

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SAMUEL JOHNS,)
)
 Claimant,)
)
 v.)
)
 MOSS TRUCKING, INC.,)
)
 Employer,)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2005-518519
IC 2005-505921

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

August 10, 2007

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Lora Rainey Breen, who conducted a hearing in Pocatello on January 3, 2007. James C. Arnold represented Claimant and M. Jay Meyers represented Defendants. The parties submitted oral and documentary evidence at hearing and took no post-hearing depositions. They then submitted briefs and the matter came under advisement on April 30, 2007.

ISSUES

As clarified by the parties at hearing, the issues to be decided at this time are:

1. Whether Claimant suffered an accident and injury while in the course and scope of his employment on or about October 4, 2004.

2. If so, whether Claimant gave notice of said accident/injury pursuant to Idaho Code Section 72-701. If not, whether Employer was prejudiced for want of or delay in receiving notice.

CONTENTIONS OF THE PARTIES

Claimant contends he sustained a lumbar spine injury caused by a slip-and-fall accident that occurred while working on October 4, 2004. Moreover, he gave actual notice of the accident that day when he called owner Jim Moss. Even if he did not provide the appropriate 60-day notice, Defendants were not prejudiced by that fact. He is in need of treatment, and he is entitled to the appropriate workers' compensation benefits.

Defendants contend Claimant's testimony lacks credibility. They contend he did not sustain a personal injury during the course and scope of employment on October 4, 2004. They further allege Claimant failed to timely report the alleged accident and such failure caused Defendants substantial prejudice. Claimant has not established his entitlement to workers' compensation benefits.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. The hearing testimony of Claimant, Leslie McGregor, David Moss, and Kenneth Moss;
2. Joint Exhibits A through L admitted at hearing; and,
3. Claimant's deposition taken on February 14, 2006.

After considering the record and arguments 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. At the time of hearing, Claimant was 63 years of age. He began working as a truck driver for Employer in April 2004.

2. On October 12, 2004, Claimant sought treatment at Lee Chiropractic. The records indicate he, “Slipped on oil & fell on tailbone” on October 4, 2004. He described constant lumbar spine pain and received treatment to that area. Insurance was noted to be: “W.C.” Exhibit F.

3. On December 17, 2004, Claimant presented to Lee Chiropractic with constant lumbar pain that had not improved from his prior visit. The next day, December 18, he received further chiropractic treatment, at which time Dr. Lee noted, “Pain of low back radiated down the left leg. Hard time walking and sitting aggravates.” *Id.* On December 30, Dr. Lee again noted left leg radiation that worsened when standing and walking. On December 31, Claimant reported his pain decreased for a short period following chiropractic adjustment, but then returned in full.

4. On January 5, 2005, Claimant was involved in a truck accident while working for Employer. Another truck pulled out in front of him, and he collided with it. The accident caused significant damage to Claimant’s truck, which had to be towed. Claimant was transported from the scene by an insurance adjuster. He did not seek medical attention immediately following the accident.

5. On January 29, Claimant sought treatment at Lee Chiropractic. Interestingly, there is no mention of the truck accident in the corresponding records. The chart notes indicate Claimant had constant pain that had remained the same since his last visit. Dr. Lee wrote, “Pain continues to be present in low back and leg. Difficult getting here due to driving schedule.” *Id.* Claimant also received treatment on February 10 and 11. On February 11, Dr. Lee recorded

continuing difficulty putting weight onto the leg. February 11 appears to be the last date Claimant sought treatment at Lee Chiropractic.

6. On February 10, Claimant presented to Intermountain Medical Clinic (IMC) complaining of a cough for two weeks. No mention is made in the chart notes of the vehicle accident or low back problems.

7. On March 8, Claimant presented again to IMC, this time with lumbar spine complaints. IMC records indicated a date of injury of January 5, 2005, with the following narrative:

Sam was involved in a trucking accident on January 5, 2005. A truck pulled out in front of him and he hit him from behind. No pain at the time, but now he is having low back pain and pain going down his left leg. He states it really hurts to walk. He also has numbness in his L leg.

Exhibit D. IMC personnel administered a lumbar spine x-ray, diagnosed multiple level disc disease/low back pain, requested an MRI, and took Claimant off work pending the MRI results.

8. On March 18, an examiner for Surety (Examiner) interviewed Claimant and noted the following summary of conversation:

How are you doing? “Not real good, I need to find out what the hell is going on.” Low back, lumbar area. No other injuries. Pain in low back and left hip. Numbness which goes down left leg, tingling which starts in the back of his thigh and goes down the back of his leg below the knee, and if he stands for very long his left leg collapses. Tingling and numbness started about four weeks ago, getting progressively worse.

Exhibit L. Claimant described in detail the vehicle accident from January and indicated he reported the accident immediately by cell phone to Jim Moss and told him, “I hurt my back a little bit but I’m OK.” *Id.* According to Examiner’s notes, Claimant denied any prior injury or medical treatment to his low back: “He said he has had his neck adjusted a few times by a chiropractor in Burley who moved to UT, he can’t remember the chiro’s name. This was

probably in 1989 or 1990 when he got his neck adjusted.” *Id.* Claimant also described an industrial accident in 2000 when he worked for another employer when he slipped on ice and shattered his wrist.

9. On or about March 24, 2005, Claimant provided Surety with a list of “all the doctors you have seen and medical facilities you have used in the past ten years.” Claimant listed only Idaho Orthopaedic and Sports Clinic in March 2002 and IMC in March 2005.

10. On April 4, Examiner contacted Claimant to clarify what his symptoms were and when he first experienced them:

Claimant stated that he had “a little soreness” right after the accident. The clmt stated that he found it difficult to walk 100-150 feet from his truck cab to the claims adjusters [sic] truck immediately after the accident. However, the clmt did not have any difficulty ambulating the next day. The clmt stated he had some soreness and stiffness the next day.

Id. Claimant then reported he would have some aching in his back which he attributed to his long hours driving. According to the adjuster’s notes, Claimant described first feeling the symptoms of numbness, tingling, and giving way in his left leg two weeks before he went to see the doctor.

11. On April 8, 2005, Claimant filled out a Workers’ Compensation First Report of Injury or Illness. He noted a lumbar spine injury in conjunction with the January 5, 2005 accident.

12. Also on April 8, Surety provided correspondence that denied Claimant’s claim stating, “Available information fails to establish a causal relationship between the above referenced incident [1/5/05 accident] and your current medical treatment.” *Id.*

13. On May 11, Claimant underwent a lumbar MRI, the results of which demonstrated abnormalities at multiple levels.

14. On May 16, Claimant saw orthopedic surgeon Benjamin Blair, M.D., who recorded the date of onset of symptoms as January 5, 2005, and the activity as a motor vehicle accident. When asked about any prior injury to the same area, Claimant described a “10-4-04 WC injury [*sic*] slipped and fell @ Flying J – mostly resolved [with] time and chiropractic treatment.” Exhibit C. Dr. Blair noted:

This is the first visit for this pleasant 61 year-old male who complains of low back pain radiating into the left lower extremity. Patient has a long and complicated history of low back problems. In October, 2004 he was involved in a work related slip and fall accident. His symptomatology almost completely resolved with time and chiropractic treatment until 1/5/05 when he was involved in a motor vehicle accident. Since that time, he has been markedly symptomatic with continued left lower extremity radicular pain (giving way weakness), and has failed conservative therapy including ibuprofen and chiropractic treatment.

Id. On May 24, 2005, Dr. Blair released Claimant to full duty work.

15. On July 6, 2005, Claimant followed up with Dr. Blair. He had undergone two epidural steroid injections, with little relief.

16. On August 4, Claimant saw Daniel Mecham, D.C., at West Chiropractic Clinic for “treatment of injuries he reportedly sustained from a fall while at work on 10/04/2004. Mr. Johns had an additional work related injury on 01-05-05.” Exhibit B. Although Dr. Mecham prescribed a treatment plan of two visits per week for three weeks, no further medical records were presented for this provider.

17. On August 22, Claimant filed a Worker’s Compensation Complaint for date of injury October 4, 2004. He described slipping and falling on spilled diesel fuel near a fueling island and indicated he provided notice of the injury on October 4, 2004, to Jim Moss. On August 23, he filed a Workers’ Compensation Complaint for date of injury January 5, 2005.

18. On February 22, 2006, Claimant saw Dr. Blair, who noted he had not seen Claimant for seven months. Claimant described worsening pain that was markedly interfering

with his quality of life. He was interested in surgery, but wanted to hold off pending the outcome of workers' compensation litigation.

19. On April 27, 2006, physiatrist David Simon, M.D., examined Claimant at Defendants' request. He noted Claimant was "semi-cooperative" and a poor historian. Exhibit A. Dr. Simon recorded the following history:

He reports that he was initially injured in October when getting out of his truck. As he slipped, he landed on a pillar that the gas pumps were on. He states that following that he had low back pain that was generally "aggravating" but occasionally worse. Mr. Johns reports that following that injury in October he called his boss but there was not a report filled out for that injury.

He states he had another injury when he [*sic*] a bad truck wreck. This apparently occurred on 01/05/05, and this is the work-related injury that his case is currently under.

Id. Dr. Simon diagnosed low back and left leg pain secondary to degenerative spine disease, with the most significant problem being central canal stenosis at L3-4. He opined the objective findings on MRI correlated with Claimant's subjective complaints. He described the "more pertinent issue" as one of causation. *Id.* He felt it was highly unlikely the January 5, 2005 accident caused Claimant's current medical condition because 1) he had already been undergoing chiropractic treatment for severe lumbar/left leg pain; 2) the radiological findings showed chronic problems that would not have been related to such a recent injury; and, 3) Claimant did not mention the vehicle accident in his post-accident treatments for several months. Regarding the October 4, 2004 incident, Dr. Simon opined:

It would be [*sic*] little bit more difficult to determine the causal relationship with the October 4, 2004 injury. Based on the information that I do have, I think it is likely that that injury caused a material aggravation of a chronic degeneration condition of his lumbar spine. Chiropractic records from prior to October 4, 2004 would be extremely helpful in making any further determination regarding this.

Id.

20. On June 8, 2006, Dr. Simon noted he had reviewed chiropractic records from prior to the October 2004 incident (including records as recent as May and June 2004). He noted that these medical records showed prior low back and left sided low back complaints along with degenerative changes at L3-4. Dr. Simon explained that this did not change his diagnosis, but he now opined Claimant's October 4, 2004 accident did not cause the underlying low back condition and that he was symptomatic even prior to the accident. He felt Claimant's October 4 incident may have exacerbated his problems, but only temporarily. He concluded, "... based on the available information, to a reasonable degree of medical probability, there is no causal relationship between the examinee's current complaints and the October 4, 2004 injury." *Id.*

21. On June 26, Dr. Blair wrote that he "may have some disagreement with Dr. Simon's issues of causation," because, according to Dr. Blair's notes, Claimant reported he was almost asymptomatic at the time of the January 5, 2005 accident. He conceded he did not have the prior chiropractic records to review.

DISCUSSION AND FURTHER FINDINGS

1. **Accident/Injury/Causation**. 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).

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). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995).

A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995).

A preexisting disease or infirmity of the employee does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as it finds him or her. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983). A claimant seeking compensation for the aggravation of a preexisting condition must prove that an accident as defined by Idaho Code § 72-102(17) aggravated the preexisting condition. Nelson v. Ponsness-Warren IDGAS Enterprises, 126 Idaho 129, 879 P.2d 592 (1994).

The provisions of the Workers' Compensation law are to be liberally construed in favor of the employee. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

The Referee finds Claimant has not provided medical testimony to support his claim for compensation to a reasonable degree of medical probability. Dr. Simon opined Claimant's October 4, 2004 accident may have temporarily exacerbated a pre-existing condition, but did not cause his present condition. Dr. Blair did not have the medical records to confirm or deny that conclusion and he did not opine that the October 4, 2004 accident caused Claimant's lumbar spine condition. In fact, his comments suggest he felt it was more likely the January 5, 2005 incident caused Claimant's problems. The record contains no other helpful medical opinions. The Referee notes that Claimant's inconsistent and inaccurate descriptions of the alleged incidents and onset of symptoms have made a favorable determination on causation difficult at

best. Claimant did not sustain an injury caused by an accident while in the course and scope of his employment on or about October 4, 2004.

2. **Other Issues.** Based on the above, the other issues to be decided at this time are moot.

CONCLUSIONS OF LAW

1. Claimant did not sustain an injury caused by an accident while in the course and scope of his employment on or about October 4, 2004.

2. All other issues are moot.

RECOMMENDATION

The Referee recommends the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED at Boise, Idaho, this 27th day of July 2007.

INDUSTRIAL COMMISSION

/s/ _____
Lora Rainey Breen, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of August 2007, 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 persons:

JAMES ARNOLD
P O BOX 1645
IDAHO FALLS ID 83403-1645

M JAY MEYERS
P O BOX 4747
POCATELLO ID 83205

jkc

 /s/ _____

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MOSS TRUCKING, INC.,)	
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)	ORDER
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)	August 10, 2007
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)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Lora Rainey Breen submitted the record in the above-entitled matter, together with her 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 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 sustain an injury caused by an accident while in the course and scope of his employment on or about October 4, 2004.
2. All other issues are moot.

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

DATED this __10_ day of _August_____, 2007.

INDUSTRIAL COMMISSION

/s/ James F. Kile, Chairman

/s/ R. D. Maynard, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __10_ 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 persons:

JAMES ARNOLD
P O BOX 1645
IDAHO FALLS ID 83403-1645

M JAY MEYERS
P O BOX 4747
POCATELLO ID 83205

jkc

/s/