

3. Whether and to what extent Claimant is entitled to temporary disability benefits.

CONTENTIONS OF THE PARTIES

Claimant contends he slipped at work while delivering automotive parts. He injured his shoulder and back. He is entitled to medical care and about six weeks of temporary disability benefits. Employer has denied this claim for extra-legal reasons.

Defendants contend Claimant did not suffer an accident. He initially reported a nonwork-related injury. Medical records show Claimant initially denied suffering a work-related injury. His current condition is not related to his work. Claimant's story is not credible.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and Claimant's supervisor, Rod Johnson;
2. Claimant's Exhibits 1 – 12; and
3. Defendants' Exhibits A – F.

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 as a delivery truck driver. He maintains a CDL.
2. On September 3, 2004, the Friday before Labor Day, Claimant worked a delivery route from Pocatello to Idaho Falls. His time card shows he worked just over seven and one-half hours that day. He normally worked much longer, ten or more hours per shift.
3. The parties dispute whether Claimant telephoned supervisor Ron Johnson while still on his route on September 3, 2004. They dispute whether, later that day at the terminal,

Claimant told Mr. Johnson that Claimant had fallen while exiting his truck earlier that day. They dispute whether Mr. Johnson told Claimant to wait through the weekend before he sought medical care.

4. The alleged accident was unwitnessed although Claimant testified that an employee at the delivery site had to physically help Claimant climb back into his truck. Claimant testified he immediately felt “a lot of” “sharp” pain as well as numbness in his right arm and shoulder.

5. Mr. Johnson testified his cell phone recorded a message from Claimant at 11:55 p.m. on September 6, 2004. In a written statement, he alleged that the message was recorded at 11:16 p.m. In that message, Claimant reported he had hurt his shoulder over the weekend and would not be at work the next morning.

6. Claimant first sought medical attention on September 7, the Tuesday after Labor Day. The triage note records that Claimant complained “of Right shoulder pain since Friday—Pt. state ‘possibly slept on shoulder wrong’.” The emergency department report states, “To the best of his knowledge, he has had no antecedent trauma or illness.”

7. On Wednesday morning, September 8, Claimant arrived at work and told Employer he had hurt himself at work on the previous Friday.

8. X-rays taken September 9 showed mild degenerative changes in Claimant’s lower cervical vertebrae. To medical professionals, Claimant denied having suffered trauma to his arm or back.

9. Claimant again sought treatment on September 11, 13, and 20 without mentioning any work accident. On September 13, the physician’s assistant to Dr. Joseph diagnosed “degenerative disk disease of the neck which is work-related.” This opinion was based upon

Dr. Joseph's remark that bouncing in the cab of a truck produced this "common" work injury.

10. The first report of injury was prepared on September 14, 2004. Mr. Johnson denied that his handwriting or signature appears on it. Mr. Johnson pointed to exhibit 3 of his deposition as an exemplar of his signature.

11. The first medical record to mention an alleged work accident is dated September 21, 2004. On that date, Claimant was informed he would be unable to drive for two months. Claimant described the alleged accident as occurring on September 2, 2004.

DISCUSSION AND FURTHER FINDINGS OF FACT

12. **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). "'Accident' means an unexpected, undesigned, and unlooked for mishap, or untoward event . . . which can be reasonably located as to time when and place where it occurred." Idaho Code § 72-102(18)(b). Claimant's description of slipping as he exited his truck and feeling immediate pain satisfies the definition of an accident. Thus, if Claimant's testimony is credible, he described a compensable accident which he timely reported to Employer on September 8, 2004.

13. Claimant's initial reports to his doctors do not support a finding of a compensable accident. Claimant told them he slept on his shoulder wrong. He denied antecedent trauma. Claimant's deposition showed he was not confused by the doctors' vocabulary. Claimant testified that he initially told the doctors he hurt it at work. That testimony was inconsistent with his deposition testimony in which he admitted that he had denied antecedent trauma.

14. Earlier medical records show Claimant was not hesitant to ascribe pain to work accidents when appropriate.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

15. Of course, the mere fact that the accident was unwitnessed does not undercut Claimant's testimony that an accident occurred. Unwitnessed accidents do occur. Similarly, the mere failure of medical professionals to note the history of injury does not always undercut a claimant's testimony that an accident occurred. Medical professionals are busy treating patients and are not unduly focused upon recording statements for evidentiary purposes. However, express denials of trauma early in the medical records carry weight when compared to belated claims of a work accident.

16. Additionally, Mr. Johnson credibly reported that Claimant's initial messages and reports did not mention a work accident. The minor inconsistency of whether the phone message arrived at 11:16 or 11:55 does not impeach his testimony about the content of the message.

17. Claimant implied that Mr. Johnson's testimony was not credible because Mr. Johnson was angry with him. The argument begs the question of why Mr. Johnson was angry. Was it perhaps because he believed Claimant was falsely alleging an accident? Regardless, we need not swim in these waters. Mr. Johnson's testimony receives more weight because it shows fewer and more minor inconsistencies than Claimant's testimony does.

18. Upon review of the entire record, Claimant failed to show it more likely than not that he suffered a compensable accident on September 2 or 3, 2004.

CONCLUSIONS OF LAW

1. Claimant failed to show he suffered a compensable accident.
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 5TH day of December, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8TH day of DECEMBER, 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:

Reed W. Larsen
P.O. Box 4229
Pocatello, ID 83205-4229

Paul J. Augustine
P.O. Box 1521
Boise, ID 83701

db

/S/ _____

CERTIFICATE OF SERVICE

I hereby certify that on 8TH day of DECEMBER, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Reed W. Larsen
P.O. Box 4229
Pocatello, ID 83205-4229

Paul J. Augustine
P.O. Box 1521
Boise, ID 83701

db

/S/ _____