

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD SAVOLD,)	
)	
Claimant,)	IC 05-527541
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
DOUG TOLBERT dba POWER HOUSE)	AND RECOMMENDATION
COACH,)	
)	
Employer,)	
)	
and)	Filed: December 15, 2006
)	
IDAHO STATE INSURANCE FUND,)	
)	
)	
Surety,)	
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)	
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 Idaho Falls on May 24, 2006. Claimant, Richard Savold, was present in person and represented by James C. Arnold of Idaho Falls; Defendant Employer, Doug Tolbert dba Power House Coach (Power House), and Defendant Surety, Idaho State Insurance Fund, were represented by Dean Dalling of Idaho Falls. The parties presented oral and documentary evidence. This matter was then continued for the submission of medical records from the State of Washington, the submission of briefs, and subsequently came under advisement on September 16, 2006.

ISSUES

At hearing, the parties expressly reserved the issue of medical causation of an injury.

The only issues to be addressed presently are:

1. Whether the accident alleged in the Complaint actually occurred on or about the time claimed; and
2. Whether Claimant gave proper notice, or Employer had actual knowledge, of the alleged accident.

ARGUMENTS OF THE PARTIES

Claimant asserts he suffered an industrial accident at work on or about May 25, 2005, that he informed his supervisor shortly thereafter, that Employer had actual knowledge of his industrial accident and that Employer was not prejudiced by any delay in receiving notice.

Defendants contend that Claimant's account of an industrial accident in May 2005, is not credible and that, even assuming the accident occurred as alleged, he did not give timely notice thereof, Employer had no actual knowledge thereof within the statutory period and thus Claimant is barred from receiving any benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Neal Andrus, Doug Tolbert, Alan Nickell, and Edwin Horel taken at the May 24, 2006, hearing; and
2. Joint Exhibits 1 through 8 admitted at the hearing (including medical records from the State of Washington subsequently filed as an update to Exhibit 7).

After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law.

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

FINDINGS OF FACT

1. Claimant was 48 years old and resided in Idaho Falls at the time of the hearing.

2. In October 1987, Claimant suffered an industrial back injury while working at the Raging River Quarry in Washington when he jumped off a loader and immediately experienced severe and nearly immobilizing back pain. Claimant's condition was diagnosed as torticollis and traumatic myositis of the spine, for which he received chiropractic treatments and was off work for several months. His employer initially denied the claim, which was subsequently found compensable by the Washington Department of Labor and Industries. Claimant's back pain waxed and waned over the next several years as he resumed working and received occasional medical treatments—the nature and extent of which are not fully described in the record. After intensive physical therapy, Claimant's back condition largely resolved in approximately 1991. Thereafter he experienced only occasional backaches, which did not limit his work nor disrupt his normal daily activities. Claimant sought no medical treatment for his back from 1992 through May 2005.

3. In December 1994, Claimant sustained an industrial injury of his left elbow. He received medical treatment, including lateral epicondylectomy and extensor tendon reconstruction surgery in July 1996, after which his left elbow condition slowly improved.

4. On July 21, 1998, orthopedic surgeon Michael Phillips, M.D., examined Claimant and rated his left elbow impairment at zero percent. Significantly, Dr. Phillips recorded no report of any low back complaints. To the contrary, he recorded that:

[Claimant] lifts as much as 100 pounds comfortably.

....

Dorsolumbar Spine: Range of motion of the low back is unrestricted in flexion, extension, lateral bending and rotation. There is no tenderness to palpation throughout the lower spine. Tandem and straightway gaits are normal. Heel stance, toe stance, and deep knee bends are performed without apparent motor weakness. Romberg and Trendelenburg tests are negative. Straight leg raising produces no pain at 90 degrees in the sitting position. Deep tendon reflexes are +2 and equal at the knee and ankle. Motor power is grade 5/5 throughout and sensation is intact to touch, temperature, and vibratory challenge.

Exhibit 7, pp. 332, 334.

5. Claimant worked for many years as an auto mechanic and heavy equipment operator.

6. In early 2005, Claimant was employed as a mechanic in Idaho Falls at Pro Rental where he repaired and maintained a wide variety of rental equipment.

7. In April 2005, Employer Doug Tolbert, owner of Power House, recruited Claimant, and on April 11, 2005, Claimant left Pro Rental and began working for Power House. Power House employs 12 to 15 people and converts semi tractor-trailers into motorhomes. Claimant's duties at Power House were more physically demanding than his duties had been at Pro Rental and included carrying steel, steel fabrication, and stretching frames; as well as lighter tasks such as wiring. He completed all of his duties as assigned without complaint.

8. On or about May 25, 2005, Claimant was at work fabricating a pair of steel folding ramps for a car-hauling trailer. Claimant testified that when lowering a partially completed ramp he felt a wrenching sensation in his back. Claimant told lead man Neil Andrus, who was working nearby, that he had just wrenched his back. Andrus confirmed at hearing that indeed Claimant told him he had hurt his back working on a trailer.

9. Claimant testified that shortly after his conversation with Andrus, he also mentioned that he had hurt his back to another coworker, Alan Nickell, and that Nickell

responded that Power House had never had an industrial accident claim and “we want to keep our record clean.” Transcript, p. 25, Ll. 23-24. Based upon Nickell’s comment, Claimant immediately concluded that making a workers’ compensation claim would not be well taken, so Claimant replied: “its no big deal.” Transcript p. 26, L. 7. His back pain was not then severe and he believed it would resolve. Claimant wanted to keep his job. He continued working.

10. At hearing, Nickell testified he did not recall Claimant ever mentioning that he hurt his back at Power House. However, Nickell testified that Claimant complained from time to time that his back hurt, but Nickell believed the complaints related to an old injury.

11. After Claimant told Andrus he had hurt his back, the word got back to Tolbert. Claimant testified that the day after he injured his back, Tolbert approached him and asked if Claimant had hurt his back the day before. Claimant responded that he had wrenched it, but thought it would just go away. Claimant told Tolbert that his health insurance would take effect in a few days and that he would go see a doctor then if his back still bothered him. Claimant testified that Tolbert then instructed Claimant to let the young guys do all the heavy work and lifting. At hearing, Tolbert denied any such conversation.

12. Claimant testified that several days after this initial conversation with Tolbert, Claimant’s back still hurt and he was still concerned with the amount of heavy physical work required. Claimant was considering leaving Power House and returning to his prior employer, Pro Rental. He discussed his concerns again with Tolbert. Claimant testified that Tolbert persuaded Claimant to stay on, and again told him to let the younger guys take care of the heavier stuff. At hearing, Tolbert denied any such conversation. Claimant continued working for Power House, although his back symptoms persisted.

13. Approximately June 1, 2005, Claimant’s health insurance, with a \$2,500

deductible, took effect through Power House. On June 3, 2005, Claimant presented to Tony C. Roisum, M.D., who recorded “pulled lower back somehow.” Exhibit 1, p. 11. Claimant did not tell Dr. Roisum that his back condition was work-related. Claimant did not want to present his condition as an industrial injury claim because, due to his experience with his claim in Washington, and Nickell’s comment the week before, Claimant believed that filing a claim would jeopardize his job at Power House. Claimant also expected his back to improve with time. Claimant testified that when he returned from his first visit with Dr. Roisum, Tolbert inquired about the prognosis. Claimant responded that it was probably just a pulled muscle and the doctor had given him some prescriptions. On June 8, 2005, Dr. Roisum took lumbar spine x-rays. His notes of June 22, 2005, record “degenerative disc disease L5-S1 with almost auto fusion and disc space narrowing at that level.” Exhibit 1, p. 12. Dr. Roisum treated Claimant with prescription anti-inflammatory and pain medication for the next several months. Claimant’s back pain improved somewhat and he continued to work. Claimant paid for Dr. Roisum’s treatment out of his own pocket.

14. Claimant mentioned his back pain on various occasions to co-workers after he began treating with Dr. Roisum. Andrus observed that Claimant moved and worked with some apparent difficulty after he wrenched his back. Nickell testified that Claimant complained of a bad back within just a couple of weeks of commencing work at Power House, and that “everybody in the shop knew that Rick was taking back pain medicine.” Transcript, p. 120, Ll. 23-24. Claimant testified that he and Tolbert frequently talked about how Claimant’s back was doing that day. Tolbert denied such conversations and testified he was unaware of Claimant’s back complaints until November 2005.

15. During the month of November 2005, Tolbert assigned Claimant to work on

cabinets and wiring to provide Claimant work less stressful to his back.

16. Claimant's back pain increased and on November 10, 2005, Dr. Roisum decided to schedule an MRI. On November 18, 2005, Dr. Roisum reviewed with Claimant the MRI results which showed lumbar disk disease at multiple levels.

17. A few weeks before December 2, 2005, Claimant told Tolbert that he intended to file a workers' compensation claim because his back was worsening. Claimant testified that Tolbert responded: "that's not an option" Transcript p. 42, Ll. 6-7; and "no, we're not going that route." Transcript p. 62, Ll. 14-15. At hearing Tolbert denied discouraging the filing of a workers' compensation claim, but acknowledged that he never filed nor directed anyone to file a claim on Claimant's behalf.

18. On November 25, 2005, Claimant underwent a left L4-5 epidural steroid injection with minimal and only very temporary improvement.

19. On December 1, 2005, Claimant was bedridden with back pain and unable to report to work. He returned to work on December 2, 2005, and was advised by several co-workers that Tolbert was angry that Claimant intended to file a workers' compensation claim. At the end of that work-day, Claimant approached Tolbert again about filing a workers' compensation claim for his back injury and advised Tolbert that his back pain was worsening and he had no other recourse but to file. Claimant testified that Tolbert invited Claimant into his office and responded that if Claimant filed a claim, Tolbert had no other work for Claimant at Power House. Tolbert did not complete nor provide Claimant any assistance in obtaining or completing an accident report form. Claimant's last day with Power House was December 2, 2005.

20. Shortly after leaving Tolbert's office, Claimant obtained and completed a Notice

of Injury Form at an Industrial Commission office.

21. After completing a notice of injury, Claimant went to an unemployment office on or about December 3, 2005, and sought to apply for unemployment benefits. When Claimant declared he was off work because he got hurt on the job, he was advised that he could not file for unemployment, but should pursue workers' compensation benefits.

22. Claimant has only been able to obtain intermittent employment since being terminated at Power House. His back pain has worsened and he has not been able to afford the additional treatment recommended by Dr. Roisum.

DISCUSSION AND FURTHER FINDINGS

23. **Occurrence of the alleged 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).

24. In the present case, the credibility of the witnesses is pivotal. Claimant's testimony and Tolbert's testimony are irreconcilable in several critical respects.

25. Claimant's testimony regarding the occurrence of the alleged May 25, 2005, incident wherein he wrenched his back at Power House has been consistent and is firmly corroborated by Andrus' testimony.

26. The records of Dr. Roisum, who treated Claimant's back pain commencing in June 2005, fail to mention any report of an alleged work-related cause for Claimant's complaints

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 8

until November 2005. However, Claimant acknowledged at hearing that he did not initially tell Dr. Roisum his back condition was work-related because he did not want to file a workers' compensation claim and he believed his back symptoms would resolve. This is consistent with Claimant's approach to the incident in all of his dealings with his Employer and co-workers.

27. Horel is Tolbert's employee and testified for Defendants. Horel was hired after Claimant left Power House. Horel testified that Claimant mentioned he had back pain on one occasion when they worked together at Pro Rental. Claimant could not recall the incident. Horel also testified that he had not spoken of Claimant's complaint to anyone, however upon further questioning, Horel admitted that he had relayed Claimant's complaint to Tolbert and Defendants' counsel. The Referee finds Horel's testimony suspect.

28. Nickell is Tolbert's employee and testified for Defendants. Nickell testified that he did not recall Claimant mentioning an accident at Power House. Nickell also testified in detail about an alleged conversation very shortly after Claimant started working at Power House in which Claimant supposedly declared that he had long-standing back problems due to a prior back injury while "wrenching." Transcript, p. 118, L. 21. However, on cross-examination Nickell was hard pressed to recall any detail about other conversations that he testified overhearing in which Claimant's use of prescription pain medication for his back was supposedly discussed. Although Nickell denied advising Claimant not to file a workers' compensation claim, Nickell admitted that he was not aware of any other workers' compensation claims filed at Power House over the last couple of years even though he was aware that "a couple of guys have gone to the chiropractor because of—you know, of twisting their back wrong or whatever. But I don't know if them [sic] were workers' compensation claims or if Doug Tolbert just paid for those out of his pocket." Transcript, p. 125, Ll. 18-22. Nickell was not only

an employee of, but also socialized with, Tolbert outside of work. The Referee finds suspect Nickell's testimony that Claimant declared he had chronic back pain prior to his employment at Power House.

29. Except for Tolbert, all the witnesses including Nickell, testified that Claimant's back problems were common knowledge early on at Power House—certainly well prior to November 2005. Tolbert testified he was not aware Claimant was having back problems until November 2005. Tolbert was evasive in responding to questions about Claimant's request to file a workers' compensation claim. Tolbert acknowledged that even when Claimant spoke of filing a workers' compensation claim, Tolbert did not inquire about any precipitating industrial accident. The Referee finds Tolbert's testimony suspect.

30. Andrus was no longer an employee of Tolbert by the time of the hearing. He denied any animosity toward Tolbert and no witness alleged such. Of all the witnesses, Andrus had the least motive to resort to selective recall or fabrication. Andrus confirmed Claimant's testimony that he hurt his back working on a trailer at Power House.

31. Having observed the witnesses at hearing, and carefully examined the record herein, the Referee finds Claimant and Andrus to be more credible witnesses than Tolbert, Nickell, and Horel.

32. The Referee finds credible Claimant's testimony regarding his alleged accident and concludes that Claimant suffered an accident on or about May 25, 2005, while working at Power House.

33. **Notice or actual knowledge.** The second issue is whether Claimant gave proper notice or Employer had actual knowledge of the May 25, 2005, industrial accident.

34. Idaho Code § 72-701 provides that "[n]o proceedings under this [Idaho Workers'

Compensation] law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof.” Idaho Code § 72-702 further provides that “[s]uch notice ... shall be in writing; the notice shall contain the name and address of the employee, and shall state in ordinary language the time, place, nature, and cause of the injury ... and shall be signed by him or by a person in his behalf.” Idaho Code § 72-704, however, provides that “[w]ant of notice or delay in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent, or representative had knowledge of the injury ... or that the employer has not been prejudiced by such delay or want of notice.”

35. Whether Claimant's claim is barred by Idaho Code §§ 72-701 and 72-704 depends on whether he gave Employer written notice within 60 days following his accident, and if he did not, whether Employer had actual knowledge of the accident within the 60 day time frame, despite lack of written notice, or whether Employer was prejudiced by the delay or want of notice. Taylor v. Soran Restaurant, Inc., 131 Idaho 525, 527, 960 P.2d 1254, 1256 (1998). Oral notice to Employer may provide him with actual knowledge of an injury, thus obviating the necessity of a written notice. Murray-Donahue v. National Car Rental Licensee Association, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995).

36. In the present case, Claimant did not provide any written notice to Employer about his May 25, 2005, accident until he filed a notice of injury with the Commission in December 2005, well past the statutory 60 day period provided for by Idaho Code § 72-701. However, Claimant argues that Power House and Tolbert had actual knowledge of his accident within days thereof and that Claimant’s delay in giving notice has not prejudiced Employer.

37. Claimant gave Andrus oral notice of his accident the day it occurred. Tolbert

acknowledged that Andrus was the lead-man with whom Claimant was working at the time of his accident. Tolbert also acknowledged that Andrus had supervisory duties at Power House, however Tolbert testified that Andrus was not Claimant's direct supervisor at the time of the accident.

38. Claimant testified that Tolbert got word of Claimant's accident, apparently from Andrus, because Tolbert knew about the accident when he approached Claimant the day after and asked Claimant if he had hurt his back. They discussed his back at that time. Claimant also testified that Tolbert approached him about his back condition after his first visit to Dr. Roisum on June 3, 2005, and periodically thereafter. Tolbert's instructions that Claimant let the younger guys do the heavy lifting and that Claimant work on cabinets and wiring, indicate Tolbert knew of Claimant's back condition long before November 2005. Tolbert's failure to facilitate filing a workers' compensation claim is consistent with his denial of several conversations in which Claimant and Tolbert discussed Claimant's back, and is also consistent with Tolbert's continuing avoidance of the claim. The Referee finds Claimant's testimony more credible than Tolbert's regarding the issue of actual knowledge and their conversation the day following Claimant's accident.

39. Tolbert expressly testified that Claimant's delay in giving written notice did not prejudice Power House.

40. Claimant has proven that Employer had actual knowledge of the May 25, 2005, accident within 60 days thereof.

41. All other issues have been reserved by the parties.

CONCLUSIONS OF LAW

1. Claimant has proven he suffered an accident arising out of and in the course of his

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD SAVOLD,)	
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Claimant,)	IC 05-527541
)	
v.)	ORDER
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DOUG TOLBERT dba POWER HOUSE)	
COACH,)	
)	Filed: December 15, 2006
Employer,)	
)	
and)	
)	
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
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Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Alan Reed 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 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 proven he suffered an accident arising out of and in the course of his employment at Power House on or about May 25, 2005.
2. Claimant has proven that Employer had timely actual knowledge of Claimant's May 25, 2005, industrial accident.

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

DATED this 15 day of December, 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 15 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:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403-1645

DEAN DALLING
PO BOX 50050
IDAHO FALLS ID 83405-0050

lbs /s/