BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALFREDO HERNANDEZ, Claimant, v. IC GLOBAL SERVICES, INC., Employer, and PACIFIC INDEMNITY COMPANY, Surety, Defendants.	)	**IC 99-033860** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed: February 18, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on January 31, 2005. Claimant appeared *pro se*. Max M. Sheils, Jr., of Boise represented Defendants. Claimant offered one exhibit—a letter from Timothy Doerr, M.D. Defendants objected to admission of the letter, as it was not made available as required by Rule 10, J. R. P. The objection was sustained. No other documentary evidence was offered into evidence. Claimant testified on his own behalf, Defendants called no witnesses, and post-hearing briefing was waived. The matter came under advisement on February 1, 2005, and is now ready for decision.

ISSUE

Based on the Complaint filed by Claimant on August 4, 2004, the only issue noticed for hearing was:

1. Whether the Commission should retain jurisdiction of this proceeding beyond the statute of limitations.

At the pre-hearing conference, and again at hearing, Defendants asked that another issue be added: Whether Claimant was entitled to permanent impairment in excess of the 10% whole person impairment already paid. After listening to argument, the Referee ruled that it would be inherently unfair to proceed on additional issues raised just seven days before the scheduled hearing.

CONTENTIONS OF THE PARTIES

Claimant seeks to have the Commission retain jurisdiction of his case beyond the statute of limitations because in the future he might need additional surgery. Initially, Claimant's concern was to ensure coverage of his medical expenses. At hearing, Claimant also mentioned time loss, additional impairment, and retraining. Defendants argue that it is not necessary for the Commission to retain jurisdiction because Idaho Code § 72-432 requires Defendants to provide whatever reasonable medical care Claimant may need as a result of his industrial injury, without regard to the statute of limitations. Defendants note that they accepted the claim, paid all of the medical costs to date, paid time-loss benefits as well as permanent impairment, and intend to stand by their obligations and the requirements of Idaho Code as they pertain to future medical care.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at hearing; and
2. The Industrial Commission legal file.

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

FINDINGS OF FACT

1. Claimant injured his back on September 13, 1999 while he was working for Employer as the information technology manager. In February 2001, Dr. Doerr performed a partial discectomy at L5-S1. Claimant returned to work for Employer following the surgery and remained in his time-of-injury position until he was laid off due to a general reduction in staff in January 2003.

2. Defendants paid Claimant's medical care and time loss benefits attributable to his surgery and recovery. In April 2001, Dr. Doerr gave Claimant a permanent impairment rating of 10% of the whole person. Defendants paid the impairment in installments, completing payment in full in April 2002.

3. Claimant went to work for DirectTV in June 2003 as a senior systems administrator.

4. Claimant continues to treat with Dr. Doerr as needed for his back injury. Dr. Doerr has advised Claimant that he has the option of a second lumbar surgery in the event that he cannot control his back pain using non-invasive methods. Whether or not to have the surgery is entirely up to Claimant. Claimant testified that he is doing all he can to assure that he does not have to have a second surgery, "[b]ut yet I don't want to live with the pain for the rest of my life, either." Tr., p. 17.

DISCUSSION AND FURTHER FINDINGS

5. Whether or not to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. Where a claimant's medical condition has not stabilized or where

a claimant's physical impairment or disability is progressive, "it is entirely appropriate for the Industrial Commission to retain jurisdiction until such time as the claimant's condition is non-progressive." *Reynolds v. Browning Ferris Industrie*s, 113 Idaho 965, 969, 751 P.2d 113, 117 (1988). "Neither physical impairment nor disability is permanent until the point when no further deterioration or change can be expected." *Id.* 113 Idaho at 968, 751 P.2d at 116.

The burden of establishing that his condition is progressive or is unstable lies with Claimant. In this case, Claimant has failed to carry his burden on this issue. There is no medical evidence in the record that Claimant's condition is progressive. In fact, Claimant testified at hearing that his condition was stable, though his activities were limited as a result of the surgery and his restrictions. The only evidence that Claimant's condition could change is Claimant's testimony that Dr. Doerr has given him an *option* to have a second surgery, which surgery *might* increase his impairment rating. Claimant testified that he would prefer to avoid a second surgery unless he can no longer live with the pain. The optional nature of the surgical procedure, and Claimant's stated desire to avoid a second surgery, if possible, demonstrate substantial uncertainty as to the likelihood that the surgery will occur. Sequelae of the possible surgery are even more uncertain. The remote and speculative nature of possible additional benefits does not justify retention of jurisdiction in this matter.

The Referee notes that the medical care associated with such surgery, should it ever occur, is governed by Idaho Code § 72-432 which provides:

> The 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 reasonably required by the employee's physician or needed immediately after an injury or manifestation of 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.

Defendants concede that they are subject to the provisions of this section and restated on the record their commitment to their obligation to pay for any future medical care that Claimant may require that can be causally related to his 1999 industrial accident.

CONCLUSION OF LAW

1. Claimant has failed to carry his burden of proving that his medical condition is unstable or progressive and therefore appropriate for retention of jurisdiction beyond the five-year statute of limitations.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 9th day of February, 2005.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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djb /s/_____