

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JIMMIE F. ANDERSON,

Claimant,

v.

HENRY FERNANDEZ and
LINDA PENCE,

Employers,
Defendants.

IC 2005-011929

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

Filed October 25, 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 Pocatello, Idaho, on January 25, 2007. Daniel J. Luker and Albert Matsuura of Pocatello represented Claimant. Lowell N. Hawkes and Ryan S. Lewis of Pocatello represented Defendants. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on May 17, 2007, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;
2. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1

- b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
 - c. Attorney fees; and
3. Whether Employer is liable to Claimant for the penalties set forth in Idaho Code § 72-210 for failing to insure liability.

CONTENTIONS OF THE PARTIES

Claimant asserts that he was injured on September 7, 2005, while loading electric motors into a shipping container for Defendants. Claimant required medical care and incurred time loss as a result of his work-related injuries and is, therefore, entitled to payment for his medical care and time loss benefits (TTDs and/or TPDs). Finally, Claimant asserts that Defendants did not have workers' compensation insurance coverage at the time of his accident, and should be liable for penalties as set forth in Idaho Code §72-210.

Defendants do not dispute that they had no workers' compensation coverage in place in August and September 2005. However, Defendants contend that Claimant could not have sustained his alleged injury in the manner and at the time he alleged, thus failing to establish any compensable claim.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Vicky Anderson, George Aggeler, Katherine Gillard, Henry Fernandez, Linda Pence, Douglas Jacob "D.J." Blood, and Christopher Rogers, taken at hearing;
2. Exhibits A through U and W through Z, admitted at hearing; and
3. The post-hearing deposition of Grant D. Finn, D.C.;

At hearing, Defendants objected to the admission of the medical records of Scott Huneycutt, M.D., (Exhibit E). The basis for the objection was that Claimant had stated during the pre-hearing telephone conference that they did not intend to call Dr. Huneycutt as a witness in the proceedings. Claimant countered that a decision not to depose or call a medical provider had no bearing on the admissibility of the medical records generated by that medical provider, and that Defendants certainly could have deposed Dr. Huneycutt if they chose. The Referee admitted Exhibit E. The medical records of a treating physician are admissible as a matter of course in workers' compensation proceedings. Claimant's statement that he does not intend to take the *testimony* of the doctor cannot be construed as an agreement not to use the doctor's medical records.

Despite the Referee's ruling at hearing, Defendants raised the issue again in their briefing. The Referee declines to reconsider her original ruling.

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. At the time of hearing, Claimant was 43 years of age. He lived in Pocatello with his wife, Vicky, and their blended family of four children.

DEFENDANTS

2. In 2005, Henry Fernandez was the owner and operator of Golden Valley Sales.¹ Golden Valley Sales was in the business of buying and selling equipment, scrap, and generators.

¹ Golden Valley Sales is an assumed business name registered with the Secretary of State in 2003. The original registration lists Fernandez as the owner/operator. The registration was amended in 2006 to delete Fernandez and substitute Pence as the sole owner/operator of Golden Valley Sales.

Golden Valley Sales regularly employed up to three laborers.

3. Linda Pence is Fernandez' daughter. In 2005, Pence operated her own business selling generators. During the period in question, the two businesses were not affiliated, although both Pence and Fernandez used the same office and address for their individual business ventures.

4. Fernandez and Pence did engage in one joint venture that bears on these proceedings. In 2002, a number of large generators became available. Pence could not qualify to finance the purchase of the generators, so they were purchased by Fernandez. Both Fernandez and Pence worked on selling the generators. Profits from the sales initially went to pay off the financing. The loan for the generators was paid in full in June 2005, at which point Pence and Fernandez each took ownership of half of the remaining generators to sell on their own accounts.

CLAIMANT'S WORK HISTORY

5. Claimant grew up and went to school in California. He dropped out of school in eighth grade and went to work when he was fifteen. Claimant worked at a number of heavy labor jobs, including work in the fruit and nut orchards in California. Claimant moved to Idaho in search of better schools for his children.

6. After moving to Idaho, Claimant worked as a mechanic and in the construction trades installing drywall and laying concrete. "I was just kind of self-employed working job to job, you know, keeping the bills paid." Tr., p. 35.

7. Claimant went to work for Fernandez as an employee in the spring of 2005. Prior to becoming an employee, Claimant had performed mechanical work for Fernandez as an independent contractor.

8. Claimant's work for Fernandez included some mechanical work but was largely

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

focused on the scrap business and loading and unloading material. Occasionally, Claimant would drive with Fernandez to other states to pick up materials that Fernandez had purchased at auction. “I pretty much did anything he asked me to, you know.” Tr., p. 37.

JULY AND AUGUST 2005

Containerized Shipments

9. During the summer of 2005, Fernandez sold two shipping containers of small electric motors. These were the only containerized shipments from Golden Valley Sales in 2005. As the seller, Fernandez was responsible for ordering the shipping container, loading it, and turning it around the same day.

10. The first container of electric motors left the Golden Valley Sales premises on August 1, 2005. At that time, Claimant and Fernandez were on a trip to Colorado, and Claimant did not participate in loading the container.

11. The second container left the Golden Valley Sales premises on August 17, 2005. Claimant participated in loading the container, along with Fernandez, D. J. Blood (Pence’s son), and Chris Rogers.

Generators

12. As discussed previously, Fernandez and Pence had purchased a number of large generators in 2002. These generators were stored on leased property identified as the “Shaw property.” Each generator was placed on a pallet on a large piece of cardboard to prevent oil from the generators leaking onto the ground. The lease on the Shaw property was due to expire August 15, 2005, and it was uncertain if it would be renewed. In July and possibly early August 2005, Fernandez had his workers, including Claimant, move the generators off of the Shaw property in anticipation of the end of the lease. At the time the generators were being moved,

Fernandez and Pence each had a fifty percent ownership interest in the generators.

13. Prior to the expiration of the lease, and contemporaneous with the removal of the last of the generators from the Shaw property, the wooden pallets and the cardboard underlayment were removed from the Shaw property, loaded onto Fernandez' flatbed truck, and disposed of by D. J. Blood and his brother-in-law at the direction of Fernandez.

CLAIMANT'S INJURIES

14. Claimant asserts that he first injured his back on September 7, 2005 while loading the small electric motors into a shipping container. Claimant testified that he was picking up several motors at a time with the forklift; the forklift was bouncing around, and a couple of the motors fell off. According to Claimant, he had to pull the motors out from under the pallet and replace them on the fork lift. In the process, he felt a pain in his low back.

Well, it was like somebody took a rubber band and just popped me in the back, you know. And I started getting – you know, it just shot out everywhere. It wasn't like it – you know, like I said before, it wasn't like it threw me to the ground and – you know. It was – you know, it didn't kill me right off the top.

Tr., p. 47. Claimant worked the remainder of the day.

15. At hearing, Claimant testified that he was awakened in the middle of the night with pain, “and by the next day, when I got up, it was – I could hardly – I just bent over like this, couldn't hardly stand up.” *Id.* Claimant stated that he had his wife call his work and tell them he was not coming in, but she was told that Claimant needed to come in and fill out an incident report.

16. Claimant testified that he went in to work on September 8, as instructed by Aggeler, and told Fernandez that he had hurt his back the day before lifting electric motors. According to Claimant, Fernandez insisted on taking Claimant to Lava Hot Springs, believing that the hot springs would help Claimant's back. Claimant stated that the hot water helped some

with his muscles, but that the underlying pain remained.

17. On September 9, Claimant reported for work “[b]ecause he [Fernandez] asked me to.” *Id.*, p. 51. Claimant testified that Fernandez wanted to get to Colorado to pick up some equipment, and he wanted Claimant to get the flatbed truck ready to go. Claimant testified that the flatbed was full of cardboard and pallets left over from moving the large generators. Claimant climbed onto the flatbed and was removing the debris when he stepped on a piece of cardboard and slipped. Claimant turned to grab the racks on the side of the flatbed to keep from falling and “just wrenched the heck out of my back, just aggravated it really bad.” *Id.* According to Claimant, he returned to the office and told Fernandez and George Aggeler, who answered phones for Golden Valley Sales, what had happened and Aggeler “just stood up and said, ‘Well, we need to take him to the chiropractor.’”

18. Following his injury, Fernandez paid Claimant \$400.00 bi-weekly to get a web site up and running. Fernandez terminated this arrangement, and the last check issued to Claimant was dated November 1, 2005.

MEDICAL CARE

Dr. Finn

19. Claimant was seen by Dr. Finn at West Chiropractor Clinic on September 9. Dr. Finn’s medical records record the date of injury as September 7, and describe the events causing the injury as, “getting cardboard out of a truck and pulling the pallets out. He lost his footing and twisted around causing him to hurt his low back.” *Ex. C.*, p. 4. Claimant complained of low back pain and left leg numbness. Claimant told Dr. Finn that he had injured his low back before, “many times.” *Id.*, at p. 2. Claimant also told Dr. Finn that he had intermittent numbness in his left leg a year previous.

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20. X-rays taken at Dr. Finn's office were unremarkable except for some slight narrowing of the disc space at L5-S1. Dr. Finn diagnosed an acute lumbosacral sprain with facet syndrome and paravertebral myospasms and a possible lumbar disc protrusion syndrome with radiculitis to the left leg. Dr. Finn took Claimant off work from September 9 to September 24.

21. Claimant received chiropractic treatments on September 9, 10, 16, 19, 22, and 27. On September 27, Dr. Finn released Claimant to return to light duty on September 28. Dr. Finn imposed a twenty-pound lifting restriction for two weeks.

22. Claimant did not return to West Chiropractic until November 15. Claimant returned complaining of significant pain in his low back and left leg. Dr. Finn recommended an MRI. The MRI report itself is not a part of the record. According to Dr. Finn, it showed discogenic disease at L3-L4 and L4-L5, more particularly stenosis at L3-L4 and L4-L5 and a broad based disc protrusion at L4-L5 and a diffuse disc bulge at L3-L4. Dr. Finn recommended a lumbar body jacket cast with a referral to Dr. Blair for injections or surgery if the body cast was not helpful.

23. The body cast did not help Claimant's pain, and Dr. Finn referred Claimant to W. Scott Huneycutt, M.D., with an appointment scheduled for January 24, 2006.

Dr. Huneycutt

24. For whatever reason, Claimant did not see Dr. Huneycutt until April 13, 2006. Dr. Huneycutt reviewed the x-rays and the MRI results, noting that the MRI was of poor quality. He did note evidence of an annular tear at L4 and a disc herniation at L3-4. Dr. Huneycutt discussed treatment options, including epidural steroid injections, physical therapy, discectomy, and lumbar decompression with instrumented fusion.

25. Claimant returned to Dr. Huneycutt on May 11, and advised he wished to pursue

the decompression and fusion, as he could no longer tolerate the pain. Dr. Huneycutt advised Claimant that he would have to discontinue his long-standing cigarette habit for some time prior to and after the surgery.

26. On July 14, Dr. Huneycutt performed hemilaminectomies and decompression of nerve roots at L3-L4 and L4-L5, fused L3 to L5, and installed hardware.

27. On August 29, Dr. Huneycutt wrote a letter "To Whom It May Concern," noting in pertinent part:

Patient underwent a lumbar surgery and although his pre-operative pain symptoms have been reduced he has developed sympathetic dystrophy, hypersensitivity and numbness in his lower extremities as well as progression of his left foot drop.

Ex. E, p. 15. Chart notes from September 26 include a notation that EMG studies revealed a severe left acute L5 radiculopathy. On October 24, Claimant was released PRN with a recommendation that he continue his exercise program.

28. Claimant wears a custom-fit carbon fiber ankle foot orthosis on his left foot to aid him in ambulating with the left foot drop.

TESTIMONY

29. Claimant has little education, and had difficulty understanding even relatively straightforward questions. His ability to express himself verbally was similarly limited. These limitations are manifest in both the hearing and deposition transcripts. Compounding Claimant's lack of comprehension and verbal incoherence was the prolixity of Defense counsel's questions. Claimant's testimony was confused, confusing, and inconsistent.

30. Defendant Fernandez was eighty years old at the time of the hearing and was, by his own admission, hard of hearing. In fact, as was evident to all in attendance, Fernandez was exceedingly deaf. The deposition transcript as well as the hearing transcript make it evident that

Fernandez missed or misunderstood much of what was asked of him. Fernandez' testimony was often confused, confusing, or inconsistent.

DISCUSSION AND FURTHER FINDINGS

INJURY/ACCIDENT

31. The threshold issue in this matter is whether Claimant sustained an injury as a result of an accident that occurred in the course of his employment. "Injury" is defined by Idaho Code § 72-102(17)(a) and (c):

(a) "Injury" means a personal injury caused by an accident arising out of and in the course of any employment covered by worker's [sic] compensation law.

* * *

(c) "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury.

"Accident" is defined by Idaho Code § 72-102(17)(b):

"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.

32. The burden of proof in an industrial accident case is on the claimant.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

33. After a painstaking review of the record in this proceeding, the Referee finds that

Claimant has failed to carry his burden of proving that he sustained an injury from an accident arising out of his employment. The bases for such finding are discussed with particularity in the following paragraphs.

ACCIDENT

34. There are four elements to the statutory definition of “accident”:

- An unexpected or untoward event;
- Connected with the industry in which it occurred;
- Reasonably located as to time and place where it occurred; and
- Causing an injury.

Claimant described two unexpected or untoward events: The first occurred while lifting electric motors that had fallen off a pallet while being loaded into a shipping container; the second occurred while removing cardboard and wooden pallets from the back of a flatbed truck. The first of these activities was associated solely with Golden Valley Sales—it is undisputed that Claimant participated in loading electric motors into a shipping container as part of his work for Fernandez. The second of these two events also involves the business of Golden Valley Sales, but to the extent that the electric generators were jointly owned by Fernandez and Pence, the second event could also expose Pence to workers’ compensation liability. The two remaining elements are problematic, however.

Time and Place

Claimant testified that the first event occurred on September 7, 2005, and that the second event occurred on September 9, 2005. The weight of the evidence in the record, however, establishes that it was not possible for either event to have occurred on the dates identified in Claimant’s testimony.

Loading Containers

35. Claimant was insistent that he was loading electric motors into a shipping

container on September 7, 2005. Testimony from Fernandez, Pence, D.J. Blood, and Chris Rogers, persuasively refutes Claimant's testimony. Fernandez and Pence both testified that the second (and last) container to leave Golden Valley Sales did so on August 17, 2005. Their testimony was based upon a shipping document that had been retained in the files of Golden Valley Sales, and which contained information regarding the arrival and departure of the container.² While the Referee noted confusion and inconsistency in some of Fernandez' testimony, primarily due to his hearing loss, his testimony regarding the timing of the two container shipments was clear and concise, with little of the confusion that appears elsewhere in his testimony.

Pence, although not associated with her father in the daily operation of Golden Valley Sales, was knowledgeable about the goings-on at her father's business, and was the individual who located the shipping document that provided the basis of her testimony and that of her father. Pence demonstrated a good recall of events, was able to testify convincingly regarding the temporal relationship of events, and was a credible witness.

Both D. J. Blood and Chris Rogers testified that they participated in loading both shipping containers, but that they were in school on September 7, 2005, and thus could not have worked that day. Pence's testimony corroborated that neither young man could have been working on September 7 because high school classes had resumed and both young men had discontinued their employment with Fernandez when school started.

36. Additionally, the Referee notes that when Claimant first sought medical care from Dr. Finn on September 9, he made no mention whatsoever of any incident that involved lifting

² Two versions of the document in question were offered into evidence as Exhibit V, but were excluded because they were not provided to the opposing party in compliance with Rule 10, J.R.P.

electric motors, and which, according to Claimant, had happened just two days prior. In fact, the first hint about the motor-lifting incident does not appear in the medical records until April 2006 when Claimant first saw Dr. Huneycutt.

Oddly, no mention of the cardboard incident appears in Dr. Huneycutt's records, although Claimant reported the cardboard incident to Dr. Finn as the cause of his injury. In his briefing, Claimant argues that he had two injuries—one on September 7 that was the initial cause of his back complaints, followed by the second incident two days later that resulted in his visit to Dr. Finn. This position is not supported by the medical records, and appears to have been cut from whole cloth subsequent to the hearing.

Removing Cardboard

37. Claimant testified that he returned to work on September 9, after spending part of the previous day with Fernandez in Lava Hot Springs and taking the remainder of the day off. He testified that he returned to work because Fernandez wanted to leave for Colorado that day, and Claimant needed to get the flatbed truck ready to go. In particular, Claimant needed to remove the cardboard and other debris from the flatbed truck. Claimant was removing the materials when he slipped and wrenched his back, necessitating his first visit to Dr. Finn.

Both Fernandez and Pence testified that all of the generators had been moved off of the Shaw property long before September 9. Pence was certain that the lease on the Shaw property expired on August 15 and that all of the generators had been moved prior to that date. In fact, she believed that most, if not all, of the generators had been removed from the Shaw property by the end of July. Fernandez was less clear about when the lease on the Shaw property terminated, but was certain that all of the generators had been removed well before the second container shipment was loaded and shipped out on August 17.

Fernandez testified that he directed D. J. Blood to dispose of the cardboard and pallet material associated with the generators at the time the last of the generators were relocated. D. J. Blood testified that he had removed all of the cardboard and other debris from the flatbed truck as soon as the last load of generators was relocated. Although he could not specify a date, he knew it was much earlier than September, and reiterated that he had been in school by the first week of September.

38. Both Pence and Fernandez testified that when Claimant came to work on September 9, he was dressed and ready to go to Denver. Both testified that Claimant did not wish to go to Denver, complaining that the long drive would hurt his back. Claimant also told Dr. Finn that he believed he would be driving to Denver that day, and Dr. Finn directed Claimant to return to the office when he returned from the Denver trip.

39. All of this testimony refutes Claimant's testimony that he came to work on September 9 and injured or re-injured his back while unloading cardboard associated with the relocation of the generators from the flatbed truck.

INJURY

40. The record is clear that at the time of the first MRI in November 2005, Claimant had some degenerative changes in his low back and showed signs of protruding disc or other disc injury (Dr. Huneycutt saw evidence of an annular tear at L4). Claimant may very well have sustained an injury while working for Golden Valley Sales. It may very well be that Claimant's low back problems were chronic and degenerative in nature or that, if acute, they occurred somewhere other than at work. The difficulty is that it is impossible to know what actually happened, or when, given the record in this proceeding.

41. Fernandez testified that he took Claimant to Lava Hot Springs sometime in

August because Claimant was complaining about his back hurting, but that Claimant had said nothing to indicate the pain was the result of a work injury.

42. Dr. Finn testified in his January 3, 2007, deposition that the MRI images showed that disc injuries at L3-L4 and L4-L5 were old injuries. This was consistent with Claimant's reports to several physicians, including Dr. Huneycutt, that he had sustained previous back injuries. Dr. Finn explained that protrusion of the injured discs could still be an acute phenomenon. The doctor testified that the only way to distinguish whether the disc protrusions were acute or degenerative was to examine the disc material surgically to see if there was evidence of calcification. Dr. Huneycutt's operative report makes no mention of whether he found the extruded disc material to be new (indicating an acute injury) or old (indicating chronic or degenerative injury).

INJURY/ACCIDENT SUMMARY

43. Undoubtedly, Claimant had sustained some injury to his back. It cannot be determined from the record in this proceeding whether those injuries were acute or degenerative. If acute, it cannot be determined from this record when or how they occurred. The only thing that is certain is that they did not occur while lifting electric motors on September 7 or while unloading cardboard from a flatbed truck on September 9.

Claimant has failed to carry his burden of proving that he sustained an injury as the result of an accident that occurred in the course of his employment.

REMAINING ISSUES

44. In light of the finding that Claimant has failed to prove the threshold injury/accident issue, all other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to carry his burden of proving that he sustained an injury as the result of an accident that occurred in the course of his employment.

2. All other issues are moot.

RECOMMENDATION

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

DATED this __12th__ day of October, 2007.

INDUSTRIAL COMMISSION

_____/s/_____
Rinda Just, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _25 day of _October_____, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DANIEL J LUKER
PO BOX 2196
POCATELLO ID 83206-2196

LOWELL N HAWKES
1322 EAST CENTER
POCATELLO ID 83201

djb _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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 Claimant,)
)
 v.)
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 HENRY FERNANDEZ and)
 LINDA PENCE,)
)
 Employers,)
 Defendants.)
 _____)

IC 2005-011929

ORDER

Filed October 25, 2007

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 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 has failed to carry his burden of proving that he sustained an injury as the result of an accident that occurred in the course of his employment.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 25 day of October, 2007.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

__Participated but did not sign____
R.D. Maynard, Commissioner

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of October, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DANIEL J LUKER
PO BOX 2196
POCATELLO ID 83206-2196

LOWELL N HAWKES
1322 EAST CENTER
POCATELLO ID 83201

djb

____/s/_____