

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JUANA M. OLIVERA, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 BLEDSOE CONSTRUCTION, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 LIBERTY NORTHWEST INSURANCE )  
 CORPORATION, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 04-007009**

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

Filed  
July 15, 2005

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Boise on March 15, 2005. Claimant, Juana M. Olivera, was present in person and represented by Daniel A. Miller of Boise; Defendant Employer, Bledsoe Construction, Inc., and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Monte R. Whittier of Boise. Susan Evans acted as Spanish interpreter. The parties presented oral and documentary evidence. This matter was then

continued for the submission of briefs and subsequently came under advisement on May 30, 2005. There were no post-hearing depositions.

### **BACKGROUND**

Defendants filed a Motion to Strike on May 18, 2005, asking the Commission to strike a March 18, 2005, letter from Claimant's treating physician to her attorney, and for attorney's fees. The letter in Question was attached to Claimant's Rebuttal Brief. Defendants argue submission of the letter is in violation of JRP Rule 10. Claimant did not respond to Defendants' Motion, but in her Brief indicated the letter was submitted to counter causation arguments advanced by Defendants in their Responsive Brief. Defendants did not address Claimant's argument in their Motion. The issue of whether Claimant's low back condition is casually related to the alleged industrial accident is not before the Commission; the parties expressly stipulated the issue was reserved for a later date at hearing.

The Referee finds the letter was produced after the hearing in this matter and was not submitted in accordance with Rule 10. Thus, Defendants' Motion to Strike is **GRANTED** to the extent the letter and references to it in Claimant's Rebuttal Brief are stricken from the record before the Commission. Defendants' request for attorney's fees is **DENIED**; the purpose of the letter was to rebut assertions made by Defendants on an issue not before the Commission.

### **ISSUES**

At hearing, the parties stipulated the following issues would be decided:

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; and

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

2. Whether the injury was the result of an accident arising out of and in the course of employment.

The remaining noticed issues of whether Claimant suffered a personal injury arising out of and in the course of employment, whether she is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and whether she is entitled to temporary partial and/or temporary total disability benefits were reserved for a later time. (Transcript, pp. 6-8).

### **ARGUMENTS OF THE PARTIES**

Claimant maintains she began to experience low back pain while lifting wood pallets on or about January 26, 2004, and that she reported the incident to her group leader, Hector Prado. She further maintains, that while helping Mr. Prado push a cart filled with trash, she twisted her back, felt more pain, and reported that incident to Mr. Prado, but that he ignored her reports and her requests to see a physician. At the time, she was a laborer engaged in construction clean-up. Claimant argues Defendants' claim they did not receive written notice of any accident is without merit since they had actual notice.

Claimant further argues she informed Tom Willis, her supervisor, on April 2, 2004, that she had injured her back and needed to see a physician, that Mr. Willis agreed, and that she was seen at a local emergency room. She also argues she consistently informed her care providers that she was injured at work, and that her credible testimony, supported by her spouse, should be accepted.

Defendants counter Mr. Prado was not aware Claimant's complaints were job-related until April 2, 2004, when she spoke to Mr. Willis, and that when she told Mr. Willis that her pain was work-related, he sent her to a local hospital. They further argue the medical chart notes and statements made by Claimant more than likely show her hard work resulted in the gradual onset of

symptoms from her pre-existing degenerative disk disease and foraminal stenosis, but that there was no specific or inciting event. Defendants also argue Claimant did not approach Mr. Willis until she began having problems with her personal health insurance paying benefits for care unrelated to her back condition. They argue that because Claimant failed to timely report her alleged accident, it is impossible for them to determine whether her degenerative disk disease was aggravated by a specific event, thereby irrevocably prejudicing them. Defendants ask the Commission to find that Claimant failed to give adequate notice of any alleged accident, and that she has also failed to demonstrate that an accident occurred on January 26, 2004.

Claimant replies that her back pain occurred quickly, not slowly as Defendants suggest, and that she has consistently related her back pain to her work. She maintains the real issue here is whether the Commission believes her, or whether it believes Mr. Prado, that Defendants did not follow the proper procedures here, and in fact never filed a Form 1 with the Commission.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant and her spouse, Raul Olivera, of her group leader, Hector Prado, and that of her supervisor, Tom Willis, taken at the March 15, 2005, hearing; and
2. Defendants' Exhibits A through P admitted at the hearing.

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 was hired by Employer on February 3, 2003, to work as a remodel janitor

performing construction clean-up in Building 24 on the Micron campus in Boise. She basically removed the debris left by carpenters and electricians. The work included mopping, vacuuming, removing large bags filled with trash to a dumpster, and removing discarded wooden pallets. The trash bags were generally in containers on wheels and dumped down into the dumpster.

2. Claimant maintains that during the last week of January 2004, she began feeling pain in her back while lifting approximately 20 wooden pallets in the building's basement; she had been directed to remove the pallets. The pallets were left behind by construction crews. Claimant further maintains she reported the incident to her group leader, Hector Prado. Employer assigned five or six janitor laborers to a group leader. Each group would be given specific tasks to perform.

3. Claimant also maintains she asked Mr. Prado for a lifting belt, but that he refused. She further maintains he told her to see a physician on her own. Mr. Olivera purchased a lifting belt for his spouse.

4. While Mr. Prado recalled Claimant telling him she did not feel good and that she was using an ointment, he denied she ever told him that she injured her back at work, or that she was injured in an accident at work. He also denied Claimant asked him for a lifting belt, but acknowledged she had asked if she could wear one. Employer's policy was not to provide such belts.

5. Claimant saw Raquel Croitoru, M.D., on February 12, 2004, for a new patient consultation. Claimant reported several areas of concern, the primary one being abdominal pain; she had concerns over having cancer. There were no specific references to either shoulder or low back pain in the chart notes.

6. After a weekly safety meeting held on Friday, April 2, 2004, Claimant reported to Mr.

Prado that she was having problems with her health insurance company in that they would not pay an outstanding medical bill, and asked to talk to her supervisor, Tom Willis. During the conversation, Claimant reiterated her concerns about the bill not being paid, and also mentioned that her back and shoulders hurt while she was working. Mr. Willis asked Claimant if she thought the pain was work related, she stated it was, and he directed her to report to St. Luke's Occupational Health Services (SLOHS) in Meridian; due to her late afternoon arrival, they redirected her to the hospital's emergency room.

7. Claimant was seen in the emergency room by J. Gary Brandecker, M.D. She complained of back pain with radiation down her left leg to her big toe. Dr. Brandecker's notes indicate the pain had been present for several months and that her pain was worse when she was working. He opined she had low back pain with radicular symptoms involving the left leg, and that her pain was musculoskeletal in etiology. Dr. Brandecker prescribed pain medications, took her off work for five days, and referred her to Joseph M. Verska, M.D., for an evaluation. The handwritten intake chart note indicated the pain had been present for three months and that Claimant had no memory of an injury.

8. Claimant provided Employer with Dr. Brandecker's work release; she was told her medical expenses would not be covered unless she reported to SLOHS, Employer's preferred provider.

9. Claimant maintains that approximately four weeks prior to speaking to Mr. Willis, she was helping Mr. Prado move a cart filled with construction debris, that he was pushing the cart too hard, and that in order to stop the cart and keep the debris from falling on a Micron employee, she grabbed the cart, causing the pain in her back to increase to the point where she could no longer

continue working. She further maintains she told Mr. Prado about the pain, but that he would not listen and told her that her pain was age-related. Claimant could not remember the exact date of the incident, but recalled some of the wood debris did fall off the cart and landed on top of the Micron employee who was walking alongside the cart, and that he required medical care. At another time, Claimant indicated the cart incident occurred some one or two weeks after the pallet incident.

10. Mr. Olivera stated he and his spouse discussed their daily activities with each other on a nightly basis. He recalled Claimant telling him about an incident involving a cart loaded with material, that she had grabbed the cart to prevent it from hitting a wall, and that was when she started having problems with her back.

11. Mr. Prado maintained Claimant never told him that she injured her back while pushing a cart.

12. Claimant also maintains she took a week off with her vacation days prior to speaking to Mr. Willis, but that the rest did not improve her back condition. Employer's records show she took leave from February 23, 2004, through February 27, 2004.

13. Claimant saw Ralph M. Sutherlin, D. O., on Monday April 5, 2004, at SLOHS. On this occasion, SLOHS provided an interpreter; at other times, Mr. Olivera translated. Dr. Sutherlin noted Claimant reported the onset of low back pain some three months previously with numbness and pain radiating down her left leg to her foot, that she felt worse while working, and that she denied any precipitating factor or any specific injury. He diagnosed low back pain with radiculopathy, ordered a MRI, and issued work restrictions which equated to light work. Dr. Sutherlin further opined, that at the present time, he could not absolutely say Claimant's condition was work-related. He added there was a possible, but not probable association.

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7**

14. Mr. Willis prepared a First Report of Injury on April 5, 2004, and forwarded it to Surety. The Report indicated Claimant had spoken to him on April 2, 2004, that she reported experiencing shoulder and back pain since November 2003, that she had seen her personal physician about the pain, that her medical insurance had denied any payment because they contended the condition was pre-existing, that she now thought the pain was work-related because of her repetitive lifting and mopping, and that she wanted to see a physician.

15. Neither Employer nor Surety filed a Form 1 with the Commission.

16. Employer reassigned Claimant to Steve Cole, another group leader, after Dr. Sutherlin released her to light-duty work. According to Claimant, she was told Employer would call her if work was available within her restrictions. Claimant maintains she was never contacted. Employer maintains Claimant was supposed to call Mr. Cole on a daily basis to see if light duty work was available. According to Employer, she did not contact Mr. Cole, and they assumed she quit effective June 2, 2004.

17. Claimant's final paycheck was issued on April 21, 2004. Employer's records showed she had worked approximately 22 hours between April 4, 2004, and April 17, 2004.

18. The lumbar MRI ordered by Dr. Sutherlin was performed at St. Luke's in Meridian on April 9, 2004. Steven V. Marx, M.D., concluded Claimant had degenerative changes at L3-4 through L5-S1 with central and foraminal narrowing.

19. Claimant returned to Dr. Sutherlin on April 13, 2004, reporting pain in her upper and lower back, with tightness in the lower back. He opined the MRI did not reveal any acute etiology for Claimant's pain, but showed she had degenerative changes. Dr. Sutherlin opined her symptomology was secondary to foraminal narrowing on the left aspect with possible impingement

of the L5 nerve root. He diagnosed lumbar pain, likely due to degenerative disk disease, and a trapezius contracture secondary to tension/stress and upper back muscular contractures.

20. At Dr. Sutherlin's request, Claimant underwent physical therapy at Intermountain Physical Therapy & Hand Rehabilitation between April 14, 2004, and April 27, 2004. The initial chart notes indicate Claimant, approximately three months earlier, had been doing a lot of lifting at work when she noticed pain in her lower back.

21. Claimant saw Dr. Sutherlin for the third time on April 27, 2004. On the intake form she stated she began having back pain at work on January 26, 2004. Claimant further indicated the building in which she was cleaning was being remodeled, and that she was required to lift heavy pallets.

22. At Dr. Brandecker's request, Claimant saw Joseph M. Verska, M.D., on April 28, 2004. On her intake papers, Claimant noted her current episode of neck and back pain had a gradual onset, that it was a work-related injury, and that it had occurred while lifting a full garbage bag out of a container. She indicated the 48 gallon bag weighed between 40 and 50 pounds. Claimant also attributed her condition to repeated lifting.

23. Dr. Verska's notes indicate Claimant's pain started in January 2004 while lifting a full garbage bag out of a container, and that she had been doing it repetitively. He opined she had mechanical low back pain, that the MRI showed some moderate to severe left-sided foraminal stenosis at L5-S1, that there were no indications for operative intervention, and that she might respond to steroid injections. Dr. Verska then referred her to William G. Binegar, M.D., for a S1 nerve block. He further noted he was not taking Claimant off work; he left that to her treating physicians.

24. Dr. Binegar performed left S1 transforaminal epidural steroid injections on Claimant on May 25, 2004, and on June 1, 2004. The injections did not provide any relief.

25. Claimant returned to Dr. Verska complaining of increased pain and symptoms consistent with L5 radiculopathy on July 27, 2004. He noted rest and the steroid injections had not improved Claimant's condition. Dr. Verska then recommended a microdiscectomy decompressing the L5 nerve root.

### **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. **Accident.** The Idaho Workers' Compensation Law defines an "accident" 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. Idaho Code § 72-102 (17) (b).

When speaking with Mr. Willis on April 2, 2004, Claimant reported her belief that her back pain was work-related; no specific precipitating incident was mentioned. Dr. Brandecker noted she could not recall any specific incident which precipitated her back pain, but that it had been present for several months. Dr. Sutherlin noted she reported the onset of low back pain some three months earlier without any precipitating incident. The physical therapy notes indicate she noticed pain in her low back while lifting at work. Dr. Verska noted her pain began while lifting a full garbage bag out of a container. Each physician had asked Claimant how her pain began.

Mr. Olivera testified Claimant told him she hurt her back trying to stop the cart. Claimant testified she hurt her back lifting the pallets. We have at least four scenarios here: 1) the gradual onset of pain while working, 2) the pallet incident, 3) the cart incident, and 4) the garbage bag incident. In addition, there is some indication in the record her low back pain was related to mopping. The Referee finds Claimant has not demonstrated an accident as defined by Idaho Code § 72-102 (17) (b) occurred on or about January 26, 2004. To believe Claimant's testimony at hearing, one would have to ignore her prior statements. She has simply advanced too many scenarios. Thus, Claimant's claim for compensation fails.

2. **Remaining Issue.** Since Claimant has not demonstrated that an accident occurred, the Referee concludes the notice issue is moot.

#### **CONCLUSIONS OF LAW**

1. Claimant has not demonstrated an accident as defined by Idaho Code § 72-102 (17) (b) occurred on January 26, 2004. Thus, her claim for compensation fails.
2. The remaining notice issue is 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 30th day of June, 2005.

INDUSTRIAL COMMISSION

/s/  
Robert D. Barclay

Chief Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of July, 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:

DANIEL A MILLER  
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BOISE ID 83707-6358

kk

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

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JUANA M. OLIVERA,	)	
	)	
Claimant,	)	<b>IC 04-007009</b>
	)	
v.	)	<b>ORDER</b>
	)	
BLEDSON CONSTRUCTION, INC.,	)	Filed
	)	July 15, 2005
Employer,	)	
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE	)	
CORPORATION,	)	
	)	
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 an accident as defined by Idaho Code § 72-102 (17) (b) occurred on January 26, 2004. Thus, her claim for compensation fails.

2. The remaining notice issue is moot.

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

DATED This 15th day of July, 2005.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Thomas E. Limbaugh, Chairman

\_\_\_\_\_  
James F. Kile, Commissioner

/s/ \_\_\_\_\_  
R. D. Maynard, Commissioner

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of July, 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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kk

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