BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALEJANDRO RUIZ, Claimant, v. BLAINE LARSEN FARMS, INC., Employer, and INSURANCE COMPANY OF THE WEST, Surety, Defendants.	)	**IC 99-023870** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed: April 26, 2006

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 Idaho Falls, Idaho, on November 16, 2005. Michael R. McBride of Idaho Falls represented Claimant. Thomas V. Munson of Boise represented Defendants. Mr. Hugo Arias provided English to Spanish and Spanish to English interpretation for the testimony of Claimant and Cecilio Sanchez. The parties submitted oral and documentary evidence. No post-hearing depositions were taken; the parties submitted post-hearing briefs. The matter came under advisement on February 22, 2006 and is now ready for decision.

ISSUE

By agreement of the parties at hearing, the sole issue to be decided is:

1. Whether and to what extent Claimant is entitled to disability in excess of his impairment.

CONTENTIONS OF THE PARTIES

Claimant contends that because of the partial amputation of the thumb of his right (dominant) hand in the industrial accident, he is precluded from work in the logging industry that he had previously performed and that paid substantially more than work he is able to do following the injury, thus entitling him to disability in excess of his impairment. Claimant seeks permanent partial disability of 41% inclusive of his permanent impairment.

Defendants argue that Claimant had not performed logging work since 1981, nor had he sought such work in the intervening twenty-four years. Further, Defendants contend, Claimant has not sought *any* work since he returned to the United States in 2004, either because he intends to return to his home in Mexico, or because he lacks proper documentation to obtain work. In either case, Defendants assert that Claimant has no disability in excess of his impairment because he has removed himself from the labor market in Idaho as well as the rest of the United States.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant, Peggy Summers, Cecilio Sanchez, and Martin Resendiz, taken at hearing;
2. Claimant's Exhibit 1, pages 1 through 101, admitted at the hearing; and
3. Defendants Exhibits A through I, admitted at the hearing.

All objections made during the deposition of Claimant are overruled except those appearing on pages 63 and 64 of the deposition, which are sustained. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

CLAIMANT

1. Claimant is a Mexican national. At the time of hearing, he was 58 years of age, and was residing with relatives in the upper Snake River valley.

2. Claimant attended school in Mexico through approximately the fifth grade. He left school sometime during the last year of primary school. He can read and write Spanish, and speaks very little English. After leaving school, Claimant worked on the family farm performing manual labor until the early 1970s, when he went to California. He worked in the California agriculture industry for two seasons, returning to Mexico during the off-season.

3. In 1977, Claimant returned to the U.S. and came to Idaho. He found work in the St. Anthony area working as a logger for a private individual. The work involved felling and limbing trees with chainsaws and measuring each log. Claimant also operated the log peeler for a short period. Claimant was paid at least $10.00 per hour for the logging work, which usually entailed a minimum of 40 hours per week with occasional Saturday work.[1] Logging usually took place nine or ten months out of the year. When logging was stopped because of snow, Claimant would work in a potato warehouse further down the valley.

4. In 1981, Claimant returned to Mexico where he married and fathered six children. During most of the time between 1981 and 1998, Claimant operated a small store that had belonged to his father in a city several hours distant from the family farm. He earned no wages during this period.

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[1] There was conflicting testimony from Claimant as to his hourly wage while he was a logger. He told Peggy Summers, Idaho Commission Rehabilitation Division consultant, that he was making $10.00 per hour when he left to return to Mexico. During his deposition, he stated he was making $12.00 per hour. At hearing, he testified he was making $14.00 per hour.

5. In 1998, Claimant returned to Idaho. He went to work for Employer performing sanitation work in their fresh pack receiving operation. His starting wage was $5.50 per hour.

ACCIDENT/INJURY

6. Claimant was injured on July 10, 1999 when his right thumb was pulled into a pump belt mechanism he was cleaning. As a result, the thumb was surgically amputated at the interphalangeal joint. Claimant returned to modified work following his surgery. He made a normal recovery and was declared at maximum medical improvement on December 27, 1999. His treating physician, R. Timothy Thurman, M.D., rated Claimant's permanent impairment at 19% of the whole person. Dr. Thurman imposed no permanent restrictions in association with the impairment rating. Claimant returned to a sanitation position, where the only necessary accommodation was a heavy liner in his rubber glove on the affected hand. He received wage increases in May 2000, February 2001, and December 2001.

7. Claimant underwent an independent medical examination on December 5, 2001 with William Lenzi, M.D. Dr. Lenzi agreed with Dr. Thurman's 19% whole person PPI rating. Dr. Lenzi opined that Claimant could return to work as a sanitation worker, and that he would have mild to moderate cold intolerance, which should improve for a period of time and then stabilize. The doctor recommended Claimant take low-dose aspirin to improve blood flow to the affected digit. Dr. Lenzi also opined that appropriate work restrictions would be "no heavy vibrating equipment, such as chain saws and no working in temperatures less than 15 to 20 degrees Fahrenheit." Claimant's Ex. 1, p. 10.

8. Claimant continued to work for Employer until April 2002, at which time he left to return to Mexico because his mother was ill. At the time he left Employer, he was earning

$6.50 per hour.[2]

POST-ACCIDENT EMPLOYMENT

9. When he returned to Mexico, Claimant helped his brother-in-law with the cattle on the family ranch. He earned no wages.

10. Claimant returned to Idaho in 2004 in order to pursue his workers' compensation claim. He made one inquiry through a cousin about available work with Employer and was told no work was available. As of the date of hearing, Claimant had made no other attempts to seek work. When asked why he had not sought work, Claimant testified that he was thinking about returning to Mexico as soon as his case was resolved, and that he didn't think there was any point in seeking work because he was undocumented.[3]

11. Martin Resendiz, Claimant's second-level supervisor when he worked for Employer between 1999 and 2002 testified at hearing that Claimant was a good worker, and that he would rehire Claimant.

DISCUSSION AND FURTHER FINDINGS

DISABILITY

12. The definition of "disability" under worker's compensation law is:

> 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 provided in section 72-430, Idaho Code.

Idaho Code § 72-102(10). A permanent disability results when:

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[2] Claimant testified at hearing that he was making $6.50 or $6.75 per hour when he left Employer to return to Mexico. According to his personnel file from Employer, his highest wage was $6.50. Defendants' Ex. E, p. 19.

[3] Claimant presented a Social Security Card and a Resident Alien (Green) Card at the time of his initial employment with Employer. In fact, Claimant received W-2 forms from Employer for 1999, 2000, 2001 and 2002. Claimant stated in his deposition that he still had these documents, but testified in his deposition and at hearing that he was not in the U.S. legally.

> . . . 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.

Idaho Code § 72-423.

13. Claimant asserts that he is entitled to disability of 41% inclusive of his impairment. Relying on *Baldner v. Bennett*, 103 Idaho 458, 649 P.2d 1241 (1982), Claimant compared his highest pre-injury wage ($14.00/hour x 6 days = $672.00/week) with his highest post-injury wage ($6.75/hour x 5 days = $270.00/week), and determined that it amounted to a 60% reduction in his wage-earning ability. Subtracting the 19% impairment from this figure, results in a 41% disability in excess of impairment. *Baldner* held that such a wage comparison methodology was an appropriate measure of loss of earning capacity. As noted by the Court:

> Our statutes thus make clear, as do our prior cases, that the primary purpose of an award of permanent partial disability benefits is to compensate the claimant for his loss of earning capacity or his reduced ability to engage in gainful activity.

Id., at 103 Idaho 461, 649 P.2d 1217.

14. While settled workers' compensation law requires that the Commission construe the law liberally in favor of claimants, the Commission is not similarly constrained in making findings of fact when evidence is conflicting. *Bennett v. Bunker Hill Co.*, 88 Idaho 300, 305, 399 P.2d 270, 272 (1965). The instant case presents a very different factual scenario than was before the Court in *Baldner*, and applying *Baldner* to the facts of this case leads to a very different result than that asserted by Claimant.

WAGES

15. The pre-injury and post-injury wages upon which Claimant calculates his lost earning capacity are not supported by the record.

Post-injury Wage

16. Claimant calculated his post-injury weekly wage based on an hourly rate of $6.75 and a forty-hour workweek. As discussed elsewhere in these findings, personnel documents establish that Claimant was earning $6.50 per hour or $260 per week at the time he quit working for Employer.

Pre-injury Wage

17. There is no reliable evidence in the record concerning the hourly wage Claimant earned when he was a logger in 1979, 1980 and 1981. Claimant variously provided hourly wages of $10.00, $12.00 and $14.00. Claimant's entire wage history from 1981 until his injury on July 10, 1999 consists of his six-month earnings record with Employer. It is not necessary to make a determination of Claimant's hourly pay for his logging job because reliance on this brief and distant history as a logger to establish pre-injury wage is entirely misplaced.

18. Claimant has not worked in the logging industry since 1981. When he returned to the U.S. after seventeen or eighteen years running a grocery store in Mexico, he did not return to work in the logging industry. There is nothing in the record to suggest that he even sought work in the logging industry upon his return. Rather, he went to work for Employer, where he remained employed until April 2002, nearly three years after his accident. To suggest that Claimant's pre-injury wage should be determined by a job he did briefly twenty-four years ago when he was in his early thirties is something of a stretch.

19. At the time of his injury, Claimant was earning $5.50 per hour or $220.00 per week. Almost three years after his accident, Claimant was earning $6.50 per hour or $260.00 per week for the same employer, performing the same job. Since, as the Court stated in *Baldner*, disability is intended to compensate an injured worker for a loss of earning capacity, then there is

no disability in this case.

EMPLOYMENT

20. By his own testimony, Claimant has not actively sought work in the U.S. since his return in 2004. His decision not to look for work had nothing to do with his injury or the impairment that resulted from the injury. Claimant's reasons for not looking for work were either that he was thinking about going back to Mexico or that he knew he did not have the documents needed in order to work in the U.S. Both of those reasons constitute volitional decisions made by Claimant to remove himself from the labor market. Claimant's loss of earning capacity at the time of hearing was not related in any way to his injury or his impairment.

CONCLUSION OF LAW

1. Claimant is not entitled to an award of disability in excess of impairment.

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 21 day of April, 2006.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of April, 2006 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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