

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEPHEN ARTHUR LOWERY,
Claimant,

v.

GALEN KUYKENDALL LOGGING,
Employer,

and

ASSOCIATED LOGGERS EXCHANGE,
Surety,
Defendants.

IC 2019-022568

**ORDER FOLLOWING 09/26/2023
HEARING**

FILED

OCT 20 2023

INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code §§ 72-506 and 72-714(3), the Industrial Commission conducted a hearing via ZOOM videoconferencing on September 26, 2023 (hereinafter “2023 Hearing”). The matter was heard before Commissioner Thomas P. Baskin and Commissioner Aaron White. Claimant appeared *pro se*. Susan Veltman represented Employer and Surety. Claimant presented oral and documentary evidence. No additional briefing was submitted by the parties. The matter came under advisement on September 26, 2023 and is ready for decision.

BACKGROUND

An initial hearing was conducted in this matter before Referee Douglas A. Donohue on March 23, 2022 (hereinafter “2022 Hearing”). The Referee submitted a recommendation for the Commissioners to review. The Commission declined to adopt the Referee’s recommendation and instead issued its own findings of fact, conclusions of law, and order (hereinafter “February 2, 2023 Decision and Order”).

In its February 2, 2023 Decision and Order, the Commission ruled that Claimant failed to meet his burden of proving the occurrence of an accident causing an injury. However, the

Commission ruled that Claimant satisfied his burden of proving that his L3-L4 lesion represented an occupational disease separate and distinct from his L5-S1 injury, that his L3-L4 lesion was causally related to the demands of his employment, and that as of his June 19, 2019, date of manifestation he had last been injuriously exposed to the hazards of his disease while in the employ of Employer. Furthermore, the Commission concluded the claim was not barred by the rule of *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).¹

On February 21, 2023, Defendants filed their motion for reconsideration pursuant to Idaho Code § 72-718. Defendants argued, inter alia, that the Commission erred because it made inconsistent findings as to the identity of the employer in whose employ Claimant was last injuriously exposed to the hazards of his disease as of the date of first manifestation of Claimant's L3-L4 occupational disease.

In the April 7, 2023 Order on Defendants' Motion for Reconsideration, the Commission acknowledged that a finding of fact made in the February 2, 2023 Decision and Order was problematic:

Claimant commenced his employment with Employer sometime in 2010. His employment with Employer came to an end on May 25, 2019. He quit because Employer failed to follow through with a promise to replace the machine that was "beating up" Claimant's back. **Since then**, and through the date of hearing, Claimant has been employed by Evergreen Timber in Alaska.

February 2, 2023 Decision and Order ¶11, p. 5 (emphasis added, internal citations omitted). On reconsideration, the Commission recognized that the use of the term "since then" admitted the interpretation that Claimant's employment by Evergreen started immediately after he left

¹ The Commission also concluded that: (1) Claimant complied with the notice and limitations requirements set forth in Idaho Code §§ 72-701 – 706 and § 72-448; (2) Claimant was entitled to recover medical benefits in the amount of \$53,135.18; (3) Claimant was entitled to recover time loss benefits during his period of recovery from December 6, 2019 through February 25, 2020; and (4) Claimant had not proven entitlement to PPI or PPD.

Employer (i.e. on May 26, 2019) as opposed to sometime thereafter. If Claimant was employed by Evergreen on June 19, 2019, then Evergreen, not Employer, would be the employer in whose employ Claimant had last been injuriously exposed to the hazards of his L3-L4 occupational disease as of the June 19, 2019 date of manifestation. In review of the record, the Commission recognized that Claimant's testimony at hearing appeared to acknowledge that Claimant did not immediately start to work for Evergreen upon leaving Employer. Furthermore, the Commission also found that Claimant's testimony at hearing about his end-date with Employer conflicted with a recorded statement he gave to Surety on September 3, 2019. As of the date of that statement, Claimant stated that he was still employed by Employer.

In light of the authority granted by Idaho Code § 72-714 to conduct additional hearings in the interest of justice, the Commission retained jurisdiction in this matter to allow the parties to adduce additional evidence on the question of when Claimant's employment with Employer came to an end, and to identify the employer in whose employ Claimant was last injuriously exposed to the hazards of his occupational disease as of the date of first manifestation and disablement. Order on Defendants' Motion for Reconsideration, pp. 16-17.²

On May 5, 2023, notwithstanding the Commission's retention of jurisdiction on an issue relevant to a determination of Defendants' liability on this occupational disease claim, Defendants filed an appeal to the Idaho Supreme Court as a matter of right under I.A.R. 11(d). On July 31, 2023, the Commission ordered that, pursuant to Idaho Code § 72-731, the Defendants' appeal

² The Commission retained jurisdiction in the matter to determine this narrow issue. The Commission continued to adhere to its other findings and conclusions of the February 2, 2023 Decision and Order, including: (1) that Claimant's L3-L4 lesion represented an occupational disease causally related to the demands of his employment; (2) the L3-L4 occupational disease first became manifest on June 19, 2019; and (3) Claimant satisfied his burden of establishing that the hazards to which he was exposed are characteristic of and peculiar to his employment, etc. *See* Order on Defendants' Motion for Reconsideration, pp. 16-17.

would not automatically stay the Commission's award, order, or decision, and that the record would remain open for the limited purpose of holding a hearing on this narrow factual issue.

ISSUES

The sole issue to be decided according to the July 31, 2023 Notice of Hearing is:

1. Identifying the employer in whose employ Claimant was last injuriously exposed to the hazards of his occupational disease as of the date of his June 19, 2019 manifestation and disablement.

CONTENTIONS OF THE PARTIES

Claimant contends that he worked for Employer for the entirety of 2019, except for a few months (late March – May 13) when he was temporarily laid off. Thus, Claimant argues that as of his June 19, 2019 date of manifestation, his last injurious exposure to the hazards of his disease took place in the employment of Employer.

Defendants do not dispute the payroll information submitted by Claimant. However, Defendants maintain their position that the April 7, 2023 Order on Defendants' Motion for Reconsideration was a final order appealable pursuant to I.A.R. 11(d) and that the Commission has exceeded its authority by holding an additional hearing and adducing additional evidence.³

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Oral testimony taken and documentary evidence admitted at the 2022 Hearing;
2. The testimony of Claimant taken at the 2023 Hearing;
3. Claimant's Exhibits (CE) 6 and 7⁴, admitted at the 2023 Hearing.

³ Due to the narrow and limited scope of this Order, Defendants' arguments regarding jurisdiction and arguments they have made on appeal to the Supreme Court will not be addressed.

⁴ Claimant marked these exhibits as Exhibits "1" and "2". However, to avoid confusion and for consistency with Claimant's Exhibits that were admitted into the record at the 2022 Hearing, these additional exhibits were re-marked as Exhibits 6 and 7, respectively.

After having considered the above evidence and the arguments of the parties, the Commission issues the following additional findings of fact⁵, conclusions of law, and order.

FINDINGS OF FACT

1. Claimant commenced his employment with Employer in approximately 2010. 2023 Hearing 8:13-14. Claimant worked as a “shovel logger” in which he operated a type of heavy equipment known as a “shovel loader.” 2022 Hearing 35:5-6; 2023 Hearing 14:15-18.

2. It was customary for Employer to shut down logging operations for approximately one to two months in late March or April of each year due to the spring thaw. 2023 Hearing 12:12-24. Accordingly, during the shutdown, Claimant was temporarily laid off by Employer in March of 2019. 2023 Hearing 7:21-24. Claimant worked for Evergreen in Alaska for a few weeks during this lay-off from Employer. 2023 Hearing 7:25-8:14; CE 7 p. 028.

3. Claimant re-commenced his employment with Employer on or about May 13, 2019. 2023 Hearing 12:25-14:4; CE 6 pp. 017-019.⁶ Claimant worked for Employer for the remainder of the month of May 2019. 2023 Hearing 14:1-4.

4. Claimant worked for Employer for the entire month of June 2019, and up until his December 6, 2019 L3-L4 decompression and fusion surgery. 2023 Hearing 8:7-23; 14:5-18; DE 8 p. 1309. Claimant worked for Employer at his customary job as a “shovel logger” for all of 2019, except for the brief layoff from late March to mid May. 2023 Hearing 14:15-18.

5. After Claimant was medically released to return to work following the December

⁵ Any findings made in the February 2, 2023 Decision and Order that are inconsistent with the factual findings made below are disregarded.

⁶ Claimant’s payroll summary indicates that he was not paid by Employer in May 2019. CE 6 p. 018. However, as Claimant explained in his testimony, Claimant was paid in June 2019 for work that he did for Employer in May 2019. 2023 Hearing 12:25-14:4; *see also* CE 6 p. 019.

2019 surgery, he worked briefly for Evergreen in March of 2020. 2023 Hearing 8:24-9:4. Claimant returned to work for Employer for approximately one week in May 2020, but quit because Employer failed to follow through with a promise to replace the machine that was “beating up” Claimant’s back. 2023 Hearing 9:2-12; 2022 Hearing 32:11-34:21. Claimant then commenced working full-time for Evergreen in approximately May or June 2020. 2023 Hearing 9:10-20; CE 7 p. 028.

DISCUSSION

6. Idaho Code § 72-439(3) provides:

Where compensation is payable for an occupational disease, the employer, or the surety on the risk for the employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefor.

For the reasons outlined in the Commission’s February 2, 2023 Decision and the April 7, 2023 Order on Defendants’ Motion for Reconsideration, Claimant’s L3-L4 occupational disease first manifested on June 19, 2019. Insofar as is relevant to the matter before us, it is established that Claimant worked for Employer in the occupation in which he was injuriously exposed to the hazards of his disease, i.e., as a “shovel logger”, from approximately May 13, 2019 until the date of his December 6, 2019 back surgery. Therefore, as of the date of manifestation of his occupational disease, Claimant was last injuriously exposed to the hazards of the disease while in the employ of Employer.⁷

7. The Commission previously concluded that Claimant was taken off work by Dr. Larson from December 6, 2019, through February 25, 2020. The Commission concludes that Claimant

⁷ The Commission previously accepted Claimant’s testimony that he first knew that his disease was caused by the demands of his employment on or about June 19, 2019. However, even if his date of manifestation lies between June 19, 2019 and the date of Claimant’s surgery, the evidence would still support a finding that as of the date of manifestation Claimant was last injuriously exposed to the hazards of his disease while in the employ of Employer.

became disabled, i.e. actually and totally incapacitated from performing work in the last occupation in which he was injuriously exposed to the hazards of his disease, no later than December 6, 2019, his date of surgery. Idaho Code § 72-102(21)(c).

CONCLUSION OF LAW AND ORDER

Based on the foregoing, the conclusions reached in the February 2, 2023 Decision and Order and the April 7, 2023 Order on Defendants' Motion for Reconsideration, are modified as follows:

1. Claimant has satisfied his burden of proving that as of his date of manifestation, he was last injuriously exposed to the hazards of his disease while in the employ of Employer at his customary job as a shovel logger.
2. Claimant became disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of his disease no later than December 6, 2019, while in the employ of Employer.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 20th day of October, 2023.

INDUSTRIAL COMMISSION



Participated but did not Sign

Thomas E. Limbaugh, Chairman

Thomas P. Baskin

Thomas P. Baskin, Commissioner



Aaron White, Commissioner

ATTEST:



Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2023, a true and correct copy of the foregoing **ORDER FOLLOWING 09/26/2023 HEARING** was served by regular United States Mail and Electronic Mail upon each of the following:

STEPHEN LOWERY
PO BOX 1639
OROFINO, ID 83544
lowerysa@hotmail.com

SUSAN VELTMAN
1703 W HILL ROAD
BOISE, ID 83702
veltman@bvwcomplaw.com
admin@bvwcomplaw.com

mm

Mary McMenamy