

May 12, 2005.

BACKGROUND

The three claims in this matter were consolidated for hearing by the Commission on August 24, 2004. IC 02-522174 is an alleged October 22, 2002, industrial accident, IC 03-002510 is an alleged February 25, 2002, industrial accident, and IC 04-007622 is an alleged June 22, 2000, industrial accident. The alleged injury in all three claims is a herniated disk at L4-5. The Referee notes the claims were filed in the reverse order of their occurrence, and that there are some discrepancies in the record on dates. For example, the October 2002 incident is listed as occurring on both the 21st and the 22nd.

ISSUES

The noticed issues to be resolved are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho 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 is entitled to reasonable and necessary medical care as provided by Idaho Code § 72-432, and the extent thereof;
5. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;

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

7. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, and the extent thereof;

8. Whether Claimant is entitled to permanent total disability pursuant to the “odd-lot” doctrine;

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

10. Whether Claimant is entitled to retraining benefits under Idaho Code § 72-450, and the extent thereof; and,

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

At the conclusion of the hearing in this matter the parties agreed issues 5 through 11 were not ripe. (Transcript, p. 167). Only issues 1 through 4 were considered by the Referee.

ARGUMENTS OF THE PARTIES

Claimant maintains he suffered a traumatic back injury in a June 22, 2000, industrial accident, and aggravated his injury in subsequent accidents occurring on February 25, 2002, and October 22, 2002. He further argues Defendants paid \$25.00 in medical benefits on one of his herniated disk claims, thereby giving him five years in which to file his Complaint and negating Defendants’ Statute of Limitations defense. Claimant also argues Defendants have presented no evidence to support their assertion his condition is pre-existing. Maintaining his condition is not stable, Claimant asks the Commission to find that he is entitled to such reasonable medical care

prescribed by his treaters including back surgery, time-loss benefits during his period of recovery, and in addition to his costs, attorneys' fees for Defendants unreasonable denial of his claim.

Defendants deny any of the three alleged industrial accidents occurred, or that Claimant's herniated disk was caused by any of the alleged accidents. They further argue Claimant failed to comply with the statutory notice and time requirements for each of the alleged accidents, and that he has failed to demonstrate, through either medical records or the testimony of his treating physician, that his herniated disk was caused by an industrial accident. Defendants ask the Commission to deny Claimant's claims for compensation.

Claimant counters that when an injury occurs on an employer's premises a presumption arises that the injury arose out of and in the course of employment, that the MRIs show the disk herniation, and that an employer's knowledge of an injury tolls the filing requirement. He seeks payment of his prior medical expenses, the surgery proposed by Dr. McDonald, and impairment and disability benefits during his period of recovery. Arguing Defendants have contested his claim without reasonable ground and that he has provided substantial and competent evidence of the nature and extent of his injury, Claimant also asks for reasonable attorneys' fees, the cost of Dr. McDonald's deposition, and other fees and costs accrued in prosecuting this matter.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his spouse, Linda Hart, of his co-worker, Robert W. Faulkner, and that of Employer, Frank B. Kaderka, taken at the January 20, 2005, hearing;
2. Claimant's Exhibits 1 through 13 admitted at the hearing;
3. Defendants' Exhibits A through C, and E through K admitted at the hearing;

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4. The deposition of Claimant taken by Defendants on July 7, 2004. Claimant's Exhibits were attached to his deposition; and,

5. The post-hearing deposition of Jeffrey D. McDonald, M.D., Ph.D., with Exhibit 1, taken by Claimant on February 14, 2005.

Defendants' objections on pp. 15 and 16 of Dr. McDonald's deposition are overruled.

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

FINDINGS OF FACT

1. Claimant began working for Employer as the body or metal man at its CDA auto body shop in June 1998. He performs all facets of the work except for painting. Claimant has worked in the trade at several shops in northern Idaho since the mid-1960s. He continued to work for Employer at the time of the hearing.

2. Employer owns the business along with his spouse. His specialty is painting, although he currently runs the business and has hired a third person to paint. Claimant and Employer had previously worked together for approximately five years at two other auto body shops in the early 1990s.

3. Claimant maintains that on June 22, 2000, he felt a pain in his back while lifting on a vehicle balanced on a jack in order to remove a jack stand from under the rear axle. He further maintains he lifted the vehicle with his left hand while bent over and removed the jack stand with his right hand.

4. Employer stated the work Claimant was performing on the vehicle was on the front

end, not the back as Claimant maintained, and that the work did not require the use of jack stands.

5. Claimant saw Bradley C. Drury, M.D., his family physician, on June 27, 2000. Dr. Drury had treated him since at least January 1997. Dr. Drury noted Claimant was being seen for “back pain” which had been present for four days. He further noted Claimant reported no trauma or injury, and that the back pain occurred approximately once per year. Dr. Drury diagnosed an acute lumbar strain and initiated conservative care including an anti-inflammatory.

6. On July 5, 2000, Dr. Drury noted Claimant continued to complain of severe back pain with right leg L5-S1 radiculopathy. X-rays taken on July 14, 2000, showed a small amount of arthritis.

7. On December 3, 2001, Dr. Drury noted Claimant was seen for left leg pain which had been present for approximately six months with no obvious trauma or injury associated with the pain. He diagnosed low back pain with left L5-S1 radiculopathy. This was the first mention of low back pain in Dr. Drury’s records since July 2000. Claimant had continued to see Dr. Drury on a regular basis during this 18 month period for his hypercholesterolemia.

8. At Dr. Drury’s request, Claimant underwent a lumbar MRI on December 11, 2001. The MRI showed a large central and left paramedian disk herniation at the L4-5 level, causing significant left lateral recess stenosis and impressing on the left L4 and L5 nerve roots.

9. After reviewing the result of the MRI with Claimant, Dr. Drury referred him to Jeffrey D. McDonald, M.D., Ph.D., for a neurosurgical consultation.

10. Claimant acknowledged he never told Dr. Drury his back condition was work related. (Transcript, p. 123). He also denied having any right-sided leg problems.

11. Claimant saw Dr. McDonald, a CDA neurosurgeon, on January 18, 2002. Dr.

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McDonald noted Claimant reported that approximately one year earlier, with no precipitating event, he began experiencing left hip pain and numbness which gradually progressed through his left lateral thigh to his calf. He further noted the symptoms increased while walking or carrying heavy objects. Dr. McDonald diagnosed left radiculopathy secondary to a left L4-5 herniated disk. Claimant decided to proceed with conservative care rather than surgical intervention. Dr. McDonald prescribed an anti-inflammatory and physical therapy.

12. Claimant maintains he aggravated his back condition on February 25, 2002, while trying to lift the paint room roll-up door at Employer's shop with Robert W. Faulkner, a co-worker. The door was frozen to the floor; Mr. Faulkner was the shop's painter.

13. Mr. Faulkner stated he asked Claimant to help him lift the frozen door and that he observed Claimant grabbing his back, and that it was obvious to him Claimant had hurt his back while helping him lift the door.

14. A Form 1 was filled out and signed by Claimant and Employer on August 29, 2002. It indicated Claimant had been injured on February 5, 1997, after falling off a frame machine while working for a previous employer, and that he had also been injured on February 25, 2002, while trying to lift a door frozen to the floor. The injury on the Form 1 was listed as a herniated disk at L4-5. The June 22, 2000, incident was not mentioned.

15. Employer stated this was the first time he had heard of the February 25, 2002, incident, and that the Form 1 was filled out the same day Claimant told him about it.

16. The previous employer was no longer in business. Claimant acknowledged not reporting his right hip injury to that employer.

17. Of note, on the intake form Claimant filled out prior to seeing Dr. McDonald on

January 18, 2002, he indicated that he had been injured at work on February 5, 1997, and on February 25, 2002. The dates and places of employment match the Form 1 previously filled out by the parties.

18. Claimant returned to Dr. McDonald on October 15, 2002. Dr. McDonald noted Claimant's low back pain and left sciatica was increasing in severity. He also noted physical therapy had not helped Claimant, and that he now wished to proceed with surgery. Dr. McDonald had earlier recommended a left L4-5 microdiskectomy.

19. Claimant maintains he aggravated his back condition a second time on October 22, 2002, while helping a co-worker, Scott Johnson, move an old commercial soft drink cooler into the paint room. He filled out a Form 1 indicting that he had been injured "over & over," suffering a herniated disk at L4-5 and citing the two dates in the prior Form 1 filled out by the parties. Employer, however, did not sign this particular Form 1; it was filed with the Commission by Claimant on June 24, 2003.

20. At Dr. McDonald's request, Claimant underwent a second lumbar MRI on October 23, 2002, in preparation for surgery. The MRI showed a large left paramedian disk herniation at L4-5 with significant compression of the left side of the thecal sac and exiting nerve root. It was also noted the herniation might have increased in size since the December 2001 MRI.

21. On October 30, 2002, Claimant prepared a statement, which was signed by Mr. Faulkner, concerning the February 25, 2002, incident. The statement indicated Claimant had herniated his L4-5 disk while trying to lift the door, and that Employer was aware of the incident.

22. Mr. Faulkner stated he really did not know that Claimant herniated a disk, or whether he had actually told Employer that he had injured himself lifting the door.

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23. Dr. McDonald reviewed the MRI with Claimant on November 1, 2002, and scheduled surgery for November 14, 2002.

24. Surety paid Dr. Drury \$25.00 for copying Claimant's medical records on November 1, 2002. Surety's records indicate it was aware of both 2002 incidents.

25. Claimant filed a Complaint with the Commission on February 25, 2003, for his alleged February 25, 2002, injury. There is no indication the Form 1 Claimant and Employer completed on August 29, 2002, was filed with the Commission.

26. Claimant filed a Complaint with the Commission on June 18, 2003, for his alleged October 22, 2002, injury. The Form 1 filled out by Claimant was filed with the Commission on June 24, 2003.

27. Claimant filed a Complaint with the Commission on July 1, 2004, for his alleged June 22, 2000, injury. No Form 1 was prepared by either party for this claim.

28. Claimant stated he gave Employer verbal notice of all three incidents and that Employer noticed his back problems.

29. Employer stated he had not noticed any reduction in Claimant's ability to perform his job over the years, that he was only originally aware of the February 25, 2002, incident in which he and Claimant filled out a Form 1, and that the only time Claimant had ever called in unable to work due to back pain was the Monday prior to the hearing.

30. Claimant acknowledged Dr. McDonald was unaware of any of his alleged accidents. (Transcript, p. 136).

31. At his post-hearing deposition, Dr. McDonald indicated Claimant had not told him of any event which might have precipitated his L4-5 disk herniation, that he had no causation opinion

on the herniation, and that it would be speculative on his part to link the herniation to the June 22, 2000, incident. He acknowledged asking Claimant questions about the onset of his symptoms in order to help diagnosis his condition during his first visit.

32. Claimant's testimony is at odds with the medical records, and at times, evasive and confrontational; he is not a credible witness.

DISCUSSION

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Injury/Accident (Causation).** 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).

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). Magic words are not necessary to show a doctor’s opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). The Idaho Supreme Court has long held that an employee may be compensated for the aggravation or acceleration of his/her pre-existing condition, but only if such aggravation results from an industrial accident as defined by Idaho Code § 72-102 (17). *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 132, 879 P.2d 592, 595 (1994).

Assuming arguendo Claimant either herniated his L4-5 disk or aggravated his low back condition in any of the three incidents he characterizes as industrial accidents, his case fails for lack of a medical opinion causally linking the herniated disk to one of the incidents. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Claimant has not done so. At his post-hearing deposition, Dr. McDonald opined, in direct response to a question from Claimant seeking a causal link between his herniated disk and the alleged June 22, 2000, industrial injury, “[i]t would be speculative on my part to link those two in causality at this date and time.” (Deposition, p. 15). Dr. McDonald had examined Claimant and recommended the surgery he now seeks. Moreover, Claimant acknowledged he did not inform either Dr. Drury or Dr. McDonald that he had been injured in an industrial accident. The Referee concludes Claimant has not demonstrated that he either herniated his L4-5 disk in an industrial accident, or aggravated his low back condition in another accident. There has been no showing of

medical causation. Thus, Claimant's claim for compensation fails.

2. **Remaining Issues.** Since causation has not been demonstrated, the Referee further concludes the remaining issues in this matter are moot.

CONCLUSIONS OF LAW

1. Claimant has not demonstrated that he either herniated his L4-5 disk in an industrial accident, or aggravated his low back condition in another accident. There has been no showing of medical causation. Claimant's claim for compensation fails.

2. The remaining issues in this matter are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 25th day of May, 2005.

INDUSTRIAL COMMISSION

/s/
Robert D. Barclay
Chief Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 2005, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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kk

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WARD C. HART,)	
)	
Claimant,)	IC 02-522174
)	IC 03-002510
v.)	IC 04-007622
)	
FRANK C. KADERKA, dba)	ORDER
NORM'S DOWNTOWN AUTO BODY,)	
)	Filed
Employer,)	June 10, 2005
)	
and)	
)	
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Robert D. Barclay submitted the record in the above-entitled matter, together with his findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with the recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant has not demonstrated that he either herniated his L4-5 disk in an industrial

accident, or aggravated his low back condition in another accident. There has been no showing of medical causation. Claimant's claim for compensation fails.

2. Based on the above conclusions, the remaining issues before the Commission in this matter are moot.

3. The Complaints are hereby DISMISSED with prejudice.

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

DATED This 10th day of June, 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 10th day of June, 2005, a true and correct copy

of the foregoing **Order** was served by regular United States Mail upon each of the following:

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