

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT L. AREL,)
)
 Claimant,)
)
 v.)
)
 T & L ENTERPRISES, INC.,)
)
 Employer,)
)
 and)
)
 IDAHO STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2005-508911

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

Filed August 2, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor. Claimant is represented by Starr Kelso of Coeur d’Alene. H. James Magnuson, also of Coeur d’Alene, represents Employer/Surety. In lieu of a hearing, the parties submitted a Stipulation of Facts on December 29, 2006. The parties then submitted post-hearing briefs and this matter came under advisement on March 19, 2007, and is now ready for decision.

ISSUE

As stipulated to by the parties, the sole issue to be decided is whether Claimant’s claim for Workers’ Compensation benefits is barred by Idaho Code § 72-701.

CONTENTIONS OF THE PARTIES

Claimant contends that he gave timely notice of his accident to Employer even though that notice came 124 days after the “incident” that was ultimately found by medical evidence to have produced Claimant’s injury. Until Claimant became aware that he had suffered an “accident” causing an “injury,” there was nothing to report. Once he was informed by his physician that his partial rotator cuff tear was the result of his “accident,” he informed his employer immediately.

Defendants contend that Claimant’s notice is untimely because his “accident” occurred 124 days prior to Employer receiving notice of the same and was clearly beyond the 60-day notice requirement contained within Idaho Code § 72-701 and, thus, his claim must fail.

STIPULATION OF FACTS

The parties submitted the following Stipulation of Facts, which is adopted by the Referee:

1. Following a startle from behind that caused him to jerk his right upper extremity that occurred in February/March of 2004, Claimant Arel had some pain posteriorly just behind the humerus. It seemed to resolve but it would ache from time-to-time. He did a lot of overhead work with his arms out to the side. He did not go to a physician at the time. This was a startle that he experienced while he was seated in a vehicle. There was no fall or significant trauma. He was able to continue to work 40 to 80 hours per week without significant difficulty.

2. Claimant Arel while performing his job with T & L Enterprises, Inc., on November 27, 2004, slipped on a log and fell. His right thigh came down on the log and his weight landed on his right elbow on a concrete pavement. The event was painful. Mr. Arel continued to work. Since this fall he noted worsening pain at the anterior and lateral aspect of the right shoulder. The pain was exacerbated by overhead lifting and rotational movements such

as bending pipes that are required by a pipe fitter. It got to the point where he felt it should be looked at.

3. On February 21, 2005, Claimant was examined by Dr. Gregory S. Hanson, a family physician, because Claimant had noticed increasing symptoms because he had been working a lot overhead with his arms out to his sides. Upon examination by Dr. Hanson (3-2-05) Claimant pointed to the deltoid area but the physician felt the primary area was posteriorly up into the joint space. Dr. Hanson assessed Claimants condition on 3-2-05 as "shoulder pain, probably rotator cuff injury". He was prescribed Ibuprofen 600 mg for 2 weeks and recheck. If the condition was not resolving at that time Dr. Hanson would consider an MRI. On follow-up Dr. Hanson recommended an MRI (Dr. Hanson 3-25-05).

4. The MRI was performed on March 21, 2005 and read on March 22, 2005 by Dr. Howard. The MRI reflected changes in the rotator cuff that suggest tendinosis or partial tear but not complete tear of the rotator cuff (Dr. Howard 3-22-05).

5. On March 28, 2005, Dr. Hanson referred Claimant Arel to Dr. Brown, an orthopedic surgeon. Arel was examined by Dr. Brown and his physician's assistant, Robert J. Alfiero, PA-C, on March 31, 2005. Claimant, consistent with what he had told Dr. Hanson, explained that his symptoms initially began one year earlier after being startled. He further explained that since slipping and falling in November, 2004, that he had begun to notice worsening pain at the anterior and lateral aspect of his right shoulder.

6. After discussing the history of events and the MRI findings at his appointment on March 31, 2005, Claimant was informed, for the first time, that his pain was not just an aggravated continuation of his pain from his earlier startle. He was told that the incident that he described occurring on November 27, 2004 was the type that would produce the injuries

reflected by the MRI. This was the first time he became aware that he had suffered not just pain, but actual violence to the physical structure of his body, on November 27, 2004.

7. After the March 31, 2005 examination the Claimant drove to his employer's and advised his employer of the slip and fall that had occurred on November 27, 2004, and Dr. Brown's opinion that he had suffered violence to the physical structure of his body on November 27, 2004 and that it was probably a torn rotatory [*sic*] cuff.

8. When questions arose on his workers' compensation claim regarding the causation of his right shoulder injury, Claimant reviewed the history of this matter once again, with Dr. Brown, on February 6, 2006. After this review, Dr. Brown stated in his notes of said date, that "the type of work he was doing and the injury that he experienced in November of 2004 are absolutely classic for producing the injuries that he sustained and were documented on MRI."

9. Claimant Arel had not advised his employer of the slip and fall before March 31, 2005.

10. Employer had no notice of Claimant suffering an injury until March 31, 2005.

11. As soon as employer received notice (either from Claimant or otherwise) that Claimant suffered an accident on November 27, 2004 it would have filed a Form 1. As it was, as soon as it received notice from Claimant, it promptly filled out and filed a Form 1.

12. If Employer had received notice from Claimant (or otherwise) within sixty (60) calendar days of November 27, 2004, it would have referred Claimant to a physician for evaluation.

DISCUSSION AND FURTHER FINDINGS

13. 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). However, the Commission is not required to construe facts 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).

13. **Notice.** Claimant presents cogent argument that his November 27, 2004 “incident” was not an “accident” that needed to be reported because an “accident” is defined as 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. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. 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).

14. Claimant’s argument continues that because he already was suffering from shoulder pain at the time of the November 27, 2004, event, and continued to suffer increasing shoulder pain thereafter, he was unaware that the November “incident” caused an “injury,” i.e., violence to the physical structure of his body. Claimant believed the increase in his shoulder pain was from the initial “startle incident” the previous February or March and the awkward overhead work required of him as a pipe fitter. It was not until he sought medical attention from Dr. Brown on March 31, 2005, that Claimant was advised his partial rotator cuff tear was not caused by the startle incident but rather by his November 2004 fall at work. Claimant further argues that since the onset of pain at work does not constitute an accident, Konvalinka v. Bonneville County, 140 Idaho 477, 95 P.3d 628 (2004); and because a claimant must prove by expert medical evidence that his or her injury was caused by an industrial accident, Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995), the 60-day notice

period prescribed by Idaho Code § 72-701 should begin when a physician informs the worker that the injury was the result of an on the job incident and the worker thus becomes aware that he suffered an “accident” as statutorily defined. Claimant thus asserts his notice is timely because he reported his incident and injury the same day he learned from his physician that he had suffered an “accident” on November 27.

14. Defendants argue that according to the wording of Idaho Code § 72-701, Claimant has failed to give timely notice of his accident and Employer did not have actual or constructive knowledge of the same. Further, Claimant has failed to prove that Employer and its surety have not been prejudiced by the delay in giving notice. Defendants assert Claimant’s slip and fall produced pain and the incident should have been timely reported so that Employer would have had an opportunity to send Claimant for medical treatment.

15. 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 sixty (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

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).

16. Several instructive decisions have addressed the time at which the one year limitations period for filing a claim commences under Idaho Code § 72-701. In Smith v. IML Freight, Inc., 101 Idaho 600, 619 P.2d 118 (1980), Smith fell while at work. He experienced pain and consulted physicians who diagnosed his condition as osteoarthritis unrelated to his

work. Smith did not file a written notice of injury nor a claim for benefits within one year of his fall. Nearly two years later, Smith was found to have suffered a herniated disk as a result of his fall. The Court chose not to address the notice issue, but found that Idaho Code § 72-701 barred Smith's untimely claim stating:

The appellant contends the Commission erred in denying his claim because due to the fact that his condition was initially diagnosed by both doctors as osteoarthritis and treated accordingly, he did not know he had a compensable claim until long past the time for filing his claim. It was not until May 2, 1977, almost two years after the accident, that the problem was diagnosed as a herniated disc, requiring surgery. Surgery was performed on May 4, 1977. He filed his claim immediately after the surgery.

....

Appellant also argues that the term 'accident' must be given a broader interpretation to allow the filing of a claim within the statutory period following discovery of the results of the accident, as has been done in other jurisdictions. [Citations omitted.] However, this argument has been presented to and rejected by this court in earlier cases: Moody v. State Highway Department, 56 Idaho 21, 48 P.2d 1108 (1935); Atwood v. State of Idaho Department of Agriculture, 80 Idaho 349, 330 P.2d 325 (1958); Gregg v. Orr, 92 Idaho 30, 436 P.2d 245 (1968); Cummings v. J.R. Simplot, 95 Idaho 465, 511 P.2d 282 (1973).

Prior to 1927, Idaho utilized the time of the injury as the time for commencing the running of the statute of limitations. 'No proceedings under this chapter for compensation shall be maintained unless . . . a claim for compensation with respect to such injury shall have been made within one year after the date of the injury . . . ' § 6243 Comp. Stat. 1919.

In 1927 the legislature amended this statute by changing only the word 'injury' to 'accident.' 1927 Sess. Laws, Ch. 106 § 9, p. 143. The court in Moody v. State Highway Department, supra 56 Idaho at 25-26, 48 P.2d at 1110 (1935), discussed this change and held that since the legislature had amended the section by changing only the one word, the intent was clearly to commence the limitation period from the date of accident not from the manifestation of a compensable injury. 'Where the language of a statute is unambiguous, this court is powerless to intervene and grant relief.' The court was aware of the hardship this presented, saying: 'The statute, as amended, works a hardship upon all workers who suffer an accident arising out of and in the course of their employment, whose compensable injuries do not become manifest until after the period prescribed . . . has passed, as is most emphatically emphasized by the unfortunate situation of the respondent in the case at bar, but the remedy is with the Legislature.' Moody, 56 Idaho at 26, 48 P.2d at 1110.

Smith, 101 Idaho at 603-604, 619 P.2d at 121-122.

17. More recently in Petry v. Spaulding Drywall, 117 Idaho 382, 788 P.2d 197 (1990), the Court again considered the time when the limitations period of Idaho Code § 72-701 begins to run for purposes of filing a claim:

Petry's claim for Worker's Compensation benefits is barred by his failure to comply with I.C. § 72-701, which provides in part that “[n]o proceedings under this law shall be maintained unless ... a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident...” The one year statute of limitations is measured from the date of the accident, and not from the date that the injury is discovered or its severity understood. Moody v. State Highway Department, 56 Idaho 21, 48 P.2d 1108 (1935); Smith v. IML Freight, Inc., 101 Idaho 600, 619 P.2d 118 (1980).

In this case, a Notice of Injury and Claim for Benefits was not filed until February of 1987, approximately 18 months after the accident. Petry argues that it is unjust to require an injured worker to file a claim within the statutory time limit where the extent of the injury is not discovered until after the time has expired; especially, as in this case, where the employer had actual notice of the injury at the time it occurred and is not prejudiced by the delay.

This argument is compelling to the conscience, but this Court is constrained by the clear words of the statute. Aristotle said that, “equity is that idea of justice which contravenes the written law.” This Court is not free to impart equity where, as in the case of Worker's Compensation, the law in question derives its existence solely from the printed words of the statutes.

In Moody v. State Highway Dep't, *supra*, this Court noted that in 1927 the legislature amended I.C. § 43-1202, the predecessor to I.C. § 72-701, by changing a single word; instead of measuring the one year time limit from the date of the “injury,” the amended statute measured the time limit from the date of the “accident.”

We have no doubt that when the legislature substituted the word “accident” for the word “injury,” it intended to change the date from which the time for making claim should commence to run, and to change that date from the first manifestation of a compensable injury to the date of the accident. Moody, 56 Idaho at 26, 48 P.2d 1108 (citations omitted).

Although the result is harsh and arbitrary, it is for the legislature to re-examine its policies, and not for this Court to fabricate new laws where explicit statutory directives already exist.

Petry, 117 Idaho at 384-385, 788 P.2d at 199-200.

18. The express language of Idaho Code § 72-701 requires that the one-year limitation period for the filing of a claim commences with an accident—exactly the same event from which the 60-day limitation period for the giving of notice begins to run. It follows that for purposes of the notice limitation period, an accident occurs at the time of the event causing injury regardless of whether the claimant is aware of the injury caused thereby. The 60-day notice period is measured from the date of the accident, and not from the date that the injury is discovered or its severity understood.

19. It is indeed unfortunate that Claimant herein was injured November 27, 2004, but apparently did not know he had a claim requiring notice until he was so informed by a physician on March 31, 2005, well after the 60-day notice period had run. The inequity of requiring Claimant to give notice of a condition he was unaware existed is self-evident, and contrary to the stated purpose of the workers' compensation law to provide "sure and certain relief" for injured workers, their families, and dependants, as stated in Idaho Code § 72-201. As set forth in Idaho Code §§ 72-448 and 72-102(19), the legislature has resolved this same inequitable dilemma for those suffering occupational diseases, but has not chosen to do so for those suffering industrial accidents.

20. Claimant herein has failed to give timely notice of his November 27, 2004, accident and his claim is barred by Idaho Code § 72-701, unless he satisfies the provisions of Idaho Code § 72-704.

21. **Knowledge or prejudice.** Idaho Code § 72-704 provides in pertinent part:

A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. Want 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 occupational disease or that the employer has not been prejudiced by such delay or want of notice.

22. The parties herein stipulated that Employer did not have actual or constructive knowledge that Claimant suffered an injury until well past the 60-day notice period. Claimant relies upon his arguments regarding Idaho Code § 72-701 and thus asserts that lack of prejudice is not an issue in this case. Defendants argue that Claimant has failed to prove that Employer and its surety have not been prejudiced by the delay in giving notice. Had Claimant's slip and fall been timely reported, Employer would have had an opportunity to send Claimant for medical treatment.

23. The Court in Jackson v. JST Manufacturing, 142 Idaho 836, 136 P.3d 307 (2006), observed that Idaho Code § 72-704 gives the employer a favorable presumption and it is a claimant's burden to affirmatively prove that the employer was not prejudiced by lack of timely notice. In the present case, the stipulated facts may not show that Defendants were prejudiced by lack of timely notice, however, the facts do not affirmatively show that Defendants were not prejudiced.

24. Claimant has not proven that the bar to his claim arising from Idaho Code § 72-701 is averted by satisfaction of Idaho Code § 72-704.

CONCLUSIONS OF LAW

1. Claimant did not give timely notice of his accident and his claim is barred pursuant to Idaho Code § 72-701.

2. Claimant has failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by satisfaction of Idaho Code § 72-704.

3. Claimant's Complaint should be dismissed.

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT L. AREL,)	
)	
Claimant,)	IC 2005-508911
)	
v.)	
)	ORDER
T & L ENTERPRISES, INC.,)	
)	
Employer,)	Filed August 2, 2007
)	
and)	
)	
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
)	
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 did not give timely notice of his accident and his claim is barred pursuant to Idaho Code § 72-701.
2. Claimant has failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by satisfaction of Idaho Code § 72-704.

3. Claimant's Complaint is dismissed.

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

DATED this 2nd day of August, 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 2nd day of August, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
P O BOX 1312
COEUR D ALENE ID 83816

H JAMES MAGNUSON
P O BOX 2288
COEUR D'ALENE ID 83814

ORDER - 2

lbs

_____ /s/

ORDER - 3