

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

LEONILA VICTORIO, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 TYSON FRESH MEATS, INC., )  
 )  
 Self-Insured )  
 Employer, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**IC 05-010298**

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

August 29, 2006

**INTRODUCTION**

The Industrial Commission assigned this matter to Referee Lora Rainey Breen, who conducted a hearing in Boise, Idaho, on March 15, 2006. Mark V. Withers represented Claimant and Glenna M. Christensen represented Defendant. The parties submitted oral and documentary evidence at hearing and took three post-hearing depositions. They then submitted briefs and the matter came under advisement on June 8, 2006. On June 30, 2006, Bruce D. Skaug was substituted as counsel for Claimant.

**ISSUES**

As agreed upon by the parties at hearing, the issues to be decided at this time are:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of employment.
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.
3. Whether and to what extent Claimant is entitled to the following:

- a. Medical care;
  - b. Temporary partial and/or temporary total disability benefits (TPD/TTD); and,
4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

### **CONTENTIONS OF THE PARTIES**

Claimant contends she sustained a low back injury while moving a box at work on August 1, 2005, and is entitled to appropriate workers' compensation benefits and an award of attorney fees.

Defendant alleges Claimant failed to prove she sustained an injury at work on August 1, 2005. She did not report it to Employer; her own statements have made it almost impossible to determine when it occurred; and, the medical evidence does not support causation.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. The hearing testimony of Areli Magana, Rosalva Pineda, Rita Acuna Victorio, Miguel Victorio, Sr., Miguel Victorio, Jr., Yessenia Victorio, Claimant, Patricia Callaghan, and Tony De Leon;
2. Claimant's Exhibits 1 through 16 and Defendant's Exhibits A through D admitted at hearing;
3. The post-hearing depositions of Rosalinda Gallegos, D.C., Timothy Doerr, M.D., and Ralph Sutherlin, M.D.

After considering the record and arguments 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. At the time of hearing, Claimant was 36 years of age. She was born in Mexico and moved to the United States in 1987. She attended school up to the fifth grade in Mexico and does not communicate effectively in English.

2. Claimant began working for Employer in July 2000. On January 16, 2002, she slipped and fell on the steps while going into work. She scraped her knees, bruised her stomach, and experienced low back pain. She saw the company nurse, who gave her medication and temporary light duty work that resolved the acute symptoms. She did not miss work and sought no formal treatment. Claimant continued to have occasional low back pain, but it did not keep her from working or otherwise doing normal activities. She maintained good attendance at work. In early 2005, she started job duties that involved packing and then pushing boxes of meat product onto a conveyor belt.

3. Whether Claimant sustained an industrial injury from an accident on August 1, 2005, is in dispute. Claimant testified that, on that date, at around 11:00 a.m. she pushed a 45-pound box of product onto the conveyor belt and “felt a lot – a lot of pain on my back.” Hearing Transcript, p. 93. According to Claimant, she continued working that day and did not report the incident because the Spanish-speaking supervisor was not at work. She took two pills that helped her get through the day and told a co-worker at lunch and several co-workers after work about her injury. She called Employer the next day, and has not since returned to work.

Employer’s Human Resources manager, Tony De Leon (De Leon) and the plant nurse, Patricia Callaghan (Callaghan), testified that, when Claimant came to the office on August 5 to fill out paperwork, she did not mention an incident occurring on August 1, despite direct questioning, but instead insisted the injury was from her slip and fall in 2002.

4. On the morning of August 2, 2005, Claimant called De Leon indicating she had had an injury, was in great pain, and could not come to work. That same morning, she saw Rosalinda Gallegos, D.C., with complaints of severe low back pain with bilateral weakness in her legs. A diagram included in Dr. Gallegos' examination notes showed symptoms into Claimant's right leg to the calf. Dr. Gallegos recorded the following history: "On 8-1-05 was lifting 45 lb box of tripe ... pushing it to side on assembly – felt a pull. (has not reported) – has [increased] since injury." Claimant's Exhibit 8. On her intake sheet, which was filled out by someone other than Claimant, it lists low back pain beginning on August 1, 2005, as the primary complaint. Later, however, when asked to describe the accident, the following is written<sup>1</sup>: "About two years ago, she fell at work. And they called the nurse. Possibly from there, is pain from today." Gallegos Depo., p. 31.

5. On August 5, 2005, Claimant met with De Leon and Callaghan to prepare paperwork. Callaghan filled out an "Injury/Illness Information" sheet based on what she understood Claimant to say through an interpreter. She wrote, "Denies new injury. After riding home from work had difficulty getting from the car." Defendant's Exhibit D. As to how the injury occurred, Callaghan recorded that the injury was from the 2002 fall and Claimant had pain off and on since then. She listed a January 16, 2002 date of injury. Claimant signed the form, but did not know what it said. Claimant thought it was paperwork she needed to sign to get paid.

6. On August 8, 2005, Claimant saw Employer's preferred provider, occupational medicine physician Ralph Sutherlin, M.D., with pain to the mid buttocks region radiating down her right leg to her ankle. As to the history of the injury, Dr. Sutherlin noted:

The patient is an employee of Tyson Food Products in which she packs tripe. The patient stated that in January of 2002 she slipped and fell face first and injured her

---

<sup>1</sup> This was written in Spanish on the intake sheet and most thoroughly translated during the deposition of Dr. Gallegos.

left hip and left forearm and elbow. The patient was not seen by a medical provider, but did receive some medication which did appear to resolve the incident. The patient occasionally used Tylenol for the discomfort. The patient states that last week on 08/01/05 she was doing her usual work with no new incidents noted, but when she drove home that evening she noticed increased pain to the lower back and tightness up and down her back.

Defendant's Exhibit B. Dr. Sutherlin noted positive straight leg raises bilaterally and decreased range of motion to the lumbar spine due to spasm. He assessed, "Acute lumbar muscular strain, etiology unknown," and concluded he could not say with any probability it was caused by work "being that there was no specific incident from work where the patient was not doing any new duties at work." *Id.* He assigned work restrictions and discharged her to a family care physician because he considered her injury to be non-industrial.

7. On August 19, 2005, Claimant sought physical therapy at RehabAuthority. The intake notes described the following mechanism of injury: "Reports she was lifting boxes (approx. 45#) at work when she had sudden pain to her neck and back. Symptoms cont. to increase causing her to seek medical attn. States she went to a Chiropractor and then referred to St. Lukes [Dr. Sutherlin]." Claimant's Exhibit 10. On August 22, 2005, Dustin Fieldsted, P.T., advised Claimant to follow up with a physician regarding her continued symptoms.

8. On August 24, 2005, Claimant began seeing Martin Donaldson, D.C. The intake sheet, filled out by Claimant's daughter, lists the date of accident and date of first symptoms as August 1, 2005. However, as to the cause of onset, someone other than Claimant or her daughter wrote, "2002 - 1/16 - pt. fell - hurt LB - increasing pain since." Claimant's Exhibit 9.

9. On September 15, 2005, Claimant provided a statement, through an interpreter, to a representative of Employer's workers' compensation adjuster ("KW"). When initially asked about the date of injury, Claimant responded, "I had a fall in 2000, January 26." She then described that on August 1, 2005, was when she "felt the pain where [she] couldn't work

anymore.” *Id.* She elaborated that her pain started in 2002, and continued through August 1, 2005, when she could not stand the pain or work any longer. In between January 16, 2002, and August 1, 2005, she described feeling back pain, “but nothing like what happened to [her] on August 1.” Claimant’s Exhibit 5. More specifically, the following colloquy is instructive:

KW: Okay. Um, back when in 2002 when you reported this to Tony, at that time were you instructed to see a physician or did you ask to see a physician?

Interpreter: I reported it then to the nurse and she said that I was fine that I could continue working and she just gave me some pills but they didn’t send me to a doctor.

KW: Okay, did you ever ask them to see a doctor prior to August 1 of this year?

Interpreter: No, because I felt a little bit of pain but with pills it would go away and I was ready to work.

KW: Okay. And what changed that you asked your employer to see a doctor?

Interpreter: Are you speaking of the first of August?

KW: Yes.

Interpreter: Well, the pain that I had was what made me go over there.

KW: Okay. Um, so explain to me what happened when you got up on the first of August.

Interpreter: Well, it was a normal day just like any others when I would go to work but that day about 11:00 I started feeling, and it continued while I was working, and then when I came home um when I got home from work, I couldn’t get out of my car.

KW: Okay, uh ... and you requested to see a physician at that time?

Interpreter: Well, like I said, um there wasn’t anyone who spoke Spanish in my area, just a supervisor who speaks English, and so that’s why I was able to withstand the pain but it was from moving a box about 11:00 a.m. that was the reason why I notified.

KW: Okay. And who did you report this to?

Interpreter: Well, like I said on the 2<sup>nd</sup> is when I reported it um that morning

when I couldn't get up.

KW: Sorry. My tape ran out. This is side 2 of the recorded statement with Leonila Victorio. Uh, could you just say that last part?

Interpreter: Well, um the 2<sup>nd</sup> was when I reported that and like I mentioned, I couldn't get up that day so I called into work and my husband took me to the doctor.

KW: Okay, and where did you go? Which doctor did you go to?

Interpreter: I went with Rosalinda Gallegos. That's her name.

KW: Is she a chiropractor?

Interpreter: Yeah.

KW: I want to back up here a minute. You said something about lifting a box on the first of August. What happened there?

Interpreter: Well, the work that I was doing was, like I said, filling boxes with sweet breads. They ... it weighed, they weighed 45 pounds and then pushing that box onto the conveyor belt.

KW: Okay. Sorry. One moment. Okay. Uh, so what did Dr. Gallegos say uh was wrong with you?

MW (Mark Withers): I'm sorry. Let me go back to that previous. She was only partially done with that answer. Uh, it was breaking it up because of translation reasons, but she indicated to me that there was more to say.

Interpreter: (Repeating question)

KW: Go ahead and finish your answer.

Interpreter: Well, during that day, like I mentioned, it was about 11:00 and I felt the pain when I was pushing a box and I felt like something pulled in my lower back and the pain didn't go away during the day.

KW: Okay, so it wasn't specifically um just the job you were doing it was a specific box that you were pushing when you felt the pain?

Interpreter: Yes. Because when I pack, when I pack I have to push the boxes onto the conveyor belt and when I was pushing that box was when I felt the pain. It felt like something pulled in my back.

Claimant's Exhibit 5.

10. By mid-September 2005, Dr. Donaldson requested an orthopedic consultation for Claimant and on September 26, he released her from chiropractic care with an ongoing restriction from returning to work.

11. Defendant denied Claimant's claim by letter dated November 2, 2005. It denied liability for the January 16, 2002 incident because Claimant failed to meet statutory time limitations for filing a claim. Regarding the alleged August 1, 2005 incident, the adjuster wrote:

8/1/05: From our investigation into the above incident, there was no specific accident reported that led to your back pain. Thus, this claim is denied. The initial xray taken at St. Luke's Regional Medical Center has been processed on a voluntary basis for diagnostic purposes. No further medical treatment will be covered under this claim.

Claimant's Exhibit 4.

12. Claimant saw orthopedic surgeon, Timothy Doerr, M.D., on January 12 and 19 and February 9, 2006. Dr. Doerr noted Claimant had a history of low back problems since 2002, but did not develop significant leg pain until the box-pushing incident on August 1, 2005. He recorded ongoing back pain radiating into the right leg. He described her recent MRI (January 16, 2006) as showing a right central and paracentral L4-5 disk herniation with slight caudal migration and severe right subarticular and lateral recess narrowing and moderate left subarticular and lateral recess narrowing. Regarding causation, he wrote:

... She is currently working on determining whether this is related to her 08/01/05 industrial injury. Based on her history of no radicular leg pain prior to the 08/01/05 injury, if this is supported by her medical records I do believe it is medically more probable than not that her current lumbar disk herniation is related to her industrial injury of 08/01/05.

Claimant's Exhibit 11. In his post-hearing deposition, Dr. Doerr confirmed the MRI results were consistent with ("would explain") Claimant's current symptoms. Doerr Depo., p. 8.

13. In his post-hearing deposition, Dr. Sutherlin confirmed that, when he saw Claimant on August 8, 2005, she was suffering from an acute, as opposed to chronic, injury.

14. Two of Claimant's co-workers, with whom she carpoled, testified Claimant was fine when she went into work on August 1, 2005, and was in significant pain when she left.

## **DISCUSSION AND FURTHER FINDINGS**

### **Accident/Injury and Causation**

An "accident" means 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, 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).

The provisions of the Workers' Compensation law are to be liberally construed in favor of the employee. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

Despite pronounced confusion in the initial medical records and the information obtained and prepared by Employer, the Referee finds Claimant experienced an acute onset of severe low back pain on August 1, 2005, while moving a box of tripe onto the conveyor belt at work. Claimant described the incident to Dr. Gallegos on August 2, 2005, the day after it occurred. Moreover, the medical records consistently cited to August 1, 2005 as a significant date with respect to Claimant's symptoms and her request for medical treatment. Dr. Sutherlin's records document the acute nature of the injury on August 8, 2005, and the testimony of Claimant and her co-workers relate the onset of her symptoms to the workplace on August 1, 2005. Claimant also specifically described the incident to the adjuster by interview on September 15, 2005.

Regarding medical causation, the Referee finds persuasive the opinions of Dr. Doerr, an orthopedic surgeon and the only physician to have reviewed Claimant's MRI results and adequately contemplated the relationship between the 2002 and 2005 incidents. His opinion that the MRI results explained Claimant's current symptoms is helpful. There is no evidence Claimant had severe low back pain or any lower extremity symptoms prior to August 1, 2005, and the Referee finds her current condition, including her herniated disk, was caused by the August 1, 2005 accident.

#### **Medical Benefits and Temporary Disability Benefits**

As conceded by the parties at hearing, if Claimant meets her threshold burden of proving compensability of her claim, the immediate benefits that would flow from it are not in dispute. Having met her burden, Claimant is entitled to the related medical benefits and temporary disability benefits as of August 1, 2005.

## **Attorney Fees**

As described above, the initial information arising out of this claim was undoubtedly confusing. However, the adjuster's September 15, 2005 interview essentially clarified the matter: it provided Defendant with a detailed description of an incident on August 1, 2005; it referenced the initial medical treatment Claimant sought, the records from which confirmed the reporting of the incident to the provider on August 2, 2005; it demonstrated Claimant's ongoing preoccupation with both the 2002 and 2005 incidents and her uncertainty as to what caused her current problem<sup>2</sup>; and, it explained the acute symptoms described by Dr. Sutherlin that seemingly arose on August 1, 2005. As of September 15, 2005, Defendant no longer had reasonable grounds to deny the occurrence of an industrial accident on August 1, 2005. Claimant is entitled to attorney fees for unreasonable denial of her claim pursuant to Idaho Code §72-804.

## **CONCLUSIONS OF LAW**

1. Claimant sustained an injury caused by an accident arising out of and in the course of employment on August 1, 2005.
2. The condition for which Claimant seeks benefits was caused by the industrial accident.
3. Claimant is entitled to related medical benefits and temporary disability benefits as of August 1, 2005.
4. Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

---

<sup>2</sup> Causation is a medical issue and not one that can be decided by a claimant.



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

LEONILA VICTORIO, )  
 )  
 Claimant, ) **IC 05-010298**  
 )  
 v. )  
 ) **ORDER**  
 TYSON FRESH MEATS, INC., )  
 )  
 Self-Insured )  
 Employer, ) August 29, 2006  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Pursuant to Idaho Code § 72-717, Referee Lora Rainey Breen submitted the record in the above-entitled matter, together with her 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 approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own, with the exception of the finding regarding attorney fees pursuant to Idaho Code § 72-804. The Commission sets forth below its discussion and conclusion on the issue of Claimant's entitlement to attorney fees pursuant to Idaho Code §72-804.

The Commission agrees that the initial information arising out of this claim was undoubtedly confusing. However, the Commission further finds that the confusion was not so resolved by the September 15, 2005 interview as to make Defendant's denial unreasonable. While the September 15, 2005 interview between Employer's insurance adjuster and Claimant was helpful in explaining more details of the accident, it did not serve to discount all the previous confusing and conflicting information that Claimant or her representatives had provided

regarding this incident. The Commission finds that Defendant did not act unreasonably in denying Claimant's claim. Therefore, Claimant is not entitled to attorney fees pursuant to Idaho Code § 72-804.

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

1. Claimant sustained an injury caused by an accident arising out of and in the course of employment on August 1, 2005.
2. The condition for which Claimant seeks benefits was caused by the industrial accident.
3. Claimant is entitled to related medical benefits and temporary disability benefits as of August 1, 2005.
4. Claimant is not entitled to attorney fees pursuant to Idaho Code § 72-804.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 29 day of August, 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 \_\_29\_ day of \_August\_\_\_\_\_, 2006, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

BRUCE D SKAUG  
1226 E KARCHER RD  
NAMPA ID 83687-3075

GLENNA M CHRISTENSEN  
P O BOX 829  
BOISE ID 83701-0829

st

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