

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARILYN G. FISHER,)
)
 Claimant,)
)
 v.)
)
 COEUR D' ALENE CAFÉ,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 02-522963

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Filed February 10, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to the Commissioners for hearing. On July 15, 2004, Commissioners R.D. Maynard and James F. Kile conducted a hearing in Coeur d' Alene, Idaho. Claimant was present and represented by Richard Whitehead of Coeur d' Alene. H. James Magnuson of Coeur d' Alene represented Defendants. Documentary and oral evidence were presented at the hearing. A post-hearing deposition of Eric P. Benson, M.D., was taken on September 10, 2004 on behalf of Claimant. Following submission of post-hearing briefs by the parties, the case came under advisement and is now ready for decision.

ISSUES

By agreement of the parties, the issues to be decided as a result of the hearing are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through § 72-706;

2. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;
3. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;
4. Whether Claimant is entitled to temporary partial and/or temporary total disability benefits, and the extent thereof;
5. Whether Claimant is entitled to permanent partial impairment; and
6. Whether Claimant is entitled to disability in excess of impairment.

In her brief, Claimant specifically withdrew issues 5 and 6.

CONTENTIONS OF THE PARTIES

Claimant contends that she suffered a work-related injury on October 12, 2002, while working at the Coeur d' Alene Café. Claimant further contends that she properly notified her employer of the work-related injury, then sought out and received medical treatment for the injury. Claimant requests reimbursement for all medical expenses related to her work-related injury pursuant to Idaho Code § 72-432. Claimant also maintains that she is entitled to temporary total disability (TTD) benefits for the period of October 14, 2002, through December 23, 2002, while she was unable to work.

Defendants contend there is no proof Claimant suffered a work-related injury, therefore Claimant is not entitled to medical expenses or TTD benefits. Defendants also assert that even if Claimant did suffer a work-related injury, Claimant failed to satisfy the notice requirement of Idaho Code § 72-701, thus releasing Defendants from any obligation to pay medical expenses or TTD benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant; Claimant's husband, Jay David Fisher; Defendant, Michael John Kempf; Barbara Fraley; and Victoria Johnson;
2. Claimant's Exhibits 1 through 14 admitted at hearing;
3. Defendants' Exhibits 1 through 3 admitted at hearing; and
4. Post-hearing deposition of Eric P. Benson, M.D., taken September 10, 2004.

After having considered all the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Claimant reported to work at the Coeur d' Alene Café on October 12, 2002, and worked out her scheduled shift. Early in her shift, Claimant performed several kitchen duties alone while the café owner (Michael Kempf) was away from the restaurant. During this early portion of her shift, a large pot filled with water and potatoes was moved from a stove to a drainage sink.

2. Claimant reported to work the following day, October 13, 2002, and completed her scheduled shift without complaining of an injury or telling anyone that she felt as though she had injured herself during the previous day's shift. Following this shift, Claimant did not return to work at the Coeur d' Alene Café.

3. Claimant presented to L. Lindquist, M.D., on October 14, 2002, complaining of work-related back pain. Benson Deposition pp. 8 – 9; Claimant's Exhibit 3; Hearing Transcript pp. 69 – 70. On October 17, 2002, Claimant saw Eric Benson, M.D., partner to Dr. Lindquist. Claimant's Exhibit 3; Benson Deposition pp. 9 – 10. Dr. Benson assessed Claimant as having a

thoracic muscle strain. Benson Deposition p. 11. Dr. Benson then referred Claimant to North Idaho Immediate Care (NIIC) where she reported on October 23, 2002. NIIC gave Claimant restrictions of no lifting over five pounds, no bending, and no squatting. NIIC and Dr. Benson prescribed a back brace for Claimant. Claimant presented to Kootenai Prosthetic Orthotic Services where she was able to acquire a back brace on November 8, 2002.

4. Claimant's husband (Jay) went to the café and spoke with Mr. Kempf on October 16, 2002, informing him that Claimant was "injured or sick," and that she was unable to work at that time. Kempf requested Claimant come in and visit with him in person.

5. Claimant and Jay went to the café together and met with Kempf. The record indicates that this meeting may have taken place on October 17 or October 22. The Commission finds the actual date of the meeting to be irrelevant. All parties agree that Claimant, Jay, and Kempf did meet at the café, and did so within a week to ten days of the alleged injury. During this meeting, Claimant informed Kempf that she had injured herself on October 12, 2002, while moving a large pot of potatoes at the Coeur d' Alene Café. Kempf did not have Claimant prepare a Notice of Injury form or any other paperwork at that time.

6. Claimant did not return to work at the Coeur d' Alene Café. On December 23, 2002, Claimant began working for Von Nash, a local interior decorator/design business.

7. Claimant is a credible witness.

DISCUSSION

Causation:

1. The Idaho Workers' Compensation Law defines "injury" as a personal injury caused by an accident arising out of and in the course of employment. An "accident" is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the

industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17).

2. A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). A physician’s oral testimony is not required in every case, but his or her medical records may be utilized to provide “medical testimony.” *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

3. The medical records in this case lead to the conclusion that Claimant’s back strain was caused by a work-related injury. Claimant first mentioned her back injury to Dr. Lindquist on October 14, 2002. Claimant then mentioned her back injury to Dr. Benson, partner to Dr. Lindquist, on October 17, 2002. Dr. Benson assessed Claimant as having a thoracic muscle strain. Benson Deposition p. 11. Furthermore, Dr. Benson indicated in his deposition that Claimant had never complained of back trouble until after October 12, 2002. Benson Deposition p. 6. The diagnosis of a thoracic strain was confirmed by NIIC on October 23, 2002. Claimant’s Exhibit 2.

4. Claimant has consistently identified the time and place of injury to satisfy the requirements of Idaho Code § 72-102(17)(b).

5. Furthermore, *Kessler v. Payette County*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997), creates a statutory presumption that an employee's injury arose out of employment whenever unrebutted, prima facie evidence is presented that the injury occurred on the work premises. In a case where credibility of the primary witnesses is equal, the lack of evidence showing any other way the potatoes could have moved to the drain sink becomes a telling point of fact. Defendant has not submitted any factual evidence to rebut Claimant's factual presentation. Even considering Kempf's testimony that the dimensions and weight of the pot would make it nearly impossible for Claimant to lift, the record does not refute the fact that Claimant could have physically attempted the activity described.

Notice:

6. Idaho Code § 72-701 provides in pertinent part that "No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof...." Failure to give timely notice shall not be a bar if it is shown that such want of notice has not prejudiced the employer. Idaho Code § 72-704. The burden is on the claimant to show lack of prejudice. *Taylor v. Soran Restaurant*, 131 Idaho 525, 960 P.2d 1254 (1998). However, actual knowledge of an accident by an employer may obviate the need for written notice. *Id.*

7. The café owner was made aware of Claimant's alleged injury during the meeting of October 17 or 22. During the course of the meeting, Claimant told Kempf that she was in pain and believed that a work injury had put her in such a state. Claimant has shown, and Defendant readily admits, that he was given oral notice regarding Claimant's injury. Hearing Transcript pp.

23 – 24. Throughout the hearing and the briefs, a great deal of effort is expended to show or deny that Claimant attempted to contact Kempf, via telephone, during the first few days following the injury. The Commission finds these disputed facts to be de minimus. Defendant readily states that he was told of Claimant's injury at the café during the face-to-face meeting of October 17 or 22. Hearing Transcript pp. 23 – 24. This is sufficient notice to satisfy Idaho Code §§ 72-701 through 72-706.

8. In addition to the oral notice, Claimant also filled out a Form 1 and provided it to Kempf within a week following the injury. Hearing Transcript pp. 31; 45 – 46; 71. Regarding prejudice to Employer, the Commission finds that the oral notice given Kempf allowed him to investigate the accident in a timely manner. Receiving actual notice of the accident and injury within 10 days, at most, of the event did not prejudice Defendant.

9. Since Claimant timely reported the accident and injury to her employer, her claim for compensation in November 2002 was also timely. Claimant's Exhibit 12.

Medical care:

10. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

11. The record is clear that Claimant presented to Drs. Lindquist and Benson following the October 12, 2002 injury. The record is also clear that Claimant presented to NIIC for further medical examination and then to Kootenai Prosthetic Orthotic Services to acquire a back brace.

Therefore, Claimant is entitled to such medical benefits reasonably related to her back injury. Beyond those specific benefits, Defendants shall be obligated for future medical expenses that are reasonably and necessarily related to the back injury of October 12, 2002.

TTD/TPD benefits:

12. For the Commission to award TTD benefits, a claimant must be released from work by a doctor to establish the start of a period of recovery. A claimant must also reach maximum medical improvement (MMI) in order to establish an end to a period of recovery. Idaho Code § 72-408 limits the availability of TTD benefits to a claimant's period of recovery. Once a claimant is medically stable, he/she is no longer in the period of recovery, and the total temporary benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001); *Loya v. J.R. Simplot Co.*, 120 Idaho 62, 813 P.2d 873 (1991); *Harrison v. Osco Drug, Inc.*, 116 Idaho 470, 776 P.2d 1189 (1989); *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979).

13. Claimant was never released from work. Dr. Benson made loose comments during his post-hearing deposition, stating that the time that Claimant did not work was a sufficient time for her to recover. He also indicated that Claimant should not work if she had ongoing pain, but he never specifically released Claimant from work. No evidence was presented to show a specific release from work. Furthermore, Claimant was never rated as MMI by any doctor. Claimant was at no time in a period of recovery. Therefore, Claimant is not entitled to TTD benefits.

14. Claimant states TPD benefits to be a noticed issue but does not address TPD benefits in her brief. Therefore, the Commission will deem the issue of TPD benefits waived.

CONCLUSIONS OF LAW

1. Claimant suffered a work-related injury due to an industrial accident on October 12, 2002.
2. Claimant provided Employer with sufficient notice to satisfy the requirements of Idaho Code §§ 72-701 through 72-706.
3. Claimant is entitled to reasonable and necessary medical care for the medical costs of Drs. Lindquist and Benson, NIIC, Kootenai Prosthetic Orthotic Services, as well as, such future treatment related to the October 12, 2002 injury.
4. Claimant is not entitled to TTD benefits.
5. All other issues are moot or withdrawn.

* * * * *

ORDER

Based on the foregoing, IT IS HEREBY ORDERED That:

1. Claimant suffered a work-related injury due to an industrial accident on October 12, 2002.
2. Claimant provided Employer with sufficient notice to satisfy the requirements of Idaho Code §§ 72-701 through 72-706.
3. Claimant is entitled to reasonable and necessary medical care for the medical costs of Drs. Lindquist and Benson, NIIC, Kootenai Prosthetic Orthotic Services, as well as, such future treatment related to the October 12, 2002 injury.
4. Claimant is not entitled to TTD benefits.
5. All other issues are moot or withdrawn.

6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __10__ day of February, 2005.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
James F. Kile, Commissioner

_____/s/_____
R.D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __10__ day of February, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following persons:

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_____/s/_____