

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TOMAS CAMPOS,)	
)	
Claimant,)	IC No. 05-509035
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
METALCRAFT, INC.,)	AND RECOMMENDATION
)	
Employer,)	
)	October 1, 2007
and)	
)	
STATE INSURANCE FUND,)	
)	
Surety,)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code §72-506, the Idaho Industrial Commission assigned the above entitled matter to Referee Lora Rainey Breen, who conducted hearings in Boise on May 2, 2007 and May 9, 2007. Darin G. Monroe represented Claimant. Paul J. Augustine represented Metalcraft, Inc., and its surety, State Insurance Fund. Ken Cortez and Kay Harrison attended the hearing as employer representatives.

Aaron Griffith, interpreter, was present at the hearing of May 2, 2007, for the benefit of the Claimant and one of the witnesses. Verbatim translation of the testimony of the Claimant was discontinued at the agreement of both parties. The Claimant indicated that he was comfortable testifying in English. The interpreter remained in the hearing room to provide translation, as requested. Bilingual witnesses were instructed to request clarification and/or

translation when needed. No objections were raised regarding the manner of translation. Vanessa Bell served as the interpreter at the May 9, 2007 hearing.

Oral and documentary evidence was presented at the hearing of May 2, 2007 with additional oral testimony presented on May 9, 2007. The record remained open for one post-hearing deposition. The parties submitted post-hearing briefs and this matter came under advisement on August 17, 2007. With the consent of both parties, an alternate Referee was appointed for the issuance of this decision.

ISSUES

The issues to be determined at this time are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;
2. Whether Claimant suffered an accident arising out of and in the course of employment;
3. Whether the condition for which the Claimant seeks benefits was caused by the industrial accident;
4. Whether Claimant is entitled to reasonable and necessary medical care pursuant to Idaho Code § 72-432; and
5. Whether Claimant is entitled to an award of attorney's fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that he sustained an injury to both wrists on May 10, 2004. Specifically, Claimant asserts that he was using both upper extremities to lift a panel onto a ledge

when a co-worker handing the panel up to the Claimant let go of the panel which resulted in the Claimant bearing the weight of the panel and twisting his hands. Claimant further asserts that he reported the injury to his direct supervisor on the morning following the injury. Surgical intervention of the left wrist has been recommended and Claimant seeks medical benefits.

Employer/Surety asserts that the Claimant failed to timely report an injury to his employer within sixty days. Employer/Surety points out multiple credibility issues surrounding the reporting of the injury and the Claimant's delay in seeking medical treatment. Employer/Surety contends that the Claimant's personal business of operating a taco truck from which food is sold may have caused the Claimant's current condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of the Claimant, Pedro Campos, Ken Cortez, Kay Harrison and Jose Aguilar Flores;
2. Joint Exhibits A through H; and
3. The post-hearing deposition of Tyler Russell Wayment, M.D., taken on June 11, 2007.

FINDINGS OF FACT

1. Claimant was 40 years old at the time of the hearing.¹ Claimant was hired by Employer in the summer of 1999 as a hardware assembler. Claimant worked for Employer until August 20, 2004, at which time Claimant resigned to start his own business. On May 10, 2004, the Claimant moved a panel from the floor to a ledge with the assistance of a co-worker, Jose Aguilar Flores. The panel is described as a partition that would serve as a wall to an office

¹ There is conflicting information in the record as to the Claimant's correct date of birth. The evidence is most consistent with a date of birth of December 11, 1966.

cubicle. Claimant stood on a ledge and lifted the panel while Jose Aguilar Flores stood on the ground and lifted the panel up to the Claimant. Claimant asserts that Mr. Flores let go of the panel and joined him on the ledge to assist with the lift. Claimant testified that he took the entire weight of the panel and, in doing so, twisted his hands. Lifting panels was not a customary job duty of Claimant, but was undertaken on May 10, 2004 to clean a work area.

2. Claimant sustained a previous work related injury to his lower back on October 11, 2002 as a result of lifting boxes while working for Employer. Claimant reported that injury to Dave Wadicans², Safety Coordinator, and a Supervisor's Accident Report was completed on October 21, 2002. Employer sent Claimant to a doctor for the lower back injury and Claimant received medical treatment at the direction of Employer.

3. Claimant's direct supervisor was Pedro Campos who also happens to be Claimant's cousin. Pedro Campos testified that he and Dave Wadicans were the supervisors who were responsible for documenting work injuries. Pedro Campos recalled a time when Claimant mentioned that he didn't "feel good to the hand" while at work for Employer (Tr. p.55), but the first time he learned that Claimant was alleging a work related injury was after Claimant left work for Employer and began operating a taco truck. Pedro Campos testified that when a work related injury was reported to him that he would advise Dave Wadicans of the injury so that Mr. Wadicans could initiate the paper work.

4. Jose Aguilar Flores works for Employer as a painter and was a co-worker of Claimant. Jose Aguilar Flores confirmed that he lifted a panel up to Claimant and that Claimant picked it up. Jose Aguilar Flores denies letting go of the panel and denies that the Claimant called out in pain or otherwise mentioned an injury on the day that the panel was lifted. Mr.

² Wadicans is a phonetic spelling adopted in the hearing transcript. The Supervisor's Accident Report includes a signature that is difficult to read but looks like Guaydacan.

Flores denied joining Claimant on the ledge. Jose Aguilar Flores testified that, eight days after the lifting incident, Claimant told him that his hand was hurting and Claimant thought he had gotten hurt on the day they were lifting the panels.

5. Kay Harrison is the General Manager for Employer. Claimant met with Ms. Harrison in August of 2004 to complete paperwork associated with his resignation. Claimant did not mention his injury to Ms. Harrison or request medical assistance.

6. Ken Cortez is the owner of Employer. Mr. Cortez spoke with Claimant on multiple occasions after May 10, 2004. Claimant previously discussed his back injury in 2002 with Mr. Cortez but did not discuss the injury of May 10, 2004 with Mr. Cortez. Claimant discussed opening his own taco truck business with Mr. Cortez both prior to and following May 10, 2004. Mr. Cortez purchased food from Claimant's taco truck and observed Claimant performing food preparation work while in the truck.

7. Initial medical treatment for the wrist injury was sought on March 15, 2006 with James H. Bates, M.D. Dr. Bates diagnosed bilateral wrist pain and epicondylitis of the left arm. Dr. Bates recommended diagnostic studies and the use of a left wrist splint. Dr. Bates noted that the history of present illness, per patient report, is an injury of May 10, 2004, while at work lifting a panel when the other person slipped or lost grip. Claimant attended follow up visits with Dr. Bates on March 23, 2006 and May 2, 2006. Based on results of a left wrist MRI, Dr. Bates recommended a surgical evaluation.

8. Claimant was seen by Tyler R. Wayment, M.D., on November 21, 2006. Dr. Wayment diagnosed bilateral Triangular Fibrocartilage Complex (TFCC) tears, left wrist worse than right wrist, and bilateral epicondylitis. Injections to both ulnar carpal joints were given and Claimant was instructed to wear wrist and elbow splints. At Dr. Wayment's deposition of June

11, 2007, he explained that TFCC tears were typically caused by traumatic injury to the hand when the hand is hyperextended such as a fall onto the hands or from too much weight hitting the hands in an awkward position. Dr. Wayment confirmed that the history of injury he recorded was that panels fell against Claimant and he hyperextended both wrists. Dr. Wayment testified that it was “hard to say” whether Claimant’s elbow problems were a separate and distinct injury from the possible TFCC tears. Dr. Wayment recommends arthroscopic evaluation of the TFCC tears.

9. Employer did not have actual knowledge of the injury of May 10, 2004, within sixty days. Employer did not become aware of the injury until after Claimant’s resignation on August 20, 2004. An exact date on which Employer became aware of the injury was not specified. Pedro Campos testified that it was after Claimant resigned. Kay Harrison testified that formal notice of the claim was received by Employer in April of 2005 in the form of attorney correspondence.

10. Claimant’s testimony regarding the mechanism of injury and events immediately following the injury conflicts with the testimony of Jose Agular Flores.

11. Claimant’s testimony regarding the reporting of the injury conflict with the testimony of Pedro Campos.

DISCUSSION AND FURTHER FINDINGS

12. There are multiple factual disputes surrounding the existence of a work-related injury and the reporting of the injury to Employer. The fact that Claimant resigned from his employment with Employer and has been operating a taco truck as a food server since August 20, 2004, along with Claimant’s failure to obtain medical treatment for the claimed injury of

May 10, 2004, until March 15, 2006, brings causation of Claimant's wrist condition into question.

13. As a threshold issue to compensability, Claimant bears the burden of proving that he timely reported his injury to Employer within sixty days pursuant to Idaho Code § 72-701. Alternatively, the Claimant must establish that the employer had actual knowledge of the injury within sixty days or was not prejudiced by the delay in reporting outside of the sixty day limit as articulated in Idaho Code § 72-704.

14. Notice of an injury to the employer 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). Complaints of pain alone are generally insufficient to constitute notice of an accident or injury. Id. When the employer is a corporation, notice may be given to any agent of the corporation upon whom process may be served, to any officer of the corporation or any agent in charge of the business at the place where the injury occurred. Idaho Code § 72-703. Although it may not be necessary for an injured worker to follow the employer's preferred chain of command when reporting an injury, notice of the injury must be given to an employee in some type of supervisory capacity and not merely to a co-worker.

15. When an employee seeks to be relieved from the effects of failing to timely report an injury to the employer based on the provisions of Idaho Code § 72-704, the employee has the burden to prove a lack of prejudice to the employer. The employer is afforded a presumption of prejudice and it is the employee's burden to affirmatively prove that the employer was not prejudiced by lack of timely notice. Jackson v. JST Manufacturing, 142 Idaho 836, 136 P.3d 307 (2006).

16. The expiration of sixty days from the date of injury in this case is July 9, 2004. The credible evidence fails to establish that an injury was reported to Employer on or before July 9, 2004. The Claimant's testimony that he reported his injury to Pedro Campos on the day after the injury was not credible, persuasive, or supported by the other evidence in the record. The fact that Claimant mentioned to Pedro Campos that his hands did not feel good on an unspecified date is insufficient to constitute a report of accident or injury. Although the evidence establishes that Claimant reported an injury to Jose Aguilar Flores within eight days, Mr. Flores was not an "agent in charge" as required by Idaho Code § 72-703.

17. Claimant failed to establish that Defendants were not prejudiced by the lack of timely notice. Employer had policies in place for the reporting and investigation of injuries. Lack of timely notice precluded Employer from performing a prompt investigation and offering to send Claimant for medical evaluation at or near the time of injury.

18. Based on the foregoing findings, all other issues are moot.

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. 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 a final order.

DATED in Boise, Idaho, on this 18 day of October _____ 2007.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 1 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:

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jkc

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TOMAS CAMPOS,)	
)	
Claimant,)	IC 2005-509035
)	
v.)	
)	
METALCRAFT, INC.,)	
)	
Employer,)	ORDER
)	
STATE INSURANCE FUND,)	
)	
Surety,)	October 1, 2007
)	
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 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. All other issues are moot.

