle of grasp and the fact he had only two digits on his dominant right hand (thumb and most of his little finger), and strength difficulties with his left hand. She noted Claimant also had a "20 pound occasionally" lifting restriction. Claimant had difficulty grasping, significantly-impaired fine motor skills with his right hand, and impaired manipulation of small objects.

10. Claimant's past employment had always been in physical, hands-on, mechanical fields, with fairly heavy work requirements. Those types of jobs were no longer feasible. Dr. Collins noted Dr. Wayment, who had treated Claimant's hand conditions, specifically precluded Claimant from using hand tools with his right hand.

11. Ninety-nine percent of all jobs in the Dictionary of Occupational Titles (DOT) require frequent to constant use of both hands and finger dexterity, according to Dr. Collins. Claimant tested in the first to second percentile in right hand finger dexterity. In fact, Dr. Collins noted Claimant had to have all the doorknobs in his house replaced with lever-type fixtures due to his lack of ability to turn a knob.

12. Given Claimant's educational background, prior work experience, age, and transferable skills, Dr. Collins opined Claimant had lost access to 94% of the available jobs for which he was otherwise qualified from his work-related injuries. This opinion assumed Claimant could perform limited truck driving and farm equipment operation.

13. While Claimant was earning \$27.85 an hour plus benefits worth roughly 30% of his wages at the time Dr. Collins wrote her report, (and \$25.75 at the time of his accident), if Claimant had to enter the labor market at a job other than with Employer, she felt Claimant could expect to make between \$12.00 and \$13.00 per hour, without benefits. Dr. Collins opined Claimant suffered a loss of earning capacity of at least 66% from his work accident.

14. Dr. Collins thought an argument for odd lot worker could be made, but in any event, Claimant's permanent disability from the industrial accident was at least 80%, and more realistically 85% when weighting loss of job market access at a 2:1 ratio with wage loss.

Mr. Jordan

15. Mr. Jordan felt Claimant had suffered a loss of job market access of about 80% due to his post-accident limitations with his right hand. He listed a number of jobs he felt were still available to Claimant, some with additional training, such as a Transystems truck driver (a large local trucking employer in the Magic Valley, known for harvest-time produce hauling, often sugar beets and other farm commodities), which pays from \$16.75 to \$29.49 per hour. He also provided various other potential jobs with actual openings at the time of his report, including maintenance supervisor or director, warehouse or production operator, security officer, limo driver, sales rep in different industries, quality tech, and parts counter person.

16. In Mr. Jordan's opinion, Claimant's wage loss could be anywhere between none (if he remains employed with Employer) and up to 35% compared to his time-of-injury wage. He felt Claimant's "average" hourly wage if he were to re-enter the market place was around \$16.77. Mr. Jordan calculated that wage by reviewing the available jobs and taking an average of the jobs' mid range wages. Mr. Jordan felt Claimant would not have to start "at the bottom" due to his skills and experience.

17. By averaging Claimant's loss of access and wages, Mr. Jordan calculated Claimant's permanent partial disability from 40% to 56%, inclusive of PPI.

Permanent Disability Rating and Conclusion

18. When reviewing the record as a whole, it appears there are two main discrepancies between the experts when calculating Claimant's permanent disability rating. The first is the import of Claimant's continuing employment with Employer at a modified time-of-injury job, and the second is Claimant's employment prospects, including anticipated wages, if Claimant entered the market place looking for employment.

Loss of Access

19. Nothing in the record suggests Claimant was in danger of losing his position with Employer at the time of hearing. Witness James Schoolcraft, a maintenance manager and mechanic supervisor for Employer, testified Claimant can do the majority of his pre-accident functions. Mr. Schoolcraft categorized it at “90%” but acknowledged he had only “very minimally” observed Claimant doing his maintenance mechanic duties. *See*, HT pp. 19 – 24. Claimant is a valued worker with Employer, with good communication and teaching skills. Since the accident, Claimant has assumed more of a supervisory role, teaching and explaining to less experienced mechanics how to do various job functions. Claimant has had perfect attendance since returning to work, which also happened ahead of schedule. Mr. Schoolcraft testified that Claimant’s job is secure as long as “his performance maintains at an acceptable level.” HT p. 26.

20. While acknowledging the fact that Claimant is a valuable employee to Employer, Mr. Schoolcraft expressed concern that if Claimant had to find work elsewhere, it might be difficult for him to do so. He is not sure he would hire someone in Claimant’s condition if that person came looking for work.

21. Claimant testified he has trouble holding small tools such as wrenches, screwdrivers, and the like. He struggles to stay within his restrictions. Claimant does not feel he is able to do 90% of his former job himself; instead he believes he does 90% while “using somebody else’s hands.” HT pp. 61, 62. He is accompanied by one or two fellow workers most of the time he is at work, and Claimant assists or “coaches” them as to how to perform the maintenance tasks. In any event, Claimant is paid on the same schedule as before the accident, and by the time of hearing had received regular raises since the time of his accident.

22. Claimant presents as a hard working, industrious individual who looks for ways to succeed. He fashioned finger tip apparatuses in various configurations to put on his finger stubs to make certain fine tasks more manageable. He is not defined by his injuries, but strives to live his life in spite of them. As Mr. Jordan noted, Claimant is the type of person who will always strive to find work, even with his limitations, because that is who he is.

23. The parties appear to acknowledge the fact that it is important to take into account the possibility that Claimant may lose his job in the future, and thus has incurred disability over his impairment rating. It is also important to look at the fact that Claimant is currently employed with an employer who feels Claimant is a skilled worker and valuable asset, and has shown no inclination to let him go as long as Claimant remains productive.

24. When these factors are considered, together with the record as a whole, the weight of the evidence supports Mr. Jordan's calculation on loss of job market access at 80%. This figure takes into account the fact that Claimant currently is employed, but may have difficulty finding employment should he lose his current position. His search will be made even more difficult by his disfigurement, as discussed below.

Wage Loss

25. Dr. Collins questions Mr. Jordan's methodology in determining Claimant's wage loss. Mr. Jordan averaged the median wages for all job categories for which he felt Claimant had transferable skills, and arrived at a composite wage of \$16.77 per hour if Claimant sought employment in the open market. Furthermore, many of the jobs listed by Mr. Jordan were disputed by Dr. Collins as not being suitable for Claimant.

26. While both parties agree some light duty driving positions could be a possibility (if Claimant received training to obtain a CDL), many other jobs were contested. Mr. Jordan's

list was a bit optimistic, especially in the upper-end supervisory positions, but as noted previously, it is likely Claimant would find *some* employment if he left Employer. It is likely Claimant would experience greater than a 35% wage loss when looking for other work.

27. On the other hand, Dr. Collins's 66% wage loss, putting Claimant in the \$11.00 to \$13.00 an hour range appears to ignore the fact that currently Claimant is making more than he was at the time of his injury, and nothing in the evidence suggests these wages will not continue. After all, so long as Claimant continues to work for Employer, he will have *no* wage loss. There is a very real chance Claimant will experience no wage loss between the time of his accident and his retirement.

28. Claimant's wage loss lies between Mr. Jordan's 35% and Dr. Collins's 66%.

PPD Finding

29. Claimant argues his disability calculation should equal his loss of market access. His argument misinterprets Idaho law. Idaho Code § 72-102(11) defines "disability" 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 defined in § 72-430, Idaho Code." (Emphasis supplied.) Claimant cites *McCabe v. Jo-Ann Stores, Inc.*, 145 Idaho 91, 175 P.3d 780 (2007) for the proposition that loss of labor market is *the* factor to consider when determining permanent disability. However, nowhere is that proposition cited in *McCabe*, and a careful reading of that decision makes it clear the Supreme Court found no fault in the Commission considering both the claimant's potential labor market, and her loss of income. As noted therein, "[a] worker is considered disabled only if their injury has caused them to suffer a decrease in "wage-earning capacity" as that capacity is affected by the pertinent medical and nonmedical factors. (Citation omitted.)

Although it is not in and of itself conclusive, a mathematical comparison of pre and post-injury wages is evidence of an injured worker's ability to engage in gainful activity.” 145 Idaho at 97.

30. The Commission routinely considers both the wage loss and the job market access when determining permanent disability. While a straight averaging has not always been applied by the Commission, it is common to consider both elements of work (access and wages) when determining disability. *See, e.g., Deon v. H&J, Inc.*, IIC 2007-005950 (May 3, 2013) (Discussion of wages and loss of access when determining permanent disability.)

31. In the present case, Claimant has proven a 70% permanent partial disability rating. This figure is supported by the weight of the evidence as a whole, and takes into account all factors affecting Claimant’s ability to find or maintain employment, including his physical disablement, his disfigurement and its effect on procuring or holding employment, Claimant’s occupation and age at the time of the accident, and his diminished ability to compete in an open labor market within the Magic Valley labor market, considering all the personal and economic circumstances of the Claimant as evidenced by the totality of the record herein.

32. Claimant is entitled to permanent partial disability benefits in the amount of 70%, inclusive of his PPI of 33%.

CONCLUSION OF LAW

Claimant is entitled to permanent partial disability (PPD) of 70%, inclusive of his 33% PPI.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and

issue an appropriate final order.

DATED this 12th day of March, 2019.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2019, 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:

BRIAN TANNER
KEITH HUTCHINSON
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DAVID GARDNER
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POCATELLO ID 83204

jsk

/s/

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Claimant,

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Surety,

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IC 2015-023179

ORDER

Filed 4/22/19

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 this recommendation.

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 permanent partial disability (PPD) of 70%, inclusive of his 33% PPI.

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

DATED this 22nd day of April, 2019.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Chairman

/s/
Aaron White, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

BRIAN TANNER
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/s/