

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUDY SPERRY,)	
)	
Claimant,)	IC 04-518261
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
LIVING INDEPENDENTLY FOR)	AND RECOMMENDATION
EVERYONE, INC.,)	
)	
Employer,)	
)	
and)	FILED JUNE 1 2006
)	
IDAHO STATE INSURANCE FUND,)	
)	
)	
Surety,)	
)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls on December 22, 2005. Claimant, Judy Sperry, was present in person and represented by Dennis R. Petersen of Idaho Falls; Defendant Employer, Living Independently For Everyone, Inc., and Defendant Surety, Idaho State Insurance Fund, were represented by M. Jay Meyers, of Pocatello. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on April 12, 2006.

ISSUES

Claimant’s opening brief withdrew the issue of total temporary disability benefits, thus the issues to be resolved are:

1. Whether Claimant suffered an accident arising out of and in the course of her employment;
2. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;
3. Whether Claimant has complied with the notice limitations set forth in Idaho Code §§ 72-701 through 706, and whether these limitations are tolled pursuant to Idaho Code § 72-604; and
4. Whether Claimant is entitled to reasonable and necessary medical care as provided by Idaho Code § 72-432 and the extent thereof.

ARGUMENTS OF THE PARTIES

Claimant asserts she suffered an industrial accident on April 13, 2004, that she reported the accident to her supervisors and medical providers, and that she is entitled to medical care for her left shoulder and knee injuries.

Defendants Employer and Surety contend that Claimant's account of an industrial accident is not credible, that she failed to timely report any supposed accident to her supervisors and is not entitled to medical care for her left shoulder and knee conditions.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Yvette Gonzalez, and Sandra Lee Dressel taken at the December 22, 2005, hearing;
2. Claimant's Exhibits 1 through 30, and 32 admitted at the hearing (Exhibit 31 was to be the post-hearing deposition of Laurence Hicks, D.O., which was subsequently cancelled);

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

3. Defendants Employer and Surety's Exhibits A through R, DD, LL, and NN, admitted at the hearing; and

4. The post-hearing deposition of Joseph R. Petersen, M.D., taken by Claimant on January 17, 2006.

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

FINDINGS OF FACT

1. In February 2003, Claimant commenced working for Employer, performing in-home care of clients including assistance with activities of daily living such as bathing, cooking, shopping, and transportation to medical appointments.

2. Claimant alleges that on April 13, 2004, she was working at the home of a client named Towanda who required full assistance. Claimant testified that while cleaning Towanda's stove that day, Claimant stepped backwards and stepped on a cat that had walked behind her. The cat screamed, Towanda then yelled, and Claimant threw herself abruptly forward, catching herself with her left arm, straining her left shoulder and twisting her left knee. Claimant testified that she felt a pinching sensation in her left knee, but no pain in her left arm. She testified that she told Towanda what had happened and continued working until 9:00 or 10:00 that evening.

3. Claimant's personal calendar, admitted into evidence at the hearing, has a notation in Claimant's own handwriting on April 13, 2004, indicating: "No Towanda." Claimant's Exhibit 27, p. 6.

4. Claimant testified that Towanda, while physically disabled, is sound of mind. The

record contains no direct testimony from Towanda. Claimant's supervisor, Sandra Dressel, later contacted Towanda who denied Claimant had an accident in Towanda's home.

5. Claimant testified that on April 14, 2004, she also worked for Towanda. She testified that she noted pain in her left knee and left shoulder, and also pain in her back, left buttock, thigh, and leg.

6. On April 15, 2004, Claimant presented to Laurence V. Hicks, D.O., who recorded her complaints of headaches and itching. Claimant testified that she told Dr. Hicks' receptionist about her left shoulder and knee. Claimant testified she told Dr. Hicks that her back and side were numb. She did not report her alleged April 13 accident to Dr. Hicks. Dr. Hicks' assessment was headache, pruritus, and burning sensation in the back. He recommended she follow the directions given her earlier by a dermatologist, and use an ice pack for headache, and benadryl, baking soda or Aveeno baths. There is no mention of shoulder, knee, or leg complaints, and no mention of any report of a work accident.

7. Claimant testified that right after she saw Dr. Hicks on April 15, 2004, she told her coworker Annie Brown and her supervisor, Sandra Dressel, of her alleged accident at Towanda's two days earlier. The record contains no testimony from Annie Brown. Claimant testified that she gave Dressel some paper work from Dr. Hicks stating Claimant got hurt on the job. Dressel testified that Claimant first told her of an alleged accident in the summer when the weather was warm. Dressel testified that she recalled being upset that Claimant waited so long to notify her of the alleged accident and responded: "Why didn't you tell me this three months ago?" Claimant's Exhibit 28 (Deposition of Sandra Dressel) p. 20, L. 1.

8. On April 29, 2004, Claimant presented to Dr. Hicks complaining of abdominal

bloating in the area of her recent gall bladder surgery, stiff painful shoulder and sore throat. Upon exam he noted limited painful range of motion in Claimant's left shoulder and ordered an MRI. Dr. Hicks' notes contain no mention of an accident.

9. On May 5, 2004, Claimant underwent an MRI scan of her left shoulder which Don M. Wayment, D.O., read as showing abnormal signal to the rotator cuff tendons consistent with either a partial or complete rotator cuff tear or tendonitis and some minimal increased fluid in the subacromial and subdeltoid bursa. There is no reference to any report of a work accident.

10. On May 11, 2004, Claimant presented to Joseph R. Petersen, M.D., who noted her left shoulder MRI report which showed possible rotator cuff tear. He recorded no report of a work accident.

11. On May 19, 2004, Claimant presented to Dr. Hicks complaining of not sleeping well, back pain, headaches, sore throat, coughing, knee pain and shoulder pain. He recommended an MRI of the knee. His chart notes contain no mention of an accident, however, the record contains a document bearing Dr. Hicks' signature entitled "Mini-Cassia Occupational Health Work Status Report" ostensibly dated May 19, 2004. This report is partially illegible and lists a date of injury of April 13, 2004, and under diagnosis: "L shoulder ... rotator cuff tear insomnia knee pain headaches & sore throat." Claimant's Exhibit 4, p. 000012. After signatures, the document concludes with directions to complete it, provide a copy to the employer, and fax a copy to a specified number. Immediately below these directions appears a handwritten notation: "Completed 8/12/4." *Id.* It is not clear when this document was forwarded to anyone. Dr. Hicks never testified in this case.

12. On May 24, 2004, Claimant presented again to Dr. Petersen for follow up on her left shoulder. He noted that anti-inflammatory medications were not helping and that Claimant was

scheduled for a cervical MRI. He recorded no report of a work accident.

13. On May 26, 2004, Claimant underwent an MRI scan of her cervical spine. The scan was negative. There is no mention of a work accident.

14. Also on May 26, 2004, Claimant underwent an MRI of her left knee. The MRI report indicates: “43-year-old female with history of a left knee injury.” Defendants’ Exhibit C, p. 10. Dr. Wayment reported his impression of the scan as: “There may be a medial meniscus, posterior horn, tear or degenerative change.” Id. There is no mention of a work accident as the cause of injury.

15. On June 7, 2004, Claimant presented to Dr. Petersen for follow up about her back and neck, shoulder, and knee. He recorded that she was having problems with the left knee and “She had an injury to this.” Defendants’ Exhibit D, p. 7. There is no mention that the injury was allegedly due to a work accident.

16. On June 28, 2004, Dr. Petersen injected Claimant’s left knee with Kenalog, Marcaine, and Xylocaine.

17. The record contains a completed Patient Information Memo to Dr. Joseph Petersen, dated June 28, 2004, bearing Claimant’s signature, which lists her reason for the visit as “L shoulder.” The date of injury is listed as “3/13/04” and there is no response to any of the form questions: “On the job injury? How did injury occur? Where did injury occur?” Defendants’ Exhibit DD-107.

18. On July 22, 2004, Claimant signed a Work Related Injury Report for Employer. The report indicates a “shoulder-knee” injury on April 13, 2004, which was reported to Sandra on April 18, 2004. The report also contains Claimant’s description of cleaning Towanda’s stove, stepping back, almost falling on the cat, and catching herself with her arm against the wall. It lists Towanda

as a witness to the injury.

19. On July 26 or 27, 2004, Dr. Petersen injected Claimant's left shoulder. His notes do not record any report of a work accident. He then referred Claimant to physical therapy.

20. On August 2, 2004, Claimant presented to Troy Anderson, P.T., who recorded Claimant's history thus: "The patient states that a couple of weeks ago, she fell over a cat while she was at her employment cleaning house and she did not have immediate pain but it came on after a couple of days." Defendants' Exhibit E-2. Mr. Anderson recorded Claimant's history of prior high blood pressure, thyroid problems, bilateral carpal tunnel syndrome, and right knee meniscus tear. Mr. Anderson also noted Claimant's pain complaints with application of a hot pack, Wadell symptoms of hypersensitivity to light touch, and her complaints of increasing pain with ultrasound treatment—even after the ultrasound machine was turned off.

21. On August 12, 2004, Claimant presented to Dr. Hicks complaining of numbness and dizziness. Among other things, he diagnosed vertigo, elevated blood pressure, and left rotator cuff problems. His notes do not mention any report of a work accident.

22. On August 19, 2004, the Workers Compensation –First Report of Injury or Illness was prepared which listed April 13, 2004, as the date of the alleged injury and indicated Claimant tripped over a client's "cats and dogs," that the injury was reported to Sandra Dressel, and that the employer was notified on July 22, 2004, of the alleged injury. Claimant's Exhibit 2, p. 000001.

23. On September 3, 2004, physical therapist Troy Anderson reported to Dr. Petersen that Claimant was doing very well, and her symptoms had completely resolved, her pain was 0/10 and she was able to perform all duties. She was discharged from physical therapy. At hearing Claimant testified that the therapist's notes regarding her improved condition were erroneous.

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

24. Claimant testified at hearing that she has a torn left rotator cuff and her left shoulder aches after working a lot. She testified that her left knee locks up, that she loses all feeling in her left knee, and she must catch herself because her left knee gives out. She also testified that she has pain with headaches, going back to her shoulder, down the left side of her back to the thigh, knee and foot, including pain which “curls her toes.” Transcript, p. 49, L. 9.

25. Dr. Petersen testified that in his multiple visits while treating Claimant he never heard anything about an alleged work accident causing her complaints.

26. Employer’s phone log contains no record of any calls from Claimant regarding her alleged accident.

27. Claimant’s medical records indicated she has suffered a substantial number of physical problems over the last ten years and has frequently consulted a number of physicians.

28. The hearing transcript cannot adequately convey Claimant’s demeanor at hearing. A pattern of unusually lengthy pauses and averting of the gaze when responding to questions was conspicuous during critical portions of Claimant’s hearing testimony. Having observed Claimant at hearing, and carefully examined the record herein, the Referee finds Claimant is not a credible witness.

DISCUSSION AND FURTHER FINDINGS

29. **Accident.** 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, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v.

Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

30. Claimant's testimony regarding the occurrence of an alleged April 13, 2004, industrial accident is expressly and impliedly contradicted by substantial credible evidence. The testimony of other employees fails to corroborate Claimant's account. The records of various medical providers, most significantly Drs. Hicks and Petersen whom Claimant saw repeatedly for several months immediately after her alleged accident, fail to mention any report of an alleged work related cause for Claimant's left shoulder and knee complaints. Disputes regarding timely notice of the alleged industrial accident further undermine the credibility of Claimant's account of the occurrence of the alleged accident.

31. The Referee finds unpersuasive Claimant's testimony alleging an industrial accident on April 13, 2004, and further alleging that she gave timely notice thereof to her Employer.

32. Claimant has failed to prove she suffered an industrial accident on or about April 13, 2004.

33. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove she suffered an accident arising out of and in the course of her employment on April 13, 2004.

2. All other issues are moot.

RECOMMENDATION

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

DATED this 22ND day of May, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Alan Reed Taylor, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 1ST 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 each of the following:

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

M JAY MEYERS
PO BOX 4747
POCATELLO ID 83205-4747

kr

/S/ _____

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Claimant,)	IC 04-518261
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v.)	
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LIVING INDEPENDENTLY FOR)	
EVERYONE, INC.,)	
)	
Employer,)	ORDER
)	
IDAHO STATE INSURANCE FUND,)	
)	FILED JUNE 1 2006
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his proposed 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 recommendations of the Referee. The Commission concurs with these recommendations. 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 failed to prove she suffered an accident arising out of and in the course of her employment on April 13, 2004.
2. All other issues are moot.

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

DATED this 1ST 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 1ST day of JUNE, 2006, 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

M JAY MEYERS
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kr

/S/ _____