Workers' Compensation Decision Summaries

Cook v. Bonner Foods, Inc.

I.C. No: 2009-019578 (and 2013-008560, *Cook v. Dockside Restaurant)*
Decision Filed: 10/16/2017

Facts:

Claimant had a 2009 injury with Bonner Foods resulting in cervical and right upper extremity injuries. Claimant also had a 2013 accident while working for Dockside Restaurant resulting in cervical injuries, right arm, and right shoulder injuries. The cases got consolidated, and the matter had gone to hearing to determine who amongst the two employers and sureties was responsible for temporary disability benefits. The Industrial Commission had issued an opinion advising that the first employer for the first injury, Bonner Foods, and its surety, were responsible for total temporary disability benefits from July 20, 2009 through March 24, 2013 and that Dockside Restaurant, the employer for the second accident, and its surety, were responsible for total temporary disability benefits from August 14, 2015 through June 10, 2015 and continuing until Claimant reached medical stability. The issue went to hearing again in 2017 over the question as to who, if anyone, should pay temporary disability benefits beyond the date specified in the prior decision.

On December 14, 2016, Dr. Dunteman, Claimant's treating surgeon, indicated that Claimant was fixed, stable, and could return to work with permanent restrictions. He rated her right upper extremity impairment at 8% of the upper extremity and restricted her lifting to no more than 5 lbs. with her right upper extremity and no repetitive work at or above shoulder level with the right arm. He also referred Claimant for pain management, although that did not come out in the December 14, 2016 chart note, but, rather, a bit later.

Claimant finally got together with a pain management physician in early April of 2017, who felt Claimant had significant regional myofascial pain syndrome that overwhelmed her.

Issue:

1. Claimant took the position that she was entitled to TTDs while she was receiving pain management treatment. The surety for the second accident, who was in all likelihood responsible for her condition and who had authorized the pain management care, contended that the pain management care was palliative and that Claimant had otherwise reached maximum medical improvement and was, thus, no longer in a period of disability that would justify additional temporary disability benefits.

Holding:

The Industrial Commission reviewed numerous reports by Dr. Dunteman and his deposition testimony. Dr. Dunteman apparently believed that surgery was an option to treat Claimant, but apparently did not think she was a good surgical candidate, and hence made the referral for pain management. He said at one time that he hoped the pain management might help her function better, but whether it would actually result in a change in the permanent restrictions he recommended for a return to work, he did not know. He also advised that if pain management did not give her the requisite pain relief that she felt she needed, then he would think surgery still remained a valid option. However, he continued to maintain throughout his letters and his deposition testimony that Claimant was otherwise stable. Apparently Clamant did not want the surgery.

The Industrial Commission viewed this as a question as to what maximum medical improvement really means. The Industrial Commission felt that maximum medical improvement was basically the same thing as medical stability. The Commission noted that case law established that maximum medical improvement refers to, "The date after which further recovery from, or lasting improvement to, an injury can no longer reasonably be anticipated, based upon reasonable medical probability." The Industrial Commission conversely noted that if continuing medical care is associated with a reasonable expectation that it will bring about some degree of recovery, then a person is not at maximum medical improvement. In coming to a determination as to whether one has reached MMI, the Commission said they could consider such factors as a return to work, extent of injury, and medical evidence regarding whether the injury has stabilized.

The Commission went on to note that Dr. Dunteman had held to the opinion he expressed in mid-December 2016 that Claimant was medically stable. The Industrial Commission held that she was not entitled to temporary disability benefits absent some testimony from a medical provider that would clearly establish that the pain management was part of some medical regimen designed to improve Claimant's condition or prepare her for surgery – i.e. that she was in a period of recovery. That was not the case.

Significance of Decision:

The case is somewhat instructive for two different reasons. First, it illustrates an example where a claimant can be at maximum medical improvement but still require medical care such that the surety is still responsible for the same. Second, it establishes that the mere fact that someone is getting medical, even in the form of chronic pain management in a palliative setting, does not mean they are in a period of disability extending TTDs.

Talbot v. Summit Wall Systems

I.C. No: 2012-004039
Decision Filed: 11/14/2017

Facts:

Claimant was 58 years of age at the time hearing. He had worked almost exclusively in the construction trades throughout his life. He had a 2009 accident and injury with a MRSA infection to his left hand that left him with 18% whole man impairment. He then suffered a 2012 injury to the right hand resulting in surgery and 6% whole man impairment. Over the course of his life, Claimant had suffered numerous accidents and injuries, but had incurred precious little medical. Claimant had suffered some type of low back injury in the remote past, which had caused him to give up the plumbing profession. The condition had progressed to the point that by 2004 he contacted the Idaho Division of Vocational Rehabilitation in an attempt to obtain work that was less demanding on his back. In 2013, as part of a Social Security Disability evaluation, Dr. Sant had diagnosed psoriatic arthritis in Claimant's low back. By 2010 Claimant was having some problems with his breathing that manifested with chronic frequent coughing and shortness of breath, and this was documented in the medical, although no formal diagnosis was made. It was clear that what was chronic obstructive pulmonary disease (COPD) had increased substantially over the intervening years and continued to progressively increase, as did Claimant's back problems even subsequent to the last accident and injury. Claimant had other issues with shoulders and knees over the years. All parties conceded that Claimant was totally and permanently disabled by the time of hearing, and the question became what all could be included in the analysis to determine the respective responsibilities of the surety and ISIF under the *Carey* formula.

Issue:

1. Whether the conditions that Claimant had preexisting the last accident, including back problems, COPD, and left wrist problems arose to the level that ISIF exposure and contribution was mandated by Idaho Code §72-332.

Holding:

The employer hired Dr. Friedman to review and assess as best he could Claimant's various medical conditions. Dr. Friedman was asked to comment on them as to the extent to which they constituted an impairment and a hindrance prior to the last accident date, and he was asked to comment on their status as of the date of his deposition. As to the prior left hand/wrist, Dr. Friedman agreed with the previously assessed 18% whole man rating. He felt that the left hand was extremely limited by virtue of the prior injury and noted that Claimant had done fairly well functionally while his right hand remained unimpaired. Dr. Friedman felt that Claimant's COPD as of 2010 when it appeared in the medical records would have constituted impairment of 6% of the whole man, and that by the time Claimant was seen by a pulmonologist and a formal diagnosis was made in 2014, his COPD had progressed to the point he had a 17% whole man

rating. Dr. Friedman examined the right wrist, which was the body part affected by the last accident, and made note of the fact that Claimant had a 6% whole man impairment rating. Dr. Friedman noted that Claimant had psoriatic arthritis and that due to this condition he would continue to lose function of the right wrist. By 2016, the date of his exam, Dr. Friedman felt the impairment in Claimant's right wrist was up to 10% of the whole man. Dr. Friedman noted that Claimant had bilateral shoulder joint difficulties rated at 2% of the whole man for each shoulder. Dr. Friedman noted that Claimant had a 9% whole man rating appropriate for his lumbar spine prior to the last accident and injury due to his psoriatic arthritis. He noted that Claimant had an additional 12% whole man impairment rating as a result of a lumbar spine fracture Claimant sustained after the 2012 accident. Dr. Friedman opined that Claimant was capable of less than sedentary work – he was not able to lift or carry, and he could not walk more than 50 feet.

Due to the lack of medical documenting the progression of the arthritic condition over the years, Dr. Friedman was unable to determine when the disease first began to manifest and, thus, was unable to opine as to whether it was a preexisting condition present in 2012, prior to the accident. He felt that Claimant had a breathing problem due to both his psoriatic arthritis and the COPD. He was able to segregate out the effects of the COPD and determine that it was a preexisting condition that warranted a 6% whole man impairment rating based primarily on Claimant's history of being unable to climb more than one flight of stairs without stopping to catch his breath prior to the accident. No definitive examination of Claimant's back occurred until November of 2013, when Dr. Sant performed an examination in the context of Claimant's Social Security Disability claim.

Claimant hired a vocational expert, who prepared a report on November 6, 2016. The thrust of her report was that given Claimant's non-medical factors and due to a combination of Claimant's preexisting conditions and his right hand injury, he was totally and permanently disabled. However, this expert did not discuss Claimant's limitations as they existed on January 30, 2013, the date at which he achieved maximum medical improvement from the 2012 accident and injury. As such, the Industrial Commission gave her report little weight. She, however, did testify by deposition, and at her deposition testified that Claimant's left hand injury, coupled with Claimant's right hand injury, effectively made him totally and permanently disabled. In her deposition she testified that as soon as Claimant was MMI from the right hand injury and restricted to only occasional use of the right hand, he really had no access to work. She noted that other conditions, including Claimant's low back condition, played a role in her opinion regarding his total disability, as did his COPD. She was aware that no physician had provided restrictions for the preexisting conditions prior to the last accident. There had been some discussion of Claimant being retrained to drive truck, and she did not think that was appropriate by virtue of the low back condition and the condition of Claimant's hands.

ISIF hired a vocational expert, and he looked at Claimant's various physical problems as they existed prior to the last accident and after. While ISIF's vocational expert felt that Claimant was totally and permanently disabled as of when he issued his report in November of 2016, he did not feel that the preexisting conditions played a role in bringing about Claimant's total permanent disability. He made note of the fact that the treating surgeon for the preexisting left hand injury had not restricted Claimant as such. He essentially discounted other testimony that had come into the record to the effect that Claimant lost jobs following his recovery from the left

hand injury and that he had difficulty finding employment because of it. ISIF's vocational expert was not impressed with the COPD and the back injury as qualifying preexisting conditions because of the scarcity of medical documenting those complaints and the lack of any workup or diagnosis of those conditions prior to the last accident.

The Industrial Commission reviewed the matter in its entirety and came to the following conclusions:

To trigger ISIF responsibility, it has to be shown that those preexisting conditions constitute preexisting physical impairments which were manifest, which constituted a subjective hindrance to Claimant's employment, and, finally, which combine with the compensable industrial accident to render Claimant totally and permanently disabled. The Commission noted that Dr. Friedman was the only physician who attempted to put Claimant's various physical conditions in context by discussing them as to whether they preexisted the February 7, 2012 industrial accident. They found his testimony credible. Specifically, they found that Claimant had 6% preexisting impairment due to the COPD, 18% due to the left hand, 2% due to the right shoulder, 2% due to the left shoulder, and 2% due to a prior torn ACL. The Industrial Commission determined that all of these conditions were manifest to the extent that they were known to Claimant prior to the subject accident. As to the low back, the Commission rejected inclusion of the 9% rating Dr. Friedman gave, because he was unable to say that it preexisted the 2012 accident and injury. As to subjective hindrance, the Commission determined that Claimant's left hand injury was clearly a hindrance to his employment as per his testimony, that Claimant's COPD was a hindrance to his employment given his testimony of trouble climbing stairs, and that Claimant's low back issues were a hindrance to employment. They did not believe Claimant's shoulder and knee issues were a hindrance.

The analysis became more difficult when the Industrial Commission attempted to apply the "combined with" requirement. The Industrial Commission entertained the idea that Claimant perhaps was totally disabled prior to the right hand injury. They made note of the fact that while he did not work that much prior to the right hand injury, he did continue to do jobs and found jobs that lasted from one day to one month duration between 2009 and 2012 such that he was not totally disabled. They made note of the fact that as to the left hand, he was basically unable to use a hammer in the left hand prior to the last accident. He was limited in his ability to lift with the left hand. As to the low back, per Dr. Friedman Claimant was probably limited to lifting no more than 50 lbs. occasionally. His days of working with prolonged low frequency vibrations were also over by the time of Dr. Friedman's analysis. Dr. Friedman felt that Claimant's COPD prior to the last accident would have prevented him from any work that required walking for long distances or climbing more than a flight of stairs at a time. He felt that the right hand injury limited Claimant to lifting 20 lbs. occasionally and 10 lbs. repetitively with no repetitive gripping.

The Commission concluded that it was somewhat intuitive that the left hand and right hand injuries combined in a fashion to increase Claimant's disability. They concluded that Claimant's COPD as it existed the day before the last injury also combined with the results of the right and the left wrist to increase the disability insofar as but for the COPD he could consider employments that required walking for long periods of time with little use of his hands.

However, as regards the low back condition, the Commission was not convinced that it combined with the other injuries Claimant had to produce total permanent disability. They noted that the lifting restrictions and such were basically subsumed in the lifting restrictions imposed by the hands. The Commission concluded that Claimant had preexisting impairments of 18% for the left hand, 6% for the COPD, and 6% for the right hand, totaling 30%. They concluded that the remaining 70% disability should be apportioned between ISIF and the employer. That left the employer responsible for 20% less the 6% previously paid, or 14% PPD. ISIF was responsible for the difference between weekly benefits payable by the employer and for total permanent disability benefits for the remainder of Claimant's life after the PPD had been paid out per the *Carey* formula.

Miller-O'brien v. Cygnus, Inc.

I.C. No: 2012-005159; 2012-013226
Decision Filed: 12/20/2017

Facts:

Claimant worked at a business using vibratory equipment repetitively over a three year period. She was 60 years of age and ran a deburring machine. One claim apparently involved an occupational disease claim for both shoulders, which was accepted. The second claim involved an occupational disease claim Claimant made alleging that cervical radiculopathy she had was due to a compensable occupational disease. This was the focus of the litigation.

Issue:

1. Whether or not Claimant's cervical radiculopathy and need for medical treatment, including a surgery, resulted from a compensable occupational disease involving her cervical spine.

Holding:

The thrust of the Commission's analysis focused on various studies done of Claimant's cervical spine. Cervical x-rays undertaken on March 1, 2012, did not reveal any acute failure or subluxation. There was disc space narrowing at C5-6 and C6-7 with endplate osteosclerosis and moderate anterior vertebral body osteophytes. There was some mild uncovertebral facet joint spurs narrowing the neural foramen at C5-6 and C6-7. There was moderate cervical spondylosis of C5-6 and C6-7. An MRI undertaken on April 30, 2013, revealed severe bilateral neural foramen stenosis at C5-6 and C6-7 due to a combination of annular bulging, uncovertebral and facet joint hypertrophy/spurs. Claimant was sent for a surgical consult, and Dr. Larsen concluded that Claimant had problems with both her neck and her shoulders, and had her shoulders worked up first. An orthopedic surgeon, Dr. Karsten, performed bilateral shoulder surgeries and deemed Claimant MMI as of October 21, 2015. While Claimant was being worked up for her shoulder problems, she received treatment from a Dr. Rempel, who diagnosed cervical multilevel

degenerative changes prominent at C5-6-7, and bilateral C7 radiculitis symptoms. He also felt that Claimant's shoulders needed definitive treatment before the cervical issues were addressed.

After being deemed MMI from the perspective of her shoulder, Claimant was seen by Dr. Ludwig for consideration of additional treatment. Dr. Ludwig concluded Claimant had cervical degenerative disc disease at C5-6 and C6-7 and moderate bilateral stenosis. He concluded that this was not industrial. Dr. Ludwig's belief that Claimant's cervical condition was nonindustrial was based upon the notion that imaging showed degenerative changes of a longstanding nature at C5-6 and C6-7 which predated Claimant's employment. He noted that there was slight worsening of her condition in the interval from April 30, 2013, through February 5, 2016, but that this could be attributed to progression of her underlying degenerative condition, and not necessarily the demands of her employment.

Claimant had in the meantime seen Dr. Dirks, a neurosurgeon, who recommended a surgery at C5-6 and C6-7 in the form of a fusion. Dr. Dirks resisted the invitation to consider Claimant's problems an aggravation of a preexisting condition. He noted that they had no x-rays or MRIs prior to her starting employment. He felt the work contributed to Claimant's problems. He did not doubt that she had some preexisting degenerative disease, but he felt that her symptomatology and her problems were due to her employment.

The case came down to the question of whether to go with Dr. Dirks or with Dr. Ludwig in the context of an occupational disease claim. Dr. Dirks was bothered by the lack of studies documenting degenerative disease in the cervical spine prior to Claimant's employment and the association of her symptomatology with that employment. Dr. Ludwig felt that the imaging done on Claimant was such that it was entirely possible to establish that Claimant's cervical spine conditions predated her employment. He characterized Claimant's findings on studies as chronic such that they had been there prior to her employment. Ultimately, the Industrial Commission concluded that Claimant bore the burden of proving an occupational disease caused by the hazards of her employment under the *Sunquist v. Precision Steel & Gypsum, Inc.* case. The Commission held that in the setting of an occupational disease, an aggravation of a preexisting condition was not compensable as such. Here, the cervical problem preexisted and at best was aggravated by work. Thus, the *Nelson v. Ponsness-Warren* rule survives.

Bennett v. Quality Concrete

I.C. No: 2011-019216; 2012-014384
Decision Filed: 01/29/2018

Facts:

Claimant was 44 years of age and resided in the Treasure Valley at the time of hearing. He obtained a GED after the accident. In his youth he had worked as a dishwasher. He worked as a laborer installing prefab insulated panels. Given time he became the shop foreman for the insulation panel business. He suffered a low back injury in 2009 resulting in a 2010 back surgery, enjoyed a good recovery, and returned to his heavy labor time-of-injury position without restriction or impairment. He suffered another back injury on August 10, 2011, from which he

recovered with no restrictions or impairment. Again, he returned to his time-of-injury job with the employer.

Claimant sustained yet another industrial accident on June 5, 2012. He was treated by Dr. Manos in the form of a microdiscectomy at L4-5 on September 12, 2012. He had a setback during physical therapy, and Dr. Manos recommended a fusion. The fusion was done in August 2013. After surgery Claimant still had pain in his legs and weakness. He completed a work hardening program, and Dr. Krafft felt Claimant could lift 75 lbs. and push 200 lbs. Claimant continued to complain of pain and disagreed with Dr. Krafft's conclusions.

Claimant underwent a spinal cord implant stimulator, which in spite of revisions and replacement, did not really ever provide significant relief. Claimant underwent an FCE, and Dr. Manos used the FCE to make recommendations regarding restrictions, which were very limited. Dr. Gussner, who had seen Claimant both as an IME physician and a treater over the years, saw Claimant yet again for an IME in October of 2015, at which time Claimant was post-fusion and post-implant. He felt Claimant needed yet another revision of the stimulator and saw him again in March of 2016, post-revision, at which time he rated Claimant at 15% of the whole man with 10% apportioned to preexisting conditions and 5% due to the June 5, 2012 accident. He recommended that Claimant return to work observing restrictions of occasional lifting of up to 20 lbs. and lifting of up to 10 lbs. on a repetitive basis. He recommended that Claimant avoid repetitive bending, twisting, and torqueing. He rejected the FCE as an appropriate method of determining restrictions and noted that he issued restrictions based primarily upon a patient's diagnosis. Peggy Wilson, who conducted the FCE, opined that Claimant could work a 4-5 hour workday with frequent positional changes, could sit between 3-4 hours a day for up to 20 minutes at a time, and could stand for 4 hours a day for 20 minute at a time.

Claimant hired a vocational expert. In his report, he noted that Claimant worked in the construction industry at semi-skilled jobs. He primarily used Dr. Gussner's restrictions in his assessment, but he also was aware of and considered Dr. Manos' restrictions issued in January of 2017, which were even more restrictive. He felt that Claimant was totally and permanently disabled.

The defendants' vocational expert did a report in 2014 and again in 2017. In 2014 he opined that Claimant had disability of 19% inclusive of impairment, and in 2017 he concluded that Claimant had 81% disability inclusive of impairment.

Issue:

1. The extent of Claimant's permanent disability, including total permanent disability.

Holding:

The referee weighed all the various medical and vocational opinions that had been generated. He ultimately found Claimant totally and permanently disabled. However, along the way, Claimant and Claimant's counsel wanted attorney's fees based upon the employer's failure

to pay the 19% PPD from the first opinion of their vocational expert. Defendants had paid the impairment, but had refused to pay any additional disability pending the ultimate conclusion of the case. Claimant says they should have, because they had no defense to disability, at least in that amount. Defendants, citing to the case of *Corgatelli v. Steel West, Inc.*, made note of the fact that where there is an allegation of total permanent disability, payment of permanent partial disability over and above impairment would not entitle Defendant to a credit in the event of a finding of total permanent disability and would simply get lost in the shuffle. The referee agreed with the defendants' position and characterized their refusal to pay as a justifiable concern and would do nothing to help retire an obligation to pay total permanent disability benefits. With such an allegation hanging over their heads, an allegation which turned out to be correct, their refusal to pay any additional disability was justified. The significance would be, don't expect PPD payments over and above PPI when you allege a total-perm.

Atkinson v. 2M Company

I.C. No: 2017-008627
Decision Filed: 03/06/2018

Facts:

Claimant was employed by the defendant employer as a territorial sales person at the time of the accident. As part of his job, he responded to calls from customers requesting drilling and irrigating supplies and provided help installing parts. He was on call 24/7. He would typically go to work Monday morning in the Meridian office completing reports and scheduling appointments with customers. The rest of the week he traveled his sales territory calling upon potential customers. He typically would spend one to two nights out of town. As part of his job, he was provided a company pickup and a credit card to pay for fuel and maintenance. He always took the company truck to work on sales and emergency calls. He was allowed to use the company pickup when he needed to run around on personal errands. On a rotating basis Claimant had to work 8:00 a.m. until 12:00 p.m. every fifth Saturday. On a Saturday morning, Claimant had agreed to cover the office. Along with his wife, Claimant left for work before 8:00 a.m. He was going to drop his wife off to pick up another one of their vehicles. Their personal car was located along his usual route of travel to the 2M office. He pulled aside to scrape the windshield more completely, and while scraping the windshield the automobile was struck from behind by a passing vehicle, throwing Claimant approximately 25 feet, dislocating his shoulder, and mangling his right leg. Claimant recovered enough to return to work as an inside salesman, but he continued to have significant issues with his leg that limited him.

Issue:

1. Whether Claimant suffered an injury arising out of and in the course of his employment.

Holding:

The Industrial Commission identified the issue as one that needed to be analyzed under the going and coming rule. The Industrial Commission noted that where Claimant was paid an identifiable amount of money for traveling, he is covered going or coming on such trips he is paid for. They noted, however, that where the expenses of travel were paid, as opposed to payment for travel time, Idaho is amongst a minority of jurisdictions that do not follow the general rule that the matter is compensable and, indeed, deems such a matter to not be compensable.

Claimant cited the case of *Hansen v. Estate of Harvey*, 119 Idaho 357 (Ct. App. 1990), in support of their position that the accident was compensable. In that case, the claimant was a passenger in the company truck driven by the owner's son on the way to a job site in Washington. In Washington the truck went off the road, causing injury to Hansen. He received Washington worker's compensation benefits. He then sued his employer in Idaho district court, alleging that the driver's negligence should be imputed to the employer. The negligence case got dismissed at the district court level. The Court of Appeals reviewed the matter and felt that because the transportation was being provided by the employer, and that put the employer in control of the risks incurred, the accident was considered to arise out of the course of employment. The court then affirmed the dismissal below.

However, the Industrial Commission considered the facts of the case at hand to differ from those of the *Hansen* case. The Commission noted that in *Hansen*, the employer provided not only the vehicle, but the driver of the vehicle. In the current case, only the vehicle was provided. They went back to their former analysis to the effect that paying expenses alone and providing the vehicle does not justify expansion of the course of employment concept to include going and coming.

The Commission considered a second theory of recovery for Claimant, that being the fact that Claimant was on call 24/7 and consequently needed a company vehicle to accomplish the purpose of his job, and that because providing a company vehicle served the employer's interest by making it possible for the claimant to always have the means available to respond to emergency calls, these factors together provided enough connection to Claimant's work to make the matter compensable. They cited *In the Matter of Barker*, 110 Idaho 871 (1986) for this proposition.

In the *Barker* case, the worker was traveling from a worksite to a dentist appointment when he was killed. He was paid $90.00 a week as a travel allowance. His claim was denied at the Commission level, but on appeal the Supreme Court stated that the payment of his travel expenses, along with other evidence indicating intent to compensate the employee for travel time, justified the expansion of course of employment to include going to and coming from work. The case is primarily interesting because of the Industrial Commission's position that payment of expenses alone is not enough to make a going and coming case compensable. The availability of such a defense may simply be a red herring since the Court's exception where there is "other evidence" is so vague and so broad as to basically allow the Industrial Commission to do whatever it wants.