

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STACEY WILLIAMS,)
)
 Claimant,)
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 v.)
)
 DAVIS EXCAVATING, INC.,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 2004-512366

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

Filed: April 24, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Coeur d'Alene, Idaho, on August 31, 2006. George Conrad of Coeur d'Alene represented Claimant. Paul J. Augustine of Boise represented Defendants. The parties submitted oral and documentary evidence. Post-hearing briefs were filed and the matter came under advisement on January 30, 2007, and is now ready for decision.

ISSUE

The only issue to be decided in this proceeding is:

1. Whether Claimant sustained an injury from an accident arising out of and in the scope of his employment.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts that he sustained a herniated disc at L5-S1 as the result of an accident while working for Employer on May 21, 2004.

Defendants assert that Claimant's herniated disc was not the result of a work-related accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Frank Davis taken at hearing; and
2. Joint exhibits A through G admitted at hearing.

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

FINDINGS OF FACT

BACKGROUND

1. At the time of hearing, Claimant was 33 years of age. He was living in Spokane, Washington, with his wife, Sandy.
2. Claimant graduated from Post Falls High School in 1991 with a GPA of 3.75.
3. After high school, Claimant worked in the construction trades, including a number of years hanging sheetrock. Claimant quit sheetrocking in about 1998 because of pain in his hands. He went to truck driving school in 2000, after which he worked a variety of trucking-driving jobs.
4. Claimant had no work-related injury, and in particular, no low back injuries, prior to May 2004.

THE JOB

5. In April or May 2004, Claimant went to work for Employer. Although the position was ostensibly that of “truck driver,” Claimant’s un rebutted testimony was that the job was approximately forty percent driving and sixty percent manual labor, *e.g.*, shoveling, raking, and hauling dirt.

6. Employer was in the business of excavating for utilities, foundations, site grading, etc. During the construction season, Claimant and his co-workers often worked in excess of twelve-hour days.

7. Claimant was overweight and out of shape after four years as a truck driver. Unaccustomed to heavy manual labor, Claimant was frequently stiff and sore during the time that he worked for Employer. Claimant’s aches and pains were of the kind that often accompanies heavy labor.

THE ACCIDENT

8. On Friday, May 21, Claimant and a co-worker were moving dirt from the front to the back of a house with a wheelbarrow, and then raking it level. Claimant testified that it was particularly heavy work and he was having difficulty keeping up with his much-younger colleague. At the end of the day, he was particularly fatigued.

9. When the day’s work was finished, Claimant drove the dump truck back to Employer’s shop, where co-worker Shade Miller was waiting for him. Mr. Miller and Claimant had known each other for a number of years, lived near each other, and carpoled to work. As Claimant was exiting his dump truck, his left foot slipped off the step and he landed on the ground hard with both feet. When his feet hit the ground, he felt an intense pain shoot down his right leg. Claimant and Mr. Miller briefly discussed Claimant’s slip and the pain in his right leg.

See, Claimant's Depo, p. 35 ("I must have pulled something today or I must have worked a little too hard today or something."), and hearing testimony, Tr., p. 20 ("I don't know what I did today, but I'm sore."). The intense pain recurred when Claimant exited Mr. Miller's vehicle at Claimant's home.

10. Claimant rested Friday evening and when he awoke Saturday morning the pain in his right leg was "intense" and "excruciating." Claimant's Depo., p. 37. Claimant rested on Saturday.

POST-ACCIDENT CHRONOLOGY

11. On Sunday, May 23, Claimant sought emergency medical care at Kootenai Medical Center (KMC). The chart note describes the following history:

This is a 31-year-old gentleman who presents complaining of 3 months of on and off back pain from his right SI joint area, down the back of his leg to his calf. Over those 3 months, there has become more severe pain and more often and is to the point that he needs help getting dressed in the morning.

Ex. A, p. 005. Gordon E. Luther, M.D., the physician who saw Claimant that day, suspected a ruptured disc. Claimant remained certain he had just pulled a muscle. Dr. Luther ordered an MRI and made a referral to a neurologist. He also prescribed a short course of pain medication and muscle relaxers.

12. Despite continuing pain, Claimant returned to work Monday, May 24, 2004 and worked through Friday, May 28. Claimant testified that he notified Employer, Frank Davis, about his injury on Monday, May 24, but did not recall exactly what he told Davis. Davis did not recall having a conversation about Claimant's injury on May 24.

13. Monday, May 31, 2004 was Memorial Day and Claimant did not work. On Tuesday, June 1, Claimant had an MRI at KMC. It showed a large, right-sided disc herniation impressing the thecal sac and nerve root at L5-S1. Immediately following the MRI, Claimant

saw Anthony L. Russo, M.D., to discuss the findings. Dr. Russo prescribed steroids and pain medication.

14. The record is unclear as to whether or not Claimant worked Wednesday, June 2 through Friday, June 4. On Monday, June 7, Claimant returned to KMC and was seen by Warren C. Keene, M.D. The chart note states, “[Claimant] originally did not claim it as a work injury but he says it did definitely occur at work.” Ex. A, p. 009. Dr. Keene reconfirmed the diagnosis of a herniated disc and imposed work restrictions. Those restrictions appear at p. 11 of Exhibit A, but the copy is unreadable.

15. That same day, Monday, June 7, Claimant took the document containing his restrictions to Davis. Davis advised Claimant that he had no work for Claimant within his restrictions.

16. On June 8, Claimant filled out a First Report of Injury or Illness (Form 1). Claimant stated the injury occurred on May 21, and that Davis was notified May 30. Claimant identified the type of injury as a ruptured disc in his back. As to the mechanism of injury, Claimant wrote, “back was sore—just kept getting worse woke up one morning and had pain and spasms in my leg.”

17. On Friday, June 11, Davis delivered Claimant’s check to him at his home. Claimant and Davis visited for about half an hour. About an hour later, Davis received a call from Surety regarding Claimant’s claim. Davis asserts that this is the first time he became aware that Claimant was asserting that his back injury was work-related.

18. Claimant returned to the ER at KMC on June 19, complaining of increased pain. He was seen by Dr. Russo, and given a morphine injection. Additionally, Dr. Russo dispensed prednisone and pain medication.

19. On June 21, Letitia McCully, PA-C, of Community Health Association of Spokane wrote a letter indicating that Claimant was being treated for a condition that prevented him from lifting and he would require on-going treatment and intervention.

20. On June 29, Claimant had his consultation with Glenn Keiper, M.D., the neurologist to whom he was initially referred on May 23. Dr. Keiper's chart note includes the following history:

This is a 31-year-old gentleman seen at the request of Dr. Luther for a neurosurgical consultation. He was well until 6 weeks ago when he was hauling a heavy load with a wheelbarrow and had the acute onset of buttock pain followed by pain radiating down to the bottom of his foot. The pain has been there every [sic] since and is becoming excruciating.

Ex. D. p. 003. Dr. Keiper confirmed the diagnosis of L5-S1 disc herniation, and noted that by history and MRI the herniation was work-related. "This gentleman a has a [sic] neurologic deficit which places some urgency on his need for care in hopes of making a full recovery." *Id.* Dr. Keiper gave the Claimant three treatment options: 1) do nothing; 2) try physical therapy and epidural steroidal injections; and 3) undergo right L5-S1 microlaminotomy and discectomy. Claimant opted for surgery.

21. Claimant testified that during the course of his appointment with Dr. Keiper, they discussed the exact etiology of Claimant's herniation. Claimant understood Dr. Keiper to opine that it was unlikely that the strenuous wheelbarrowing of soil would cause the acute herniation. At Dr. Keiper's request, Claimant reconstructed his workday, including his slip and hard landing when he got out of his dump truck at the end of the day. It was Claimant's understanding the Dr. Keiper thought that the hard landing while exiting his truck was the more likely cause of the herniation.

22. On July 24, Claimant returned to the ER at KMC reporting urinary incontinence

and increased symptomology from his herniated disc. He was seen by Paul F. Paschall, M.D. Dr. Paschall ordered an immediate MRI in light of Claimant's known disc herniation and discussed the findings with Dr. Keiper. Claimant followed up with Dr. Keiper on July 26. The results of the MRI conducted on July 24 were unchanged from his earlier imaging. Dr. Keiper noted:

There is a dispute with L&I regarding the etiology of this disk herniation and they will not authorize the surgery. The patient is suffering significantly with pain and has a right S1 radiculopathy. He states that he is going to get a letter to try to obtain authorization for L&I. He will be scheduled for surgery once authorization has been obtained.

Ex. D, p. 005. Claimant also requested a refill for his pain medication from Dr. Keiper, who declined to fill any pain prescriptions until after surgery. He directed Claimant to have his primary care physician treat his pain complaints.

23. Claimant returned to the ER at KMC on August 6 for an exam incident to refilling his pain medication. His condition was unchanged and he continued to await approval for his surgery. The chart note from this visit is the first one to mention that Claimant's injury occurred while he was getting out of his dump truck.

24. Sometime during the summer of 2004, Surety advised Claimant that it was denying his claim.

25. Claimant filed his complaint on September 13, 2004 without benefit of counsel. The date of injury is identified as May 21, 2004. Claimant described how the injury occurred as follows:

After working all day I stepped out of my dump truck and missed the step. I slipped to the ground and had a spasm down my leg. The spasms continued the next day so I went to the emergency room.

Complaint, p. 1. The Complaint records May 24, 2004 as the date upon which Employer was

given verbal notice of the injury.

26. Claimant was a credible witness. While he could not always clearly recall which doctor he saw when, that is not surprising since Claimant was seen by at least five different physicians during his numerous visits to the KMC ER. However, the medical records as a whole support the substance of Claimant's testimony, which was consistent both in his deposition and at hearing.

DISCUSSION AND FURTHER FINDINGS

27. The burden of proof in an industrial accident case is on the claimant. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). 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).

28. 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).

29. Defendants assert that Claimant cannot meet his burden of proving by substantial and competent evidence that he suffered an injury resulting from an accident related to his employment because he is not credible. Defendants identify five particular areas of inconsistency that they assert are probative on the issue of credibility:

- Form 1 identifies "wheelbarrowing dirt" at 2:00 p.m. as the activity engaged in and the time at which Claimant's injury occurred, whereas his Complaint and

testimony at hearing identified a misstep while exiting the dump truck at 5:00 p.m. as the time and cause of the injury;

- Claimant's account of events at hearing is contradicted by the medical records;
- Claimant did not tell the first medical provider that his injury was work-related;
- Claimant did not assert his injury was work-related until after he learned he needed surgery; and
- Claimant did not provide notice of the work injury to Employer.

Each of these assertions will be discussed in turn.

FORM 1 / COMPLAINT

30. Claimant completed a Form 1 on June 8, 2004, after an MRI confirmed that Claimant had a herniated disc. Claimant, though clearly an intelligent gentleman, is not expected to be conversant in the etiology of spinal injuries. Specialists often disagree about the exact origin of a particular spinal injury. The record in this proceeding consistently dates the onset of Claimant's acute, radiating pain to May 21. The record is also consistent as to what work Claimant was performing that day. Lacking medical expertise, Claimant reasonably made the connection between the work he was doing and the injury he sustained. In fact, that is what Claimant reported when Dr. Keiper took a history of Claimant's complaint.

31. It was not until Claimant's June 29 appointment with Dr. Keiper that Claimant had the benefit of a specialist's wisdom concerning the *most likely* cause of the disc injury. By Claimant's account, it was only through a careful reconstruction of his day that Claimant described an event that Dr. Keiper identified as the more likely cause of Claimant's disc herniation.

In fact, whether it was moving dirt or a slip while exiting his truck that caused Claimant's herniated disc may be a distinction without a difference. The MRI evidence shows the existence of an acute injury resulting from an untoward or unexpected event, which was reasonably located as to time when and place where it occurred; that Claimant sustained an injury is not disputed.

TESTIMONY/MEDICAL RECORDS

32. The most significant discrepancy between Claimant's testimony and the medical records appears in the chart note from Claimant's first visit to the emergency room at KMC. See Finding 11, *supra*. Claimant was asked about this chart note during his deposition and again at hearing. When queried during his deposition whether the chart note accurately captured his explanation, Claimant stated:

A. No. What I told them is that I had a sore back for about three months, but what I was complaining about when I went in there was the pain down my leg.

Q. [By Augustine] It says over the three months has become more severe. Pain is more often and is to the point that he needs help getting dressed in the morning. Is that true?

A. That's not what I said. What I said was that my back had been aching, you know, like sore back, you know, the leg pain was just starting then.

Q. Okay. But was it to the point that you needed help getting dressed in the morning?

A. Just like a couple of days before I went in there.

Claimant's Depo., pp. 64-65. Claimant was asked again about this chart note at hearing, and he responded:

A. The pain I was having was soreness in my back from bending and lifting—moving that I wasn't used to. I never had that pain down my leg before that day.

Q. [By Augustine] That was something different?

(Chart note was read)

A. No, I don't remember saying that to him. What I said to him is I thought I pulled a muscle because I was out of shape, and I have been having tenderness in my back and having a hard time bending, you know, because of those muscles weren't used to working.

I used to weight train and stuff like that, and I understand my body; so I thought I had just overdone it and pulled something and that's what I was trying to explain to him.

Tr., pp. 23-24. Claimant went on to explain that the soreness he'd experienced since he'd been working for Employer was the kind that generally resolved itself overnight with rest, but that the leg pain was different and didn't improve with rest.

This is not an instance where the chart note and a claimant's testimony are wildly at odds. In fact, the chart note almost, but not quite, captures the essence of Claimant's reported history. Often a review of the nursing notes provides some clarity as to which version is the more accurate. All of the chart notes from KMC make reference to the nursing notes on file, but those notes are not a part of the record. Claimant's consistency in distinguishing the two types of back pain he experienced and how they differed, and his consistent reiteration of what he told Dr. Luther, lead the Referee to conclude that the chart note inartfully captured Claimant's history, but is not inconsistent with it.

TIMING OF ASSERTION THAT INJURY WAS WORK-RELATED

33. Defendants' third and fourth reasons for disputing Claimant's workers' compensation claim both relate to Claimant's delayed report that his back injury was related to his work. It is undisputed that Claimant did not report the work-related nature of his injury on his first medical visit and that he did assert that his injury was work-related after learning of the ruptured disc. At issue is what meaning is imputed to these undisputed facts. Defendants interpret the events as corroboration of their view that Claimant was looking for someone to foot the bill for his non-industrial back injury. Claimant portrays his actions as an exercise of reasonable caution in light of his experience that employers in the construction trade tend to have a hair trigger when it comes to work injuries.

34. Claimant explained in his deposition and again at hearing that when he first sought medical attention, he assumed it was just a pulled muscle and that a couple days of medication and rest would resolve the problem. Claimant went on to testify that his experience in the construction trades was that to report a work-related injury would both create trouble for the employer and put a worker's job at risk, so it was easier to just pay for minor medical expenses out-of-pocket. Once it became evident that his injury was not minor, Claimant sought the workers' compensation benefits to which he was entitled.

35. Mr. Davis testified that he always told his employees to report work injuries, and that the purpose of workers' compensation insurance was to protect employers as well as employees in the event of a work accident. Even so, it is easy to see why Claimant may have been hesitant to report a workers' compensation claim initially. He had only worked for Employer for a short period. Although Claimant believed that Employer was a good guy, his years in the construction trade led him to err on the side of caution. Although those involved in the workers' compensation system would like to believe that injured workers are never punished for bringing claims, Claimant's perception is all too often the reality.

36. Defendants' initial concern about the timing of Claimant's revelations may have been reasonable. However, neither Defendant made any further inquiry into the matter. Defendants offered no evidence in support of their assumption, or to rebut Claimant's explanation. The Referee found Claimant to be a credible witness, and his explanation of his course of action to be reasonable under the circumstances.

NOTICE TO EMPLOYER

37. Finally, Defendants cite to Claimant's failure to inform Employer about the work accident. It is undisputed that Claimant prepared his Form 1 on June 8, the day after his

appointment with Dr. Keene that confirmed the seriousness of his back injury. Surety had the Form 1 by June 11, and Davis was made aware of the claim that same day. Defendants do not contend that Claimant's notice was outside the statutory period, just that Claimant's failure to clearly inform Employer could be interpreted as an attempt to create workers' compensation coverage for a non-compensable injury.

38. This argument assumes that Claimant failed to notify Mr. Davis immediately about his accident and subsequent injury, a fact that is in dispute. Claimant contends that he did tell Davis about the injury on the Monday following his initial emergency room visit, but doesn't recall the exact words he used. Davis testified that Claimant probably did complain about his back hurting because such complaints were common; but, unless Claimant *specifically* stated that he *injured his back at work*, Davis probably wouldn't have paid much attention. It is not necessary to determine whether or not Claimant notified Davis, or to parse the adequacy of any notice that Claimant may have given. In light of Claimant's initial belief that the injury was minor and would resolve on its own, and his understanding of the possible repercussions of reporting even a minor injury, failure to report is a rational option and is not probative of a fabricated accident.

SUMMARY

39. As noted by both parties at hearing and in their briefing, the sole issue in this proceeding, whether Claimant's back injury resulted from an industrial accident, hinges on the credibility of the Claimant. Having found the Claimant to be credible, and having carefully reviewed the entire record with an eye to the five particular challenges to credibility raised by Defendants, the Referee finds that Claimant has met his burden of proving that he sustained a low back injury as a result of an accident at work.

CONCLUSION OF LAW

1. Claimant sustained a low back injury from an accident arising out of and in the scope of his employment on May 21, 2004.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 4 day of April, 2007.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of April, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

GEORGE D CONRAD
2120 NORTHWEST BLVD STE C
COEUR D ALENE ID 83814

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

djb /s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STACEY WILLIAMS,)	
)	
Claimant,)	
)	
v.)	IC 2004-512366
)	
DAVIS EXCAVATING, INC.,)	
)	
Employer,)	ORDER
)	
and)	Filed: April 24, 2007
)	
STATE INSURANCE FUND,)	
)	
Surety,)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusion 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 conclusion of law as its own.

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

1. Claimant sustained a low back injury from an accident arising out of and in the scope of his employment on May 21, 2004.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 24 day of April, 2007.

INDUSTRIAL COMMISSION

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 24 day of April, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

GEORGE D CONRAD
2120 NORTHWEST BLVD STE C
COEUR D ALENE ID 83814

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

djb

/s/ _____