

course of his employment;

3. Whether the condition or conditions for which Claimant seeks benefits were caused by the industrial accidents;

4. Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;

b. Temporary partial and/or temporary total disability benefits (TPD/TTD);

and

c. Attorney fees.

CONTENTIONS OF THE PARTIES

Claimant asserts that he sustained injuries to his back on January 26 and January 31, 2005, while performing work for Employer, and that he reported the injuries to Employer on the dates of occurrence. In any event, Employer had actual knowledge of a work injury within the statutory reporting time. Claimant sought medical care for his injuries, and has not been able to work since January 31, 2005. He is entitled to medical care, TTDs or TPDs as appropriate from the date of injury, and an award of attorney fees because of Defendants' unreasonable denial of his claim.

Defendants dispute both that Claimant had work accidents and that he sustained injuries as a result thereof. Defendants assert that even if Claimant had been injured as a result of a work-related accident, he failed to report those injuries to Employer in a timely fashion as required by statute. Defendants argue that even if the Commission finds there was an accident and injury, Claimant was medically released from work for only one week in March 2005, and no physician imposed work restrictions. Finally, Defendants assert that their initial and continued denial of Claimant's claim was proper, so Claimant is not entitled to an award of

attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Randy Jones, taken at hearing;
2. Claimant's Exhibits 1 through 17, admitted at hearing;
3. Defendants' Exhibits A through K, admitted at hearing;¹ and
4. The post-hearing deposition of D. Wade Davis, D.C.

All objections made during the post-hearing deposition of Dr. Davis are overruled. After having considered all 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. At the time of hearing, Claimant was 31 years of age, and resided in Burley, Idaho. Claimant has a lengthy but somewhat sketchy history as an itinerant worker starting about 1992. He was employed in a variety of jobs with a number of different employers in Wyoming, Idaho, and Nevada. Claimant began working as a welder in the mid to late 1990s and thereafter most of his work involved welding.

2. Employer is the owner of Ross Manufacturing in Burley, Idaho. The company, in business for thirty years, manufactures truck beds, repairs farm equipment, and builds stock tanks. In addition to the owner, the business may have from one to three additional employees, depending upon the amount of work available. Employer hired Claimant on April 12, 2004, as a welder and general shop hand. Employer paid Claimant \$8.50 per hour. Work hours were Monday through Friday from eight o'clock a.m. to six o'clock p.m. with an hour for lunch.

¹ Subsequent to hearing, the parties stipulated to substitute a slightly revised Exhibit K for the exhibit offered and admitted at hearing.

Saturday work was also sometimes required. During the time that Claimant worked for Employer, the only other employee was Miles Witt, who had worked for Employer off and on for twenty years.

3. Initially, Claimant was a good worker—coming to work on time, and working however long Employer needed him. As time went on, his work ethic deteriorated. He showed up late, left early, and took long lunch breaks. Some days he didn't show up at all. As Randy Jones testified, “he came to work enough to not fire him.”² Tr., p. 107. Jones also had to send Claimant home on occasion because he showed up smelling of alcohol, or “wasn't all there.” *Id.*

4. Claimant testified that on Wednesday, January 26, 2005, he was fabricating a watering trough from pre-cut components. When he squatted down to roll the trough over and onto a stand so he could finish welding it together, he felt a sharp pain from his mid-back through his right buttock and leg. Claimant testified that this occurred just before the lunch break. Claimant further testified that when he saw Employer about twenty minutes later he told him about the accident and said he needed to see a chiropractor; Employer told him to go get treatment. Claimant testified that he left work about noon that day but was unable to get in to see a chiropractor. Claimant stated at hearing that he went home, and on Thursday, January 27, he could not get out of bed so he called Employer and reported he could not work. Claimant first saw Dr. Davis on Friday, January 28. Claimant testified that he borrowed \$50.00 from Employer to pay for his visit to Dr. Davis.

5. On his first visit to Dr. Davis, Claimant reported “right sided mid back pain with rib pain, neck pain with tingling in the hand and headaches and lower back pain with right leg

² Mr. Jones was an unusually tolerant employer, and seemed to take it as a given that employees will have attendance problems and that he will have a lot of turnover. Additionally, he often made cash loans to his employees when they were short of funds between paychecks, expecting to be repaid when the employee cashed their payroll check.

numbness to the foot,” with onset when he rolled the watering trough he was fabricating. Defendant’s Ex. E, p. 30. He reported a history of alcoholism on his new patient information. Dr. Davis performed a comprehensive chiropractic exam and made a number of findings. Although his chart note includes a lengthy section entitled “Assessment,” it was not until his deposition that his actual diagnosis was made clear:

. . . lumbar segmental dysfunction with sciatica or sciatic pain, which could also be a type of neuritis or neuralgia; 739.1, which is cervical segmental dysfunction with associated headaches . . .

Dr. Davis Depo., p. 15. Dr. Davis’s treatment included percussion, moist heat, massage, and extensive manipulation. He advised using ice for fifteen minutes every two hours and to return on Monday.

6. Claimant did not work on Saturday, January 29 or Sunday, January 30. He returned to work on Monday, January 31. Claimant testified that at about 8:30 that morning, he and Miles Witt were unloading steel off of a delivery truck. The two men were attempting to slide twenty-foot steel shaft from the Hyster into the storage rack when one end of the steel shaft dropped, forcing Claimant to the ground. Claimant testified that the incident ‘put my back right out again, and I couldn’t, couldn’t hardly move.’ Tr., p. 27. The pain was in the same location as his January 26 injury. Claimant testified that he told Employer about the incident after he and Mr. Witt finished unloading the steel from the delivery truck:

Q. [By Mr. Peterson] Did you tell Mr. Jones about it on that day?

A. Yes.

Q. And what did you tell him?

A. Well, it come out a little weird, because, as I was walking back through the shop, and we’d, we’d got rid of the, we was signing off the, the truck driver, so he could go do his job, I was coming through the shop, and he was all, “Did you hurt yourself again?”

Q. And who is “he”? [sic]

A. Randy Jones. And it was kind of smart aleck, you know, and – and I said, “Yeah, as a matter of fact, I did.”

And I just went over to my job and worked that day out. And I mean, that was all that was said. It was it was really unpleasant.

Id., at pp. 28-29.

7. Claimant returned to Dr. Davis for follow up on January 31. He reported that he was feeling better, “about 60%” and was “still having some right sided hand numbness but the leg is no longer numb. The rib also is much better today with no difficulty breathing.” Defendants’ Ex. E, p. 37. The “Objective,” “Assessment,” and “Plan” portions of Dr. Davis’s chart note for January 31 are, with the exception of the recommended use of ice, identical to the chart note for January 28.

8. In his deposition and on cross exam during the hearing, Claimant testified that he did not return to work for Employer after January 31, 2005, because of his pain. Claimant stated that he never told Employer that he was not returning to work, but he did call Employer every day or nearly every day until he learned that his claim was denied. At the time he stopped working, Claimant owed Employer \$80.00 for personal loans.

9. Time cards for Claimant showed that he worked a full day on January 26, and a full day on February 2, 2005. Claimant was not paid for his work on February 2.

10. Claimant continued to treat with Dr. Davis. At his February 4 appointment, Claimant told Dr. Davis about the second accident involving the steel shaft. Once again, the “Objective,” “Assessment,” and “Plan” portions of the chart note were identical in all material respects to the chart note for January 31.

11. Claimant returned to Dr. Davis on February 7. He reported increased pain following his last visit. In addition to his standard chart note verbiage, Dr. Davis wrote that he sent Claimant to Cassia Regional Medical Center (CRMC) for x-rays of his thoracic spine and would refer him to Joe Peterson, M.D., for a medical opinion if there was no improvement in his

condition.

12. Claimant had thoracic spine x-rays at CRMC February 8. They showed an old compression fracture at T11, but were otherwise normal. Dr. Davis was not listed as the ordering physician, and there is no evidence he ever saw the thoracic x-rays done on February 8, as they are not mentioned in his chart notes of February 9. Dr. Davis referred Claimant to Dr. Peterson for a medical opinion.

13. Claimant returned to Dr. Davis on February 24 reporting that Dr. Peterson would not see him. Dr. Davis repeated his standard exam, assessment and treatment.

14. On March 1, Claimant presented to CRMC emergency department complaining of “back pain across the low back and numbness of the entire left leg.” Defendants’ Ex. F, p. 70. Claimant also reported that he had been taking a lot of ibuprofen with no relief and had been drinking “lots of beer in an effort alleviate his pain.” *Id.* He denied any illegal drug use. Claimant was seen by Daniel M. Henrie, M.D., who reviewed the thoracic x-rays from February 8 and ordered lumbar x-rays as well. The lumbar spine images showed mild posterior facet arthrosis at L5-S1, but no acute bony injury. Dr. Henrie ordered a urinalysis and urine drug screen, but Claimant was unable or unwilling to provide a specimen. Dr. Henrie prescribed a prescription anti-inflammatory as well as Darvocet for back pain. He instructed Claimant not to drink alcohol in conjunction with the pain medication. He also gave Claimant a work release for the period from March 1 through March 8, when Dr. Henrie had scheduled a re-check. Claimant was a no-show on March 8.

15. On or about March 4, Employer received a call from CRMC regarding bills for Claimant’s March 1 visit. Randy Jones testified that sometime prior to the call from CRMC he had received a bill from a chiropractor for services provided to Claimant but he had thrown it

away, in part because he did not have any reason to believe that Claimant's chiropractic treatment was work-related. Based on the call from CRMC, Randy Jones filed a first report of injury or illness.

16. Claimant returned to CRMC on March 10, complaining that his back pain was only minimally improved. He said he forgot his March 8 appointment with Dr. Henrie because it was his birthday that day. He was examined by Frederick L. Wood, III, M.D., who found nothing that he "would suspect to be a nerve root problem . . ." *Id.*, at p. 78. Dr. Wood released Claimant to full duty, and advised him to take OTC analgesics and return to see Dr. Henrie on March 22.

17. On March 18, Claimant returned to the CRMC and saw Dr. Henrie. He wanted something besides ibuprofen for his pain, which he said had increased. Dr. Henrie prescribed both an analgesic and a muscle relaxant and told Claimant to return on March 22. On March 21, Claimant presented at CRMC emergency department seeking pain management. He was seen by Brent R. Payne, M.D. On exam, Dr. Payne made no objective findings consistent with Claimant's reported pain. Analgesics were administered by injection and Claimant was released with instructions to return to see Dr. Henrie the following day as scheduled. Claimant was a no-show on March 22.

18. On March 23, Claimant presented at Minidoka Memorial Hospital in Rupert complaining of back pain from his mid back to his low back. Nursing notes document a strong odor of alcohol and slurred speech. Claimant was given prescription pain medication and counseled about alcohol use.

19. On March 25, Claimant returned to see Dr. Davis. He complained that his back and neck pain were about the same and the back pain was radiating down the right front leg.

Claimant did not tell Dr. Davis of his four trips to the emergency department at CRMC or his visit to Minidoka Memorial just two days before. Dr. Davis performed essentially the same exam, made the same assessment and provided the same treatment that he had on the previous five visits. Again he referred Claimant to Dr. Peterson. Claimant returned on April 11 and 26 and received essentially the same assessment and treatment. On April 26, Dr. Davis also suggested Claimant return to Dr. Peterson or CRMC for back x-rays.

20. On April 28, Claimant had a second series of lumbar spine x-rays at CRMC. These films were ordered by David Ontiveros, M.D. Although Claimant had lumbar spine x-rays at the same facility on March 1, the x-ray report indicates that there were no comparison films available. The lumbar spine x-rays taken on April 28 were normal with no abnormalities evident.

21. Claimant was back at CRMC on May 5 complaining of back pain from his mid back down to his low back and radiating into his right leg. He was seen by Lanny F. Campbell, M.D. Claimant told Dr. Campbell that he had quit drinking, but that he had started again a few days later. He smelled of alcohol, but denied he had been drinking. Claimant told Dr. Campbell that he was scheduled for a mental health evaluation on May 10. No records of such an evaluation were offered into evidence.

22. Claimant returned to Dr. Davis on May 16, and reported that he had been to CRMC for x-rays. He neglected to mention his May 5 visit. He did not bring the films for Dr. Davis to review, but reported that Dr. Ontiveros told Claimant that "he was ok." Defendants' Ex. E., p. 49. Dr. Davis performed his usual exam, assessment and treatment on May 16, and again on May 25, June 8, July 5, July 20, July 25, August 11, August 19, August 30, September 22, October 12, November 1, December 5, and January 2, 2006, with no significant change in

Claimant's subjective complaints.

23. Claimant is neither a credible nor a reliable witness. The Referee had ample opportunity during the hearing to observe the demeanor of and gage the credibility of Claimant. Reading Claimant's deposition and the medical records submitted into evidence confirmed the Referee's initial estimation that Claimant lacked credibility.

DISCUSSION AND FURTHER FINDINGS

NOTICE

24. Idaho Code § 72-701 requires that an injured employee give timely notice to his or her employer of any workplace injury. Such notice is to be provided "as soon as practicable but not later than sixty (60) days after the happening thereof . . ." *Id.* The Referee finds that Claimant provided neither written nor verbal notice to Employer about his alleged workplace accidents of January 26 and January 31, 2005. While Claimant repeatedly claimed that he did tell Employer, upon further questioning it became apparent that Claimant did not provide sufficient information to constitute notice of his injuries. With regard to the first incident, he simply told Employer that his back hurt and he needed to see a chiropractor. With regard to the second incident, he merely responded affirmatively to a question from Employer. While these exchanges might have put Employer on notice that Claimant had hurt himself, they do not constitute any kind of notice that the injuries were work-related. Employer had reason to know that Claimant had previously sustained injuries that were not work-related.³

Employer received at least inquiry notice that Claimant was claiming workers'

³ On one occasion, Claimant appeared at work hobbling around and looking as if he had been beaten up. Employer asked him what happened and Claimant replied that he had gotten drunk and had been run over by a car. Claimant later admitted that he had fabricated the story. In fact, Claimant had gotten drunk, trashed his living quarters, and then had been found in the borrow pit alongside the road by the bartender at the establishment where he had been drinking. Claimant had no idea how he received his injuries or ended up in the borrow pit.

compensation benefits when he received a call from CRMC regarding the hospital bills. This notice, which occurred well within the sixty-day maximum provided by statute, did not include information on the date or dates of injury or how the injury or injuries occurred. Employer first learned details about the claim when he received a notice from Claimant's counsel in May. Whether the notice Employer received in March cured Claimant's failure to provide timely notice need not be addressed herein, as this matter is decided on other grounds.

CAUSATION

25. In an industrial accident case, the burden is upon the claimant to prove that he sustained an *injury* as a result of an *accident* that occurred within the course of his employment. "Injury" is defined by Idaho Code § 72-102(17)(c) as an injury caused by an accident, resulting in violence to the physical structure of the body. "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. Idaho Code § 72-102(17)(b).

A claimant carries the additional burden of proving to a reasonable degree of medical probability that that injury for which he claims benefits is causally related to an accident occurring in the course of his employment. The causal connection between the accident and the injury must be proved by expert medical testimony. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

26. Claimant argues that he has met his burden of proving causation because Dr. Davis's deposition testimony that it was "very probable that [Claimant] was experiencing these

problems, symptoms, and conditions related to the injury he explained to me the first time I saw him,” was unrebutted. Dr. Davis Depo., p. 33. Defendants assert that Dr. Davis’s opinion is inherently unreliable because it is based almost entirely upon the representations of Claimant who has demonstrated a penchant for fabricating stories as well as withholding pertinent information. For the reasons discussed below, the Referee cannot make a finding of causation based on Dr. Davis’s opinion.

27. Claimant may well have strained his mid to low back while in the course of his employment with Employer. Claimant may just as well have strained his low to mid back during the course of an alcohol-induced blackout, as Defendants contend. Neither version of events can be established with any degree of likelihood. While it is not Defendants’ responsibility to prove their causation theory, it is Claimant’s responsibility to prove his.

Claimant’s testimony regarding the time and manner in which his injuries occurred is called into question by his time cards, his failure to clearly notify Employer regarding the time and manner his alleged injuries occurred, and his reports to Dr. Davis during his first four visits. Claimant asserted that he only worked half a day on the date of his first injury, January 26, 2005. His time card shows he worked a full day. Claimant did not work on January 27 and January 28. Claimant alleged a second injury on January 31 and stated it was his last day of work. Claimant’s time cards show he worked a full day on January 31, and returned to work on February 2. Claimant’s visit to Dr. Davis on January 31 had to have been after the second injury, since he clocked in at 8:01 a.m., yet Claimant did not mention it to Dr. Davis until February 4.

More importantly, Dr. Davis’s opinion regarding causation was equivocal at best. Although he testified on direct that it was “very probable” that Claimant’s complaints were the result of the alleged industrial accidents, he testified on cross exam that there were many causes

of spinal subluxation, that many of those causes were present in Claimant's subjective history, and that he could not rule out these other causes for Claimant's complaints.

Most importantly, however, Dr. Davis's medical records and his ultimate opinions are based entirely on his acceptance of what Claimant told him or did not tell him. Dr. Davis did not see the thoracic x-rays or the two sets of lumbar x-rays that were done as a result of Claimant's many visits to CRMC and showed no significant abnormalities. Dr. Davis did not see the objective results of the tests of the many physicians who saw Claimant in March, April, and May that showed no evidence of pathology and no functional deficits. Dr. Davis either did not see, or ignored Claimant's alcoholism, and was unaware that Claimant received injuries on at least one occasion resulting from an alcoholic blackout. Because Dr. Davis was unaware of many of Claimant's frequent hospital visits, he was oblivious to Claimant's patent drug-seeking behavior.

Finally, even a cursory look at Dr. Davis's medical records raises questions about the validity of his opinions. While Claimant asserts a right-sided mid and low back injury in his claim, he reported and was treated for a number of symptoms, including left leg numbness, neck pain, headaches, bilateral upper extremity numbness and tingling, hip pain, rib pain, and difficulty breathing. Claimant's subjective complaints varied from visit to visit, yet Dr. Davis's treatment was always the same—as were the results. Despite all of the treatment, Claimant's complaints in January 2006 were virtually the same as his complaints on his first visit. Dr. Davis testified during his deposition that his chart notes were created from a software program that allowed him to pick and choose what items would be included in the written notes. This was obvious even without the deposition testimony. Dr. Davis's treatment of Claimant was rote. Regardless of the complaint, the assessment and the treatment were virtually identical.

CONCLUSIONS OF LAW

1. Claimant has failed to carry his burden of proving that it is more likely than not that he sustained an injury or injuries from an accident or accidents occurring within the course of his employment.
2. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 13 day of June, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of June, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

RUSSELL E WEBB
PO BOX 51536
IDAHO FALLS ID 83405

djb

/s/ _____

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

DATED this 26 day of June, 2006.

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 26 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 persons:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

RUSSELL E WEBB
PO BOX 51536
IDAHO FALLS ID 83405

djb

/s/ _____