

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK CERCHIONE,)
)
 Claimant,)
)
 v.)
)
 SECURITAS SECURITY SERVICES)
 dba PINKERTON CONSULTING AND)
 INVESTIGATIONS,)
)
 Employer,)
)
 and)
)
 INTERMOUNTAIN CLAIMS,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2006-000706

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

Filed July 10, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on January 16, 2008. Claimant, Mark Cerchione, was present in person and represented by Lawrence Sirhall, Jr., of Boise. Defendant Employer, Securitas Security Services dba Pinkerton Consulting and Investigations (Pinkerton), and Defendant Surety, Intermountain Claims, were represented by Eric Bailey, of Boise. The parties presented oral and documentary evidence. This matter was then continued for the

taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on April 15, 2008.

ISSUE

The issues to be resolved were narrowed at hearing where the parties acknowledged that the pivotal issue is whether the condition for which Claimant seeks benefits was caused by an industrial accident.

ARGUMENTS OF THE PARTIES

Claimant asserts his fall at work on January 10, 2006, resulted in his lumbar disk herniation and need for surgery in August 2006. Defendants acknowledge Claimant's fall but assert that his need for surgery in August 2006 was not due to that event.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the January 16, 2008, hearing;
2. Joint Exhibits 1 through 10 admitted at the hearing;
3. Deposition of Claimant taken by Defendants on April 19, 2007;
4. Deposition of Ann Marie Kaus taken by Defendants on November 7, 2007;
5. Post-hearing deposition of Scot B. Scheffel, M.D., taken by Claimant on January 23, 2008;
6. Post-hearing deposition of Paul C. Collins, M.D., taken by Defendants on February 7, 2008; and
7. Exhibits A and B admitted by stipulation of the parties on April 8, 2008.

The objections posed during Dr. Collins' deposition are overruled. After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in Idaho Falls and was 46 years old at the time of the hearing. Claimant completed high school and later entered the U.S. Army where he served as a military police officer until 1982. Thereafter Claimant worked as a security officer for INEL and later as a police officer for Idaho Falls. He left the Idaho Falls Police Department in 1996 and worked as a district loss prevention manager for WalMart in Oregon and California. In 2000, Claimant moved to Boise and continued to work for WalMart. Claimant then commenced work for Pinkerton and was stationed at Hewlett Packard.

2. At the age of 21 Claimant packed out several elk quarters. The following day his back was sore and he could not stand upright. His back pain resolved gradually. Over the years since that incident, Claimant has experienced episodes of back pain approximately twice annually, each lasting a few weeks. He has worked out his pain with stretching, over-the-counter ibuprofen, and by taking it easy for a few weeks. On occasion his back pain has persisted and he has resorted to chiropractic care to relieve it. On each occasion, Claimant's back pain resolved and he has resumed his usual activities.

3. In July 2004, Claimant lifted 15 boxes of shingles, each weighing 30 pounds. He noted lumbar pain and presented to Janet Sermon, D.C. Claimant's lumbar pain resolved and he continued his usual activities.

4. On January 10, 2006, Claimant was working for Pinkerton. While standing and talking with another employee, Claimant faced forward and leaned his back against a wall with both of his feet slightly out from the wall. The floor was carpeted with eighteen-inch carpet squares. Unbeknownst to anyone, a slow plumbing leak had largely dissolved the adhesive securing the carpet to the floor. Without warning, the square of carpet upon which Claimant was standing abruptly slipped out from under him. Claimant's feet flew out from under him and he fell to the floor landing upon his buttocks. Claimant immediately stood back up and told his co-employee that he was fine.

5. For approximately two weeks after the fall, Claimant's tailbone was sore and he noticed no back pain. Claimant's tailbone soreness resolved.

6. By approximately March 2006, Claimant noticed lumbar stiffness and soreness. On March 9, 2006, Claimant had a routine physical with his family physician. Claimant did not mention his low back pain because he believed it was similar to the episodes he had experienced occasionally over the years and would resolve within a few weeks.

7. Throughout April 2006, Claimant's back was sore. From January through approximately May 2006, Claimant believed that his low back pain was his usual back ache which would resolve in a few weeks. However when his back pain persisted into May 2006, Claimant presented to Dr. Sermon. Dr. Sermon's chiropractic care did not relieve Claimant's back pain.

8. By June 2006, Claimant became seriously concerned because his low back pain was worsening rather than resolving. In addition to back pain, Claimant began to notice numbness in his right buttock and leg.

9. On July 12, 2006, Claimant presented with complaints of back pain to Scot B.

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Scheffel, M.D., at the Idaho Sports Medicine Institute. Dr. Scheffel initially believed Claimant's SI joint was the source of his symptoms and treated Claimant conservatively. He referred Claimant to physical therapy. Claimant attempted to perform the physical therapy exercises, however they increased his back pain.

10. In July 2006, Claimant noticed increasing numbness in his right buttock and leg down to his shin.

11. On August 21, 2006, Claimant presented to the hospital emergency room when his back pain worsened after sitting on an airplane for several hours. The examining physician found no reflexes in Claimant's right leg and promptly ordered an MRI. The MRI revealed a large disk protrusion at L4-5 and a small annular tear with disk protrusion at L5-S1. Claimant was referred to Bruce Anderson, M.D.

12. Claimant subsequently returned to the emergency room when his back pain worsened again. On August 26, 2006, Dr. Anderson performed a discectomy and encountered a very large free disk fragment. Claimant did not miss any work prior to surgery. After the surgery Claimant was off work for one week and then returned to work part-time for another week. After two weeks he returned to work full-time.

13. Claimant's condition has improved dramatically since surgery and he has no restrictions. Richard Radnovich, D.O., examined Claimant and assessed a permanent impairment rating of 13% of the whole person due to Claimant's industrial accident.

14. Having observed Claimant at hearing, and carefully examined the record herein, the Referee finds Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

15. 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). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed 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).

16. **Causation.** 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, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). In the present case, Defendants assert that Claimant has not established that his fall in January 2006 caused his need for surgery.

17. Defendants' expert, Paul C. Collins, M.D., opined that while it is possible Claimant's fall on January 10 resulted in a herniated disk, it is more likely that Claimant's repetitive motion in 2004 caused the disk herniation. Dr. Collins testified that after annular tearing, sufficient disk material would be extruded within four to six weeks to impinge an exiting nerve root. Although Dr. Collins opined that extrusion of disk material through an annular tear would likely occur within four to six weeks, Dr. Collins also related the need for Claimant's surgery to an event occurring nearly two years earlier. Dr. Collins acknowledged that he could not rule out Claimant's January 10 fall as the cause of Claimant's surgery.

18. Dr. Scheffel opined that Claimant's fall on January 10, 2006, caused his disk herniation and need for surgery. He testified that it is not uncommon for a period of several months

to transpire in a middle-aged individual between trauma causing annular tearing and further non-traumatic activity causing extrusion of sufficient disk material through the annular tear to impinge a nerve root and produce lower extremity pain. Dr. Scheffel further observed that lumber surgery resolved Claimant's lower extremity pain immediately—further demonstrating the relationship between Claimant's fall in January and his disc herniation. Dr. Radnovich also opined that Claimant's fall caused his need for surgery.

19. Defendants allege that Claimant must have suffered a traumatic event during the summer of 2006 which caused his need for surgery in August 2006. There is no persuasive evidence in the record that Claimant suffered any traumatic event between his January 10, 2006, fall at work and his August 2006 surgery. Claimant expressly denied any other traumatic event. The Referee finds Claimant's testimony credible.

20. Dr. Scheffel's opinion is most persuasive because Claimant had pursued vigorous occupations in law enforcement for many years after his initial back pain episode when he was 21. Furthermore, Claimant's work history establishes that his back was functional after his July 2004 back pain episodes and prior to January 10, 2006. As noted, there is no evidence Claimant suffered any other back trauma between January 10, 2006, and his lumbar surgery in August 2006. The Referee finds that Claimant's fall at work on January 10, 2006, caused his need for lumbar surgery.

CONCLUSION OF LAW

Claimant has proven his industrial accident of January 10, 2006, caused his need for lumbar surgery.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and

Conclusion of Law as its own, and issue an appropriate final order.

DATED this 7th day of July, 2008.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary