



Code § 72-604;

2. Whether Claimant suffered a personal injury arising out of and in the course of employment;

3. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;

4. Whether Claimant's condition is due in whole or in part to a pre-existing injury or cause;

5. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

6. Determination of Claimant's average weekly wage;

7. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;

8. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof;

9. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate; and

10. Whether Claimant is entitled to attorney fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

At hearing, Claimant withdrew the issue of his entitlement to PPI benefits. In addition, the issues of pre-existing condition (and resulting apportionment), Claimant's average weekly wage, and TPD/TTD benefits were not addressed by the parties in briefing and are deemed waived.

## **CONTENTIONS OF THE PARTIES**

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 2**

Claimant contends he injured his back in the course and scope of employment when he fell from a ladder while attempting to store boxes containing business and personal belongings. As a result of his fall, Claimant sustained a herniated disc and required an anterior cervical discectomy and fusion. Although Claimant did not immediately report the injury to Surety, he maintains his claim for benefits should not be barred by the statutes of limitation because Surety was not prejudiced by any delay that may have occurred. Claimant seeks reimbursement for medical treatment and asserts entitlement to attorney fees for Defendants' inadequate investigation which led to its unreasonable denial of benefits.

Defendants argue that compensability rests on Claimant's credibility and that Claimant is clearly not credible. Defendants assert that not only did Claimant fail to timely file a notice of injury, but also that Claimant cannot prove his injuries occurred in the course and scope of employment. Claimant utilized the rear portion of his shop for personal use and, admittedly, was storing boxes that contained both business and personal items. Finally, Defendants maintain that attorney fees are not warranted because of the questionable nature of several aspects of Claimant's claim.

Claimant responds that Defendants misstate the facts and misconstrue the evidence. Claimant emphasizes that the dual purpose of the shop space should not preclude an award of benefits. He reiterates that Defendants were not prejudiced by his delay of notice, and that it was, in fact, their inadequate investigation that entitles him to attorney fees.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant and his sole employee, Brian Griffith.
2. Claimant's exhibits 1 through 12 admitted at hearing.
3. Defendants' exhibits A through I admitted at hearing.
4. The depositions of Claimant and his wife, Angela Nielson, with exhibits 1 through 6, taken by Defendants on August 12, 2004; Bryan Edward Griffith, with exhibits 1 through 3, taken by Defendants on August 13, 2004; and David A. Cox, D.C., with exhibit 1, taken by Defendants on September 16, 2004.

After having fully considered the above evidence and arguments of the parties, the Commission hereby issues its decision in this matter.

#### **FINDINGS OF FACT**

1. Claimant owns and operates a commercial print shop. As a sole proprietor, he has elected coverage for himself under the Workers' Compensation Law. Hearing Transcript, p. 19. The business employs one full time employee, Brian Griffith. Mr. Griffith has worked for Claimant for approximately 18 years. Claimant's deposition, p. 9.

2. Claimant's print shop building is divided into two parts. The front of the shop is used for business purposes. Claimant intends to convert the back of the shop into a "train room" (his personal hobby), but it is currently unfinished and the rafters are being used for storage. Hearing Transcript, p. 28.

3. On March 13, 2003, Claimant arrived at the shop between 6:30 and 7:00 a.m. He noticed some boxes lying on the floor in the back of the building that needed storing. Claimant testified that the boxes contained books, paperwork, personal items, and his son's climbing equipment. *Id.* at p. 33. Claimant positioned a ladder and began hauling the boxes into the rafters of

the storage room.

4. After lifting the fourth box into the rafters, Claimant lost his balance as he descended the ladder. As Claimant fell from the ladder, the box he had just placed in the rafters was jostled and fell, hitting Claimant on the back. *Id.* at p. 34. Claimant testified:

I fell and the next thing I remember, I was laying over one of the boxes that was still on the floor. And I hurt, so I just pushed the boxes over to the side and went up front and sat down in my chair in the office.

*Id.* at p. 35. Claimant is uncertain whether the box that hit him contained business or personal items.

5. Mr. Griffith arrived for work at approximately 9:00 a.m. and commented that Claimant looked pale. Claimant testified that he told Mr. Griffith that he was not feeling well, but did *not* tell him about the box falling incident. *Id.* at p. 36. Mr. Griffith testified that Claimant told him that he had an accident in the train room while storing boxes and hurt himself falling from a ladder. Mr. Griffith's deposition, p. 15.

6. Because the pain had not subsided by later that afternoon, Claimant reported to Dr. Cox. Dr. Cox documented that Claimant was complaining of pain in the right shoulder blade, upper thoracic spine and right trapezius after a box fell and hit him in the head and right shoulder. Claimant's exhibit 1. Dr. Cox performed massage and an adjustment/manipulation to the cervical and thoracic spine. *Id.* He noted that Claimant felt better after the treatment.

7. Claimant returned to work the following morning but still did not feel well. Claimant's deposition, p. 16. When symptoms did not subside over the weekend, Claimant made an appointment with Dr. Wortham and met with him for an appointment on March 17. Dr. Wortham noted Claimant's pain complaints and referred him to Michael H. Williams, M.D., a neurosurgeon.

8. Claimant returned to Dr. Cox on March 17 reporting that the adjustment helped for

half a day, but then the pain returned. *Id.* Dr. Cox again performed massage and an adjustment/manipulation to Claimant's cervical and thoracic spine.

9. Claimant met with Dr. Williams on March 25. Dr. Williams noted that Claimant was referred for the evaluation of right hand problems. Claimant's exhibit 6. Claimant reported to Dr. Williams that he could not recall pursuing any special use or activity involving his right upper extremity. *Id.* Based on MRI results, Dr. Williams determined that he had nothing to offer Claimant in terms of nonsurgical treatment.

10. Claimant first met with Scott Huneycutt, M.D., on May 20. Dr. Huneycutt noted that Claimant reported he injured his head and neck when he was struck with a falling object. Claimant's exhibit 2. The doctor determined that Claimant suffered a traumatic herniated cervical disc as a result of an on the job injury. *Id.* Dr. Huneycutt discussed Claimant's treatment options, including surgery. Claimant wanted to proceed with surgical intervention. *Id.*

11. On May 22, 2003, Claimant submitted a Notice of Injury to Surety noting March 24, 2003, as the date of his on the job injury. Surety denied his claim for benefits. In a letter dated July 7, 2003, Claimant requested that Surety reconsider his claim. A hand-written note at the end of Claimant's reconsideration letter explains that Claimant noted March 24 as the date of injury because he was afraid that if he noted the true date of injury that the claim would be denied "because of the late date." Claimant's deposition, exhibit 6.

12. Dr. Huneycutt noted on July 22, 2003, that he believed Claimant's herniated cervical disc and current symptoms are a direct result of his March 24, 2003, on the job injury. Typed on the bottom of the doctor's chart note is a notation that reads, "7/22/03 chart noted amended at patient request." *Id.*

13. On August 21, 2003, Dr. Huneycutt performed an anterior cervical discectomy and fusion. *Id.* Claimant returned to Dr. Huneycutt in November reporting that he was experiencing some loss of coordination and sensation in his right fingers, but that the surgery had eliminated his pain. He had been able to return to work “in a gainful fashion.” *Id.*

14. Although Claimant’s wife, Angela Nielson, knew Claimant was experiencing back pain, Claimant did not tell his wife that a box had fallen on him or that he had injured himself at work. Ms. Nielson’s deposition, p. 12.

15. During the 18 years that Mr. Griffith has worked for Claimant, Mr. Griffith has not observed any work-related boxes being stored in the rafters of the train room. Hearing Transcript, p. 86. He has, on occasion, retrieved personal items from the rafters for Ms. Nielson. *Id.*

#### **CONCLUSIONS OF LAW**

16. **Sufficiency of notice.** A claimant is required to provide notice to an employer within 60 days of the work-related accident. Idaho Code § 72-701. Want of notice or delay in giving notice shall not be a bar to proceedings unless it is shown that the employer was prejudiced by such delay or want of notice. Idaho Code § 72-704.

17. Claimant’s alleged work injury occurred on March 13, 2003. He did not complete a Notice of Injury until May 22, 2003 - clearly outside the 60-day notice requirement. In addition, Claimant admitted to knowingly reporting an incorrect date of injury because he believed reporting the actual date of injury would cause his claim to be denied.

18. The inquiry does not end when notice of an injury is reported outside the 60-day time limitation. Claimant’s delay in giving notice is not a bar to proceedings unless Defendants are prejudiced by such delay. Claimant testified at hearing that by the time the injury was reported to

Surety all of the boxes had been moved and stored elsewhere. Hearing Transcript, p. 78. Also, prior to May 2003, Claimant had already consulted with numerous doctors and received palliative and diagnostic treatment.

19. It must be concluded that Defendants were prejudiced by Claimant's delay in providing notice of his injury. Defendants had no opportunity to investigate the site of the accident or the circumstances under which the accident occurred. In addition, they were unable to assist in obtaining or managing Claimant's initial medical treatment. Therefore, the Commission finds that Claimant has not complied with the notice limitations set forth in Idaho Code § 72-701 through § 72-706.

20. **Accident and injury in the course and scope of employment.** "Injury" is defined as a personal injury caused by an accident arising out of and in the course of employment. Idaho Code § 72-102(17)(a). "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs causing an injury. Idaho Code § 72-102(17)(b). A claimant bears the burden of establishing, by a preponderance of the evidence, that an accident occurred within the course and scope of employment. Painter v. Potlatch Corp., 138 Idaho 309, 63 P.3d 435 (2003).

21. Assuming, *arguendo*, that proper notice can be established, Claimant cannot prove that his accident and injury occurred within the course and scope of employment. The rear of Claimant's print shop building was intended to become a "train room" for Claimant's hobby of collecting Lionel trains. Although Claimant testified that he was storing both business and personal items in the rafters above the train room, Mr. Griffith, in 18 years of working for Claimant, was unaware of any business records stored in the rafters. Mr. Griffith had, however, retrieved personal

items for Ms. Nielson from the rafters on previous occasions. Finally, Claimant did not know and cannot now prove whether the box that fell and hit him contained business or personal items.

22. The initial burden of establishing an accident and injury occurred within the course and scope of employment lies with the claimant. In this instance, the Commission finds that Claimant has failed to meet his burden due to inconsistent testimony from witnesses and lack of supporting evidence.

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### **ORDER**

1. Claimant has failed to comply with the notice limitations set forth in Idaho Code § 72-701 through § 72-706.

2. Claimant has failed to prove that he suffered an accident and injury that arose out of and in the course of employment.

3. Based on the foregoing, the remaining issues are moot.

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

DATED this 18 day of April, 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 18 day of April, 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:

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\_\_\_\_\_/s/\_\_\_\_\_  
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