BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TROY DAMPEER, Claimant, v. KELLY SERVICES, INC., Employer, and AMERICAN CASUALTY COMPANY, Surety, Defendants.	)	**IC 03-000368** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** FILED MAR 3 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Idaho Falls, Idaho, on August 25, 2004. Dennis R. Peterson represented Claimant. Glenna M. Christensen represented Defendants. The parties submitted briefs and the case came under advisement on January 14, 2005. It is now ready for decision.

ISSUE

After due notice and by agreement of the parties, the sole issue to be decided is whether and to what extent Claimant is entitled to temporary total disability benefits.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his neck. He was working for Employer's client, a canola oil seed company, under a platform, stood, and hit his head on a bar. He had previously suffered

an industrial accident which required neck surgery. He was still in the recovery period when released for light duty. Neither Employer nor Employer's client offered him work. Eventually, Claimant was released to work with the same restrictions imposed after the prior surgery. Claimant asserts eligibility for TTD benefits from January 6, 2003, to February 19, 2003.

Defendants contend Claimant's light-duty restrictions were the same as his previous permanent restrictions. Further, he refused suitable light work which was offered. He failed to maintain contact with Employer.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, by Lori Bolm, senior staffing supervisor for Employer, and Tracy Gohr, warehouse manager for Employer's client;

2. Claimant's exhibits 1 – 6;

3. Defendants' exhibit A; and

4. The prehearing deposition of Wladyslaw Fedeczko, warehouse supervisor for Employer's client.

FINDINGS OF FACT

1. Claimant suffered a prior industrial accident which resulted in neck surgery. David C. Simon, M.D., imposed permanent restrictions. The restrictions allowed lifting 25 pounds occasionally and 55 pounds rarely, below shoulder level. The restrictions stated he should refrain from overhead lifting with his right arm but allowed overhead reaching and repetitive arm activities occasionally. Dr. Simon approved a job as a forklift operator. Employer obtained work for Claimant as a forklift operator for a canola oil seed company.

2. On January 6, 2003, working for the canola oil company, Claimant was under a platform, stood too quickly and struck a bar. He was wearing a hard hat. He reported the

accident and sought medical care. The physician at Family Emergency Center restricted him from all work for a few days.

3. Claimant was released to return to light-duty work on January 10, 2003. Claimant's temporary light-duty restrictions included no lifting, pushing, or pulling in excess of 25 pounds; no repetitive twisting, bending, or stooping; no overhead reaching or lifting with his right arm; and no repetitive movements with his right hand.

4. On January 10, 2003, Claimant returned to the canola oil company. The warehouse supervisor discussed with Claimant whether Claimant could push a broom as a temporary light-duty job. Claimant believed it beyond the scope of his restrictions and expressed unwillingness to do it.

5. On February 18, 2003, Dr. Simon provided permanent restrictions exactly the same as after the prior surgery.

6. Claimant found a job on his own on March 13, 2003, at Valley Wide Co-Op. He has worked at various jobs since.

7. Claimant's average weekly wage at the time of the accident was $340.00.

Discussion and Further Findings

8. **Credibility.** Whether Claimant was offered a temporary light-duty position is disputed by the parties. Mr. Fedeczko testified by deposition he offered Claimant three positions – operate the line, operate a forklift, or sweep the floor – in a 30 to 40 minute conversation on February 10, 2003. Mr. Fedeczko did not appear at hearing. His credibility and demeanor cannot be assessed, but the transcript of his deposition does not demonstrate objective internal inconsistencies. Testimony of Lori Bolm and Tracy Gohr concerning this key issue is all hearsay. Both appeared credible at hearing. Claimant similarly appeared credible at hearing.

He described his conversation with Mr. Fedeczko. Claimant testified he told Mr. Fedeczko why his temporary restrictions would not allow him to push a broom. Claimant and Mr. Fedeczko remembered differently whether there was a conversation about the effect of Claimant's medication regimen on any possible light-duty work. A difference of memory does not necessarily demonstrate a lack of credibility by either party, and does not do so in this instance.

9. Hearsay relating to conversations before and after Claimant's accident was discussed at hearing. In addition to those who testified, conversations included the third-party adjuster and at least two other employees of Employer. Differences between Claimant's account of conversations for which he was present and other accounts require the addition of simple miscommunication as well as normal inaccuracies of memory as explaining factors. None of this undercuts Claimant's credibility.

10. Finally, in briefing, Defendants suggest Claimant had no intention of returning to work because his wife drove him to Employer's client on February 10, 2003. Claimant well explained that because of his medication regimen his wife was driving him everywhere. Moreover, the fact that he discussed with Mr. Fedeczko possible jobs for 30 to 40 minutes suggests a genuine interest to discover whether a job was available. Finally, Claimant found a job on his own by March 13, 2003.

11. **TTDs.** Defendants must show Claimant refused a suitable job offer. Maleug v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986). Whether a job was actually offered or merely discussed is not clear. Again, testimony of both Mr. Fedeczko and Claimant suggests some miscommunication occurred. Moreover, whether the job was suitable is not clear. Claimant's temporary restrictions precluded all bending and pushing with his right arm. The effect of his medication likely made forklift operation unsuitable if offered. Defendants failed to

show it likely that Claimant refused a suitable job that was actually offered. The fact that Claimant was not offered a return to work when his temporary restrictions were lifted and his prior permanent restrictions reinstated suggests no suitable temporary job was actually offered.

CONCLUSION OF LAW

Claimant is entitled to TTD benefits from January 6, 2003, to February 19, 2003.

RECOMMENDATION

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

DATED in Boise, Idaho, on this 24TH day of February, 2005.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3RD day of MARCH, 2005, 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:

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