

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL WIGLEY,)
)
 Claimant,) **IC 2007-029057**
)
 v.)
)
 DICKINSON FROZEN FOODS, INC.,)
)
 Employer,)
) **ORDER**
)
 LIBERTY NORTHWEST)
 INSURANCE CORPORATION,)
) **October 21, 2008**
 Surety,)
)
 Defendants.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Susan Veltman 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 suffer an injury caused by an accident arising out of and in the course of employment.
2. Claimant timely reported the alleged injury to Employer pursuant to Idaho Code § 72-701.

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

DATED this __21__ day of __October_____, 2008.

INDUSTRIAL COMMISSION

/s/
James F. Kile, Chairman

unavailable for signature
R. D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21__ day of __October_____, 2008, a true and correct copy of the foregoing **Findings, Conclusions and Order** was served by regular United States Mail upon each of the following persons:

RICHARD S OWEN
P O BOX 278
NAMPA ID 83653

MONTE R WHITTIER
LAW OFFICES OF HARMON, WHITTIER & DAY
P O BOX 7507
BOISE ID 83707

jkc

/s/

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 Claimant,)
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 DICKINSON FROZEN FOODS, INC.,)
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 Employer,)
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 LIBERTY NORTHWEST)
 INSURANCE CORPORATION,)
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 Surety,)
 Defendants.)
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IC 2007-029057

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

October 21, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Fruitland, Idaho, on July 8, 2008. Richard S. Owen of Nampa represented Claimant. Monte R. Whittier of Boise 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 October 2, 2008 and is now ready for decision.

ISSUES

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

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;
2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident; and

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3. Whether Claimant timely reported an injury to Employer pursuant to Idaho Code § 72-701.¹

All other issues are reserved at the request of the parties.

CONTENTIONS OF THE PARTIES

Claimant contends that he injured his lower back when he bent a piece of metal for use as a deflector to route onions into a hopper and prevent the onions from falling off of the conveyor belt. Claimant felt a pop and sharp pain on the left side of his low-back. Claimant admits that he is not very good with dates and that he had difficulty identifying his date of injury. Claimant delayed reporting his injury to Employer because he did not want to make an issue out of it. Claimant admits prior problems with his mid-back, but not his low-back. He asserts that he injured his back at work on July 15, 2007 and reported the injury to Employer on August 21, 2007. Claimant had surgery in October 2007 as a result of his injury.

Defendants agree that Claimant reported a work-related injury to Employer on August 21, 2007, at which time Claimant could not pinpoint a date, but gave Employer the impression that his injury occurred in early August 2007. When Claimant initially sought treatment, he reported that he injured his back at home lifting tires. Claimant discussed his back problems and his likely need for surgery with Employer on August 10, 2007, but indicated that he did not know how or when he had been injured. Claimant's testimony at hearing regarding an accident date of July 15, 2007 is inconsistent with Claimant's prior representations. Claimant is not credible and has not established that he was injured at work.

¹ This issue was first raised by Defendants in their post-hearing brief. Generally, issues raised post-hearing are not considered. However, the issue was raised in response to Claimant alleging a date of injury at hearing that had not previously been alleged. Claimant consented to inclusion of the issue in his post-hearing brief.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 9;
2. Defendants' Exhibits A through M;
3. Testimony taken at hearing from Claimant, Claimant's girl-friend Melody McLean, maintenance supervisor Harry Wightman, accounting specialist Brandi Mordhorst, human resource generalist Jeffery Hymas, shift supervisor Kevin Petty, and director of human resource Glen Yearsly;
4. The deposition of Kevin Krafft, M.D., taken by Claimant on July 25, 2008; and
5. The Industrial Commission's legal file.

Defendants' renewed objection to Claimant's Exhibit M, Claimant's time card/ work ticket for July 15, 2007, is denied. Defendants' arguments are noted and Claimant's manner of procurement of the document and failure to timely exchange the document will be considered in determining the weight and credibility afforded the document. Exhibit M is properly considered pursuant to the duty imposed on the Referee "to make such inquiries and investigations as may be deemed necessary" pursuant to Idaho Code § 72-714(3).

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. Claimant was 24 years old and resided in Huntington, Oregon, at the time of hearing. He was born and raised in California and graduated from high school in Crescent City, California in 2003. Claimant learned the mechanic trade from his father and worked for his father after high school. He subsequently performed counter work for an auto parts supply

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company and drove a forklift for a lumber company. Claimant's family relocated from Crescent City to Huntington in late 2005 and Claimant went to work repairing trucks for his father's new truck shop.

2. Claimant had pain, muscle spasms and tightness in his mid-back area while working in Crescent City. Claimant experienced pain on a daily basis at work when he would twist or bend. The mid-back pain did not concern him enough to seek treatment while living in Crescent City and he was able to participate in recreational activities including rafting and riding BMX bikes.

3. Claimant sought medical treatment on July 20, 2006 with Kent Hamilton, PA-C for chronic back pain and left knee pain. Chart notes reflect that Claimant reported tenderness in the muscles of his lumbar spine and up into his ribs. Claimant was referred for a lumbar x-ray which was negative for pathology. Claimant testified that he did not know why x-rays would have been taken of his low-back and maintains that his previous pain was in the mid-back.

4. Claimant began working for Employer in December 2006. He worked in the truck shop for approximately six months as a substitute for another employee who was on medical leave. After the other employee returned, Claimant accepted a full-time graveyard position inside the plant as a mechanic.

5. On July 26, 2007, Claimant went to Valley Family Health Care and was evaluated by Patrick Barfield, FNP. Claimant reported that he was seeking care for breathing problems and chronic lower back pain. With regard to the back pain, the chart note states:

Pt also complains of severe and chronic lower back pain, radiating down to both legs. It goes down to the knee level on the L and occasionally across the buttock and posterior leg to the mid thigh on the R. He also feels chronic neck pain. He is unable to touch his chin to his chest. Pt used to ride BMX. All of his jobs have required heavy lifting. He states he was recently doing some work at home on a heavy vehicle. He was lifting tires and aggravated his back at that time. Pt has

used Ibuprofen, as well as pain medication and muscle relaxers, all to little improved effect. Pt has never had an MRI on his back. He does not believe he has ever had a pulmonary function test done. Pt recently acquired insurance. He is now interested in utilizing this insurance to determine what is wrong with him. He is not requesting any pain medication today. Pt has been working 12 hr shifts. He is off work for THUR, FRI, SAT, and SUN. FRI is the best day for him to have some time [sic] of study.

Defendants' Exhibit F, p. 22.

6. Claimant testified that he does not recall telling Mr. Barfield how he hurt himself. He did not want to tell Mr. Barfield that he was hurt at work because he "didn't want to make an issue out of it." Transcript, p. 25, line 15.

7. Claimant followed up with Mr. Barfield on July 31, 2007 regarding both his asthma and chronic back pain. Claimant reported that his asthma was aggravated by work because of the strong onion smell. Claimant did not mention a work related injury to his back, but indicated that his back pain was severe enough to interfere with his sleep.

8. Claimant underwent a lumbar MRI on August 3, 2007. A disc herniation at L5-S1 with mild compression on the right S1 nerve root was identified.

9. On August 10, 2007, Claimant met with Brandi Mordhorst to discuss health insurance. Ms. Mordhorst is an accounting specialist with Employer who also performs various human resource functions. She requested that Claimant come to her office to complete paperwork because it was the open enrollment period for their health insurance plan and the deadline to renew coverage was approaching. Claimant explained to Ms. Mordhorst that he could not afford to lose his insurance because he hurt his back, had an MRI and might need surgery. Ms. Mordhorst asked Claimant how he hurt his back and he said that he was not sure when or where it happened. The conversation was overheard by Jeffery Hymas who works for Employer in the

human resource department. Both Ms. Mordhorst and Mr. Hymas contemporaneously documented the conversation and provided testimony consistent with their documentation.

10. Claimant agrees that he discussed his back problems with Ms. Mordhorst and Mr. Hymas on August 10, 2007, and does not refute their version of the conversation. Claimant also discussed his back injury with his supervisor, Harry Wightman, on August 10, 2007, and indicated that he hurt his back two weeks prior and that he was going to need surgery. Claimant told Mr. Wightman that he was not sure where or when he hurt his back. At Claimant's request, Ms. Mordhorst provided names of preferred providers under Employer's Blue Shield plan.

11. On August 18, 2007, Claimant rafted the main fork of the Payette River with a group of people, including his shift supervisor, Kevin Petty. Mr. Petty testified that they made two trips from Banks, Idaho, which lasted two and a half hours each. He did not observe Claimant having difficulty getting into or out of the raft or flipping the boat with water in it and carrying it up the launch ramp. However, Claimant mentioned that his back was getting sore while on the second float. Mr. Petty was not aware that Claimant was alleging an on-the-job injury until later in August when Claimant started working light-duty.

12. Claimant reported a work related injury to Mr. Hymas on August 21, 2007. Claimant was unable to identify an accident date, but gave Mr. Hymas the impression that it occurred during the first few days of August. Claimant explained that he injured his back while breaking sheet metal in the chemical room. Claimant received a written warning for failing to immediately report the injury in accordance with company policy. On December 20, 2006, Claimant signed a form titled "Procedures for Reporting Work Related Incidents or Injuries" as part of his new-hire paperwork which states:

All work related accidents or injuries that may or do result in physical harm must be reported IMMEDIATELY to your Supervisor, Lead, or the HR Coordinator...

Defendants' Exhibit J, p. 43. On the day that Claimant reported a work-related injury, Employer referred Claimant for medical care and made an offer of modified duty work.

13. Claimant testified that he was using a piece of 1/4 to 5/16 inch thick piece of stainless steel to make a deflector panel because onions were falling off of the belt and onto the floor instead of into the hopper. Claimant placed the three foot by two foot piece of metal into a sheet metal break that served as a vice with a lip and an edge, designed to bend metal. He pulled up on the piece of metal to make a crease and felt a pop and a sharp pain in his back. The pain worsened over a period of a week and radicular symptoms developed.

14. Claimant explained that he did not previously report the injury at work because he did not want "to make a big issue of it" and thought he "pulled a muscle or something" that would go away if he just kept working. Transcript, p. 22, lines 16-22. He testified that he mentioned the injury to his girlfriend on the date it occurred.

15. Claimant was seen by Clint Baker, PA-C, at the referral of Employer on August 21, 2007. Mr. Baker identified the date of injury as "08/07" and noted the mechanism of injury as "bending some metal." He provided work restrictions and referred Claimant for a surgical consultation. Defendants' Exhibit I, p. 40.

16. Surety obtained a recorded statement from Claimant on August 24, 2007. In the statement, Claimant indicated that his injury occurred "somewhere around" August 6th, but that he was not exactly sure about the date. He stated that on August 10th he told Harry Wightman how he had been injured. He waited until August 10th to mention it because he did not want to whine and figured that it was just a pulled muscle that would go away. Defendants' Exhibit C, pp. 9-10.

17. Surety sent a denial letter to Claimant on September 4, 2007, which referenced Mr. Barfield's chart note of July 26, 2007 and characterized Claimant's work at home on a heavy vehicle as an intervening event. The letter pointed out that an accident must be reasonably located as to the time when and place where it occurred.

18. Claimant was evaluated by neurosurgeon, Christian G. Zimmerman, M.D., on September 13, 2007. Dr. Zimmerman noted that Claimant's onset of symptomology was sometime in July 2007 when Claimant was lifting and pulling on a piece of sheet metal at work. Dr. Zimmerman recommended diagnostic nerve blocks and possible surgery. Claimant returned to Dr. Zimmerman on October 16, 2007 and indicated that he preferred to attempt additional conservative treatment. Conservative treatment failed to resolve Claimant's symptoms and he underwent surgery on October 30, 2007, at the direction of Dr. Zimmerman in the form of an L5-S1 lumbar laminectomy and microdiscectomy.

19. Claimant worked in a light-duty capacity for Employer from August 21, 2007 until mid-September 2007 when he took emergency leave. Claimant's light-duty assignment included work in the office. Employer generally allows 15 days of emergency leave for employees who are not eligible for leave under the Family Medical Leave Act. Claimant's emergency leave was extended through October 2007, but he was terminated effective October 31, 2008.

20. On April 28, 2008, Claimant was seen by Kevin R. Krafft, M.D., for an impairment rating evaluation at the referral of his attorney. Claimant reported to Dr. Krafft that his injury occurred on July 21, 2007. Dr. Krafft assigned a 7% whole person permanent partial impairment rating, but indicated that Claimant would benefit from additional physical therapy to more accurately determine his work ability and to finalize his impairment.

21. Dr. Krafft testified in his post-hearing deposition that Claimant's lumbar MRI findings reflect that Claimant sustained an injury. The MRI findings and L5-S1 herniation could be consistent with either bending sheet metal as described by Claimant or from lifting tires as reflected in the July 26, 2007 chart note, depending on which mechanism of injury is adopted.

22. Claimant testified at hearing that he came across his time sheet/work ticket for July 15, 2007 while performing light-duty office work on the last day he was on Employer's premises in September 2007. The document includes an entry for making a diverter for the blue room which indicated to Claimant that his actual date of injury was July 15th or 16th, 2007.² Claimant took the original document without the knowledge or permission of Employer. He took the document because he could not come up with exact dates or answer questions asked to him about the date his injury occurred. However, he did not bring the document to anyone's attention or make efforts to clarify his date of injury with anyone until the night before hearing when he told his lawyer about the document.

23. Melody McLean is Claimant's girlfriend and the mother of Claimant's son born on July 3, 2007. Ms. McLean testified that Claimant is bad with dates. She remembers Claimant telling her about the injury in mid-July 2007 and recalls the date because she remembers that the conversation took place when her son was two weeks old.

DISCUSSION AND FURTHER FINDINGS

24. A claimant must prove that he or she was injured as 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). A claimant is not required to establish a specific time and place of injury. *Hazen v. Gen. Store*, 111 Idaho 972, 729 P.2d 1035 (1986). Rather, an accident need

² Because Claimant worked the graveyard shift, his shift began on July 15th but ended on July 16th.

only be reasonably located as to the time when and the place where it occurred. *Spivey v. Novartis Seed, Inc.*, 137 Idaho 29, 43 P.3d 788 (2002). To prevail on a worker's compensation claim, a claimant must establish that an accident happened by a preponderance of the evidence. *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008). The claimant must prove to a reasonable degree of medical probability that the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. *Id.* Probable is defined as "having more evidence for than against." *Id.*

25. 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.

26. 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.

27. Claimant alleges an injury of July 15, 2007. It is undisputed that Claimant reported an injury to Employer on August 21, 2007. Claimant reported his injury well within the 60 day time limit. The fact that Claimant provided vague and inconsistent information about his date of injury and did not articulate an injury date of injury of July 15, 2007 until hearing does

not invalidate his previous reporting of the injury. Since August 21, 2007, Claimant has consistently alleged a single accident and injury. Claimant's inconsistencies in identifying the date of his injury do not translate into Claimant reporting multiple new injuries that might trigger additional reporting requirements.

28. Claimant's pre-hearing inability to identify his date of injury and failure to immediately report the injury pursuant to Employer's policy do not bar Claimant's recovery. However, both circumstances are properly considered when evaluating Claimant's credibility and determining whether Claimant was injured when and how he alleges.

29. As noted above, Claimant's time sheet/work ticket for July 15, 2007 (Claimant's Exhibit 9) was admitted into evidence over Defendants' objection. The document was the subject of examination, cross-examination and discussion during hearing. The document itself is given little weight in light of the fact that Claimant's removal of the original document from Employer's premises makes it impossible to verify the authenticity of its contents. The entry relied upon by Claimant to establish that he constructed the diverter panel on July 15, 2007 is in Claimant's handwriting and is the last of ten entries.

30. Claimant's method of obtaining his work ticket of July 15, 2007 and explanation of his failure to either produce the document or disclose the information contained in the document until his testimony at hearing hurt his credibility. It is understandable that Claimant would think the document was significant and that Claimant would want to use it to document and clarify his date of injury. However, it makes little sense that he would take the document from Employer's office in September 2007, but fail to advise anyone of the information he discovered until the eve of hearing. Claimant was evaluated by Dr. Krafft in April 2008, well

after discovering his work order of July 15, 2007, yet he reported to Dr. Krafft that his injury occurred on July 21, 2007.

31. Even if it is assumed that Claimant was bending sheet metal on July 15, 2007, Claimant has failed to present credible evidence to explain why he reported chronic lumbar pain with an aggravation at home lifting tires when he sought medical treatment on July 26, 2007. The most credible explanation for Claimant's lumbar injury is that it occurred as Claimant initially reported at Valley Family Healthcare- doing automotive work at home and lifting tires.

32. Claimant's explanations that he did not want to make an issue about his back pain and that he minimized his condition and thought it was a muscle strain are not credible or persuasive. Claimant failed to report a work-related injury on August 10, 2007 when discussing the need for surgery with Employer. On that date, Claimant mentioned back problems and the need for possible surgery to his supervisor and two human resource representatives, but failed to disclose a work injury when directly questioned about the cause of his problems. Claimant's failure to report the claimed injury extended beyond the period of time when he believed that his condition was limited to a strain or other transient condition.

33. Once Claimant reported an injury to Employer, he provided inaccurate and misleading information to Surety when providing a recorded statement. Claimant estimated his date of injury to be "somewhere around the 6th" and indicated that he reported how his injury occurred to Mr. Wightman on August 10, 2007.

34. Claimant's raft trip of August 18, 2007 is only marginally relevant. Claimant's disc herniation existed prior to the raft trip and was identified by MRI. Claimant demonstrated an ability to continue regular-duty work and participate in recreational activities for approximately three weeks, in spite of the herniation. There is no indication that Claimant

sustained an intervening injury on the raft trip. Claimant mentioned his sore back to Mr. Petty, but did not elaborate on the cause of the pain or give Mr. Petty reason to believe that he had been injured at work.

35. Overall, Claimant was not a credible witness. His substantive credibility was negatively impacted by the multiple inconsistencies discussed in the preceding paragraphs. Claimant's observational credibility was fair, at best.

36. The testimony of Ms. McLean regarding Claimant's date of injury is not credible. Ms. McLean is understandably sympathetic to Claimant's situation. Her testimony at hearing was based on recollection of a conversation that took place a year prior to hearing. It is not surprising that Ms. McLean is more reliable than Claimant when it comes to remembering dates and the chronology of events. However, it is surprising that Ms. McLean would wait until the day of hearing to assist Claimant in identifying his date of injury when Claimant's failure to identify his date of injury was a factor in Surety's denial of the claim and when litigation had been pending for more than nine months.

37. Claimant has failed to meet his burden of proof to establish that he injured his back at work.

CONCLUSIONS OF LAW

1. Claimant did not suffer an injury caused by an accident arising out of and in the course of employment.

2. Claimant timely reported the alleged injury to Employer pursuant to Idaho Code § 72-701.

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 20 day of October 2008.

INDUSTRIAL COMMISSION

 /s/
Susan Veltman, Referee