

CONTENTIONS OF THE PARTIES

Claimant contends he suffered a compensable accident at work and as a result has a herniated lumbar disc. He is entitled to benefits. Defendants unreasonably denied his claim.

Defendants contend Claimant did not suffer a compensable accident. Alternatively, if he did, it did not cause the condition for which Claimant seeks benefits. They reasonably denied the claim. They question Claimant's credibility in describing the "accident."

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, Surety adjustor Todd Blake, and orthopedic surgeon Robert Colburn, M.D.;
2. Claimant's Exhibits A – P;
3. Defendants' Exhibits A – H;
4. Post-hearing depositions of treating physicians Donald J. Greggain, M.D., and Kurt A. Bailey, D.C.; and
5. Exhibit N-1 submitted post hearing by stipulation to augment the record.

After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant worked for Employer since 1999. Mostly, he drove a Hyster. He also handled wood products by hand.

2. On March 9, 2004, Claimant experienced an onset of back pain which increased during his shift. He reported it to a supervisor and sought medical care. On March 18, 2004, Claimant filed a Form 1.

3. Claimant visited family practice physician Don Greggain, M.D., on March 11, 2004. He reported back pain radiating into the left leg. He described prior back injuries and occasional chiropractic care. He denied recollection of any injury "other than the work of the

yardlift that he operates and jostling; felt a pain that radiated from mid lower back to the (left) shoulder and down the (left) knee and calf through the buttock.” Dr. Greggain ordered an MRI.

4. The MRI (repeated with addendum) showed degeneration and a herniated L5-S1 disc. X-rays also taken March 17, 2004, showed degeneration in the disc and posterior facet at L5-S1.

5. On March 29, 2004, Claimant filed a short term disability claim and checked “yes” to the question “Did your work cause this condition?” To the question “How did injury happen?” Claimant wrote, “driving lift truck and performing regular duties at work.” Claimant further noted by checking boxes that he had filed a workers’ compensation claim which had been denied. The physician’s portion of this disability claim form was completed on April 2, 2004, checking “yes” to the question, “Is condition due to injury or illness arising out of employment?” It was signed by Dr. Greggain’s partner, Jayme Mackay, M.D., “for” Dr. Greggain. On May 4, 2004, Dr. Mackay completed a statement of continuing disability which checked both “yes” and “no” boxes with a question mark nearer the “no” box in response to the question, “Is condition due to injury or illness arising out of employment?”

6. On April 2 and May 4, 2004, Claimant visited Dr. Mackay for continuing symptoms.

7. An insurance claim form from Dr. Greggain’s office dated March 12, 2004, contained checked boxes indicating Claimant’s condition was related to employment and “other accident,” but claim forms dated April 2 and 7, 2004, contained checked boxes indicating Claimant’s condition was not related to employment or “other accident.”

8. On a date between March 18 and April 8, 2004, Claimant described the event as follows:

On March 9th I was driving the planer lift truck on swing shift, feeding 16’ 2X10

on #2 planer and 16 [18'?] 2X4 on #4 planer. The pace of the work was very fast and I had to retrieve the loads from the yard, throw the spacer blocks (stack) and place them on the planer. Shortly after first break I started to experience some tenderness in my lower back.

9. In response to an April 13, 2004 written inquiry from adjustor Todd Blake, Dr. Greggain circled “No” to the question, “On a more probable than not basis, do you feel that Mr. McAtee sustained an injury on March 9, 2004?” and elaborated, “I believe this is a culmination of longstanding mechanical and degenerative changes that finally led to disc failure and nerve entrapment.”

10. On April 20, 2004, Surety formally denied Claimant’s claim.

11. On April 22, 2004, Dr. Greggain corresponded with orthopedic surgeon Gregory D. Dietrich, M.D., and stated, “He recalls no specific injury, just the wear and tear of years working on heavy equipment and the jostling and vibration of the same.”

12. On May 7, 2004, Dr. Dietrich noted a history of stiffness and soreness increasing during a shift. He recommended conservative treatment, including physical therapy. After a May 18 visit, Dr. Dietrich recommended an epidural steroid.

13. Claimant attended four sessions of physical therapy in May 2004 then did not appear for his scheduled appointments. Claimant testified the physical therapy made his back feel worse.

14. Pain consultant, Craig Flinders, M.D., performed epidural steroid injections. He recommended surgery.

15. On August 5, 2004, Dr. Dietrich recommended surgical decompression and spinal fusion.

16. Dr. Dietrich completed a statement of continuing disability on August 10, 2004. He checked “no” to the question “Is condition due to injury or illness arising out of

employment?”

17. Robert C. Colburn, M.D., evaluated Claimant at Claimant’s request. He noted, Claimant “now remembers that he hit a bump, which was a drain set rather deep in the floor, and this [sic] his seat bottomed out.” Dr. Colburn opined:

I recognize that there is controversy over the industrial relation and there has been some variation in the recorded description on the injury and the events of 03/09/04. However, it is evident in my opinion after reviewing these various reports that there was an acute change in his condition on 03/09/04, which occurred during the time that he was performing his work activities. It is also clear that Mr. McAtee did have preexisting back pain problems but no history of the radicular symptoms were noted in the records that I reviewed.

18. Upon receipt and review of the chiropractic records, Dr. Colburn acknowledged the existence of evidence of prior complaints of radicular symptoms but did not otherwise modify his opinion.

19. Dr. Greggain testified that while he did not personally check the boxes questioning an industrial relationship on the claim forms, his opinion was that Claimant’s disc herniated as a natural progression of his degenerative disease without a specific precipitating event at work.

20. Claimant’s last chiropractic visit before March 9, 2004 occurred on December 12, 2003. Claimant reported lumbosacral pain with radiation into his left leg. Dr. Bailey did not observe radiation of pain on examination. In post-hearing deposition, Dr. Bailey opined Claimant did not show symptoms of a herniated disc on that date. He confirmed Claimant visited for infrequent chiropractic care which Dr. Bailey considered to be prompted by muscular soreness. Claimant had also reported radiating pain into his left leg on August 26, 2002, which Dr. Bailey could not objectively confirm. Although Claimant reported “sciatica” on November 12, 1999, Dr. Bailey could not objectively confirm this on examination and opined Claimant did not suffer from true sciatica then.

DISCUSSION AND FURTHER FINDINGS OF FACT

21. **Accident and Causation.** A claimant must prove he was injured as the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (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, 890 P.2d 732 (1995). A preexisting disease or infirmity does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as it finds him. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

22. Here, the medical experts agree Claimant suffers from degenerative disc disease and a herniated disc. They agree that, in general, his work contributed to the development of his degenerative disc disease. The medical experts disagree about whether the herniated disc was caused by an event at work.

23. The record does not include X-rays or MRIs taken before March 9, 2004, if any exist. Claimant had longstanding back complaints which included complaints of intermittent radiating pain.

24. Claimant's testimony about what happened and whether his symptoms were acute is without other support of record. It provides the only link between the herniated disc and March 9, 2004. Claimant's initial reports to his doctors do not support a finding of a compensable accident. Some specific event or sudden onset of pain, at minimum, is required. *See, e.g.,* Page v. McCain Foods, Inc., 141 Idaho 342, 109 P.2d 1084 (2005); Spivey v. Norvatis

Seed, Inc., 137 Idaho 29, 43 P.3d 788 (2002); Wynn, *supra*. The description Claimant offered Dr. Colburn and Claimant's testimony offered at hearing differed substantially from the vague and general descriptions he offered for the first year after the alleged event. Claimant's recent "improvement" upon his description of the alleged event is not credible.

25. In the face of prior complaints of infrequent radiating pain and Claimant's willingness to enhance his testimony, Claimant failed to show his condition was caused by a compensable accident.

26. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant failed to show his herniated disc was caused by a compensable accident.
2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusion of Law as its own and issue an appropriate final order.

DATED this 7TH day of April, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18TH day of APRIL, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Ned A. Cannon
508 Eighth Street
Lewiston, ID 83501

Scott Chapman
P.O. Box 446
Lewiston, ID 83501

db

/S/ _____

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

DATED this 18TH day of APRIL, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Thomas E. Limbaugh, Chairman

/S/ _____
James F. Kile, Commissioner

Participated but did not sign.

R. D. Maynard, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 18TH day of APRIL, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Ned A. Cannon
508 Eighth Street
Lewiston, ID 83501

Scott Chapman
P.O. Box 446
Lewiston, ID 83501

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/S/ _____