

3. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his right hip in a fall at Employer's premises on July 19, 2002, and timely notified his employer of the same. He seeks the appropriate workers' compensation benefits as well as attorney fees for Surety's wrongful denial of his claim.

Defendants contend that Claimant's alleged accident was unwitnessed and he did not report any work-related injury until May 23, 2003, well beyond the 60-day period for reporting found in Idaho Code § 72-701. Further, Claimant told his supervisor and a co-worker that he injured his back, not his hip, while removing an automobile engine from the back of a truck. Finally, based upon the information available to Surety at the time of their denial, their denial was reasonable and 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 presented at the hearing.
2. Claimant's Exhibits 1-14 admitted at the hearing.
3. Defendants' Exhibits A-G admitted at the hearing.

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. Claimant was 46 years of age and resided in Pocatello at the time of the hearing. He worked as a welder at Employer's structural steel storage systems facility. He alleges that on July 19, 2002, he was about to complete a welding task when he stumbled over an extension cord

left lying across the top of a catwalk, and he fell down three stairs and hit his back against a frame jig. He testified that it was hard to stand on his right leg for a minute after the accident and his low back hurt. According to Claimant, after a couple of hours, the pain in his lower right side was getting worse, so he spoke with his foreman, Rudy Ramos, about going home.¹ Claimant testified that he told Mr. Ramos that he had injured his back when he fell into the jig; Mr. Ramos denies this.

2. Claimant first sought medical treatment post-accident on July 22, 2002, from Mark E. Belnap, D.C. Dr. Belnap's office note for that date indicates, "As he told me on a prior visit, ever since he bumped in the low back Mr. Winchester has been experiencing some discomfort in his pelvis on a constant (75-100%) basis." Defendants' Exhibit B, p. 81. Claimant had previously seen Dr. Belnap on July 8th and 9th and had informed Dr. Belnap that he did a lot of bending and heavy lifting both at work and at home. Claimant further informed Dr. Belnap that his "problem" started around June 25, 2002.

3. Claimant continued to treat with Dr. Belnap until September 13, 2002, for "lumbar spine subluxation complex." Claimant used his private health insurance to cover Dr. Belnap's services. Dr. Belnap's records do not mention specifically the July 19, 2002, accident or any right hip problem.

4. The medical records in evidence reveal that Claimant had low back pain complaints preceding his alleged July 19, 2002, accident. For instance, a medical record authored by Mark Mansfield, M.D., dated August 13, 2002, indicates, "43 y/o for 1 1/2 year [sic] has had low back pain radiating down his right buttock." Defendants' Exhibit C, p. 102. The

¹ Claimant's testimony in this regard is confusing. At one point he testified that his lower right side pain was getting worse after a couple of hours. At another point, he testified that he had his conversation with Mr. Ramos no later than 20 minutes after the accident and Mr. Ramos told him to go have his back looked at.

record does not mention the July 19 accident. A September 23, 2002, lumbar MRI revealed degenerative changes but no herniations.

5. On May 23, 2003, Dr. Mansfield referred Claimant to Scott Huneycutt, M.D., a neurosurgeon. Claimant did not see Dr. Huneycutt until February 11, 2004. Claimant's chief complaints at that time were low back and right hip pain. Dr. Huneycutt notes the date of Claimant's accident as June or July 2002. Dr. Huneycutt diagnosed an annular tear with significant low back pain and a right hip injury with significant positive right hip examination. He recommended a repeat MRI and a referral to a hip specialist. The repeat MRI revealed moderately prominent degenerative changes of the right hip and mild degenerative changes of the left hip.

6. Claimant saw Hugh Selznick, M.D., an orthopedic surgeon, on May 3, 2004, for an initial evaluation. Dr. Selznick erroneously noted, "(Claimant) had an accident at work a little over a year ago and had a lot of discomfort in his lower back and right hip pain." Defendants' Exhibit G, p. 121. Dr. Selznick diagnosed osteoarthritis of the right hip and was concerned about an avascular necrosis, which was subsequently ruled out by MRI. Dr. Selznick opined that Claimant will need a total hip replacement as his symptoms dictate. He further opined on May 29, 2004, that, "This gentleman started developing right hip symptomatology after an injury upwards of a year ago when he was doing welding activities and fell off a jig, landing on his low back and right hip." Claimant's Exhibit 3, p. 86.

7. Claimant used his health insurance and family medical leave on two occasions until he was eventually terminated on August 4, 2003, for failing to report for work. Of interest is the September 20, 2002, request for family leave wherein it is stated by Dr. Mansfield's physician's assistant that the condition for which the leave was requested commenced on July

9, 2002, and did not mention anything about a July 19, 2002, accident. *See*, Claimant's Exhibit 11, p. 151. In the second request for family medical leave filled out by Dr. Mansfield on April 29, 2003, he indicated that the condition for which Claimant sought leave commenced on February 27, 2001. Defendants' Exhibit A, p. 34.

DISCUSSION AND FURTHER FINDINGS

Notice:

Idaho Code § 72-701 provides in pertinent part: "No proceedings under this 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 60 days after the happening thereof, and** unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident . . ." (Emphasis added). The Idaho Supreme Court has held that the notice must be sufficient to apprise the employer of any accident arising out of and in the course of employment causing the personal injury. *Murray-Donahue v. National Car Rental Licensee Association*, 127 Idaho 337, 339, 900 P.2d 1348, 1350 (1995). Idaho Code § 72-704 provides in pertinent part: "Want of notice or delay in giving notice shall not be a bar to proceeding under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of knowledge." The claimant bears the burden of proving that timely notice was given or that employer was not prejudiced by the lack of timely notice. *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 535, 960 P.2d 1254 (1998). Here, Claimant argues that Employer had actual knowledge of his alleged accident and injury.

8. Claimant contends he informed his foreman, Rudy Ramos, of his accident on the day of its occurrence. Contained within Defendants' Exhibit 1, Claimant's personnel file, is a

memo dated June 23, 2003, prepared by Mr. Ramos indicating that on July 19, 2002, Claimant asked if he could go home early because his back was sore. Mr. Ramos further stated that Claimant, “. . . didn’t have me fill out an accident report.” Defendants’ Exhibit 1, p. 46. Mr. Ramos goes on to state that on September 5, 2003, Claimant informed him that he had hurt his back moving an engine out of the back of his truck. Then Mr. Ramos, Russ Speirn, the general manager, and Claimant had a meeting to inform Claimant that they were running out of light duty jobs for Claimant to do and that they would let him know a day in advance if they would not have any work for him so he would not have to come in, “. . . but he just stopped coming in.” *Id.*, p. 47.

9. Also contained within Claimant’s personnel file is a memo from Claimant’s co-worker, Robert Sprague, dated June 19, 2003, stating that in September 2002, after a weekend, Claimant told he and Mr. Ramos that he (Claimant) had hurt his back lifting an engine block with a friend and needed some time off to see a doctor. Mr. Sprague further indicated that he and Mr. Ramos had many meetings with Claimant over the “past months” and he did not remember Claimant saying he hurt his back at work.

10. Another of Claimant’s co-workers, Troy Davis, drafted a memo dated June 18, 2003, for Claimant’s personnel file. He wrote that in June 2002, Claimant told him that he had hurt his back at home.

11. Russ Speirn authored a memo dated June 26, 2003, that indicated:

Kevin Winchester had not requested that we make a Workers [*sic*] Compensation claim before May 23, 2003. On May 23, in a meeting with Amy Kline and myself he told us that his lawyer had advised him to have us make a claim for an injury beginning September 12, 2002. On May 28, 2003, Amy Kline prepared the “First Report of Injury or Illness” with Kevin. At that time he claimed an injury was sustained July 19, 2002.

Kevin did not request medical attention through Frazier’s process for treating on-the-job injuries in July 2002 and in September 2002. Due to statements made to

employees and supervisors it was our understanding that Kevin's injuries had been sustained off the job.

In September 2002 Kevin took Family Medical leave for the time he was absent from work. Kevin did not claim an on-the-job injury at that time.

Defendants' Exhibit 1, p. 42.

12. Claimant testified that the reason he used his health insurance rather than filing a workers' compensation claim was because he "assumed" he was supposed to use his "health card" when presenting insurance information to health care providers, even for work-related injuries, and that he used family medical leave because he had used up all of his vacation and unexcused absences time. He testified as follows regarding his conversation with Mr. Speirn and the filing of a workers' compensation claim:

I went in and talked to Russ about having some medical leave and if it was available to me, and he told me it was. And I asked him about workmen's comp, and he just was sitting there at his desk. And he said, well, it's my understanding that you told the guys on the floor that you hurt your back a long time ago when you were fishing or something. And I said, yeah, but I couldn't think of why that had anything to do with this.

Q. Okay.

A. And he said, well, that's called a preexisting injury and I don't believe you're eligible for workmen's comp. However, we will grant you your family leave.

Q. And, obviously, at that point did you still feel you had a work comp injury?

A. Well, I wasn't sure then. I trusted what Russ told me.

Q. Okay

A. And, again, used my health card to take care of the medical end of it.

Hearing Transcript, pp. 53-54.

13. Claimant's testimony in regard to the alleged notice he gave Employer is not credible. The inference Claimant raised that Employer was not filing injuries as workers' compensation claims is undermined by the fact that the Commission has a list of his prior

injuries on file and, in fact, Claimant's attorney used the list to question Claimant. Further, Claimant testified on direct examination that Employer would not file a claim for a prior hernia operation because Claimant could not list a specific time and place concerning when and where he got the hernias, so he never pursued that injury as a workers' compensation claim. However, under cross-examination, Claimant reluctantly "remembered" that he entered into a Lump Sum Settlement agreement and received \$800.00 in settlement of that claim. Claimant is attempting to use that tactic here, that is, contending that Employer somehow refused to file a claim for him after having knowledge of his accident. That does not make sense for a number of reasons.

14. Claimant told Dr. Mansfield on May 15, 2003, that he was considering filing a workers' compensation claim. Then, on May 23, 2003, Dr. Selznick referred Claimant to a neurosurgeon for further treatment. By then, Claimant had retained an attorney.² On May 28, 2003, Claimant admittedly signed an I.C. Form 1 indicating that he gave notice of his injury to Employer on May 23, 2003, coincidentally the same day he was referred to the neurosurgeon. A reasonable inference may be made that by this time Claimant was aware that his injuries from whatever source might be more serious than he originally believed. Further, by May 23rd, Claimant had been off work since the previous August and the status of his "health card" is unknown, which may explain the delay in seeing the neurosurgeon (Dr. Huneycutt) and the hip specialist (Dr. Selznick). In fact, an entry dated May 11, 2004, in Dr. Selznick's records indicates some concerns about financial issues and Claimant wanted to hold off on getting an MRI until he spoke to his wife about how to proceed. *See*, Claimant's Exhibit 3, p. 83. By May 23, 2003, it would certainly have been in Claimant's best financial interest to attempt to obtain workers' compensation coverage.

² Not the same attorney that represents Claimant during the course of the present proceedings.

15. Claimant admitted meeting with Mr. Speirn regarding filing a claim on May 23, 2003. A Workers Compensation Injury Report dated May 28, 2003, indicates Employer first learned of Claimant's alleged accident on May 23. That document is consistent with the I.C. Form 1 signed by Claimant. All of the "memos" prepared by Employer's employees involving this matter were dated shortly after the May 23, 2003 notice. Had Claimant provided notice on or around the date of the accident, it only makes sense that Employer would have sought the information contained in the memos around that time. Claimant's assertion that Employer finally filed the claim in May 2003 because he had by then consulted with an attorney who "threatened" to file a claim if Employer did not is not persuasive, especially in light of Employer's track record of filing previous claims with the Commission, whether accepted or denied, i.e., the hernias.

16. The Referee finds that assuming, without deciding, Claimant suffered an industrial accident causing an injury on July 19, 2002, he failed to timely report the same. Further, Claimant has not shown Employer was not prejudiced by the delay; just the opposite is true. What Employer thought was a non-industrial back injury in 2002 turned into a hip injury requiring a total hip replacement almost two years later. Had Employer had timely notice, a timely investigation could have been initiated (as it was in May 2003), and the careful monitoring of Claimant's ongoing medical care could have better illuminated the connection, if any, between Claimant's alleged July 19, 2002, accident and back injury, and his apparent need for an eventual total hip replacement.

CONCLUSIONS OF LAW

1. Claimant failed to timely report his alleged accident of July 19, 2002, to Employer's prejudice and his claim is, therefore, barred.
2. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __28th__ day of __December__, 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __5th__ day of __January_____, 2007, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

ROBERT K BECK
2450 E 25TH ST STE A
IDAHO FALLS ID 83404

GLENN M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

_____/s/_____

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN E. WINCHESTER,)	
)	
Claimant,)	IC 2003-006972
)	
v.)	
)	ORDER
FRAZIER INDUSTRIAL COMPANY,)	
)	Filed January 5, 2007
Employer,)	
)	
and)	
)	
ZURICH NORTH AMERICAN)	
INSURANCE COMPANY,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 failed to timely report his alleged accident of July 19, 2002, to Employer's prejudice and his claim is, therefore, barred.
2. All other issues are moot.
3. The Complaint herein is dismissed with prejudice.

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

DATED this __5th__ day of __January__, 2007.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R. D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __5th__ day of __January__, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

ROBERT K BECK
2450 E 25TH ST STE A
IDAHO FALLS ID 83404

GLENNA M CHRISTENSEN
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_____/s/_____