

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HANS C. CRAWFORD,)	
)	
Claimant,)	IC 2007-036788
)	
v.)	
)	
MAX J. KUNNEY CO.,)	
)	
Employer,)	
)	ORDER
)	
STATE INSURANCE FUND,)	
)	December 19, 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 suffered an injury from an accident arising out of and in the course of his employment.
2. Claimant is entitled to medical care pursuant to Idaho Code § 72-432.
3. Claimant is entitled to temporary total disability benefits from October 3, 2007 through January 8, 2008.
4. Claimant is not entitled to an award of attorney fees.

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

DATED this __19__ day of __December_____, 2008.

INDUSTRIAL COMMISSION

/s/
R. D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

/s/
James F. Kile, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of December, 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:

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jkc

/s/_____

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 Claimant,)
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 MAX J. KUNNEY CO.,)
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 STATE INSURANCE FUND,)
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 Defendants.)
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IC 2007-036788

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

December 19, 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 Coeur d’Alene, Idaho, on August 11, 2008. Michael J. Walker of Spokane represented Claimant. Paul J. Augustine of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing as well as post-hearing briefs. This matter came under advisement on October 31, 2008.

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;
 - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);

and

RECOMMENDATION - 1

c. Attorney fees.

An issue regarding timely reporting of an injury to Employer was initially identified for resolution but was withdrawn during the hearing. Defendants agree that Claimant complied with notice limitations as set forth in Idaho Code § 72-701 through Idaho Code § 72-706, but maintain that circumstances surrounding Claimant's reporting of his injury remain relevant with regard to credibility.

CONTENTIONS OF THE PARTIES

Claimant contends that he injured his right shoulder, neck and back while working for Employer on a nighttime concrete pour. The injury occurred in the early morning hours of August 29, 2007. Claimant's foreman was aware of the injury soon after it occurred. The injury resulted in a disc protrusion in Claimant's lower back. Claimant's right shoulder and neck continue to be symptomatic to a lesser degree. Claimant has not reached medical stability and requires additional treatment for his injuries. Claimant has been unable to work since late September 2007 and is entitled to temporary disability benefits. Defendants' denial of the claim was unreasonable and an award of attorney fees is appropriate.

Defendants contend that no such injury occurred. Claimant participated in three nighttime concrete pours but was not pouring concrete on the night of August 28, 2007 or the morning of August 29, 2007. Claimant never told Employer about a back injury. Claimant mentioned right shoulder problems both prior to and after the claimed date of injury, but indicated that they were not work-related. Claimant continued to work through late September 2007 when the project was completed. Employer first became aware that Claimant was alleging a work-related injury on October 22, 2007 when documents regarding a claim filed in Washington were received.

JURISDICTIONAL HISTORY

Claimant resides in Washington and was hired through his union hall in Spokane. Employer is based in Washington. Claimant alleges that his injury occurred while working on a project in Worley, Idaho. This claim was initially pursued in Washington. The Washington Department of Labor and Industries (L&I) rejected the claim upon a determination that Claimant was an Idaho worker at the time of injury. Prior to rejection of the claim, Claimant received \$1,358.14 from L&I designated as time loss benefits from October 9, 2007 through October 22, 2007. L&I has requested reimbursement from Claimant for that amount. Defendants agree that the claim was properly filed in Idaho, but dispute the claim on other grounds. An expedited hearing was requested to resolve the above stated issues.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits A through H;
2. Defendants' Exhibits A through C;
3. Testimony at hearing from Claimant, human resource manager Valerie Whitman, and site superintendant Bob Milner; and
4. The Industrial Commission's legal file.

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 36 and resided in Cheney, Washington, at the time of hearing. Claimant was raised in both Washington and Idaho. He attended high school in Seattle, but left school during the ninth grade and obtained a GED. Claimant's past work history includes auto-body repair, wood mill work, logging, excavating, roofing, sheet rocking, painting and electrical work. Most of Claimant's past jobs involved heavy work and he was able to lift up to 100

pounds without difficulty. Claimant did not have prior injuries to his right shoulder or spine and did not receive medical treatment for his shoulders or spine prior to commencing work for Employer.

2. Claimant worked as a cement finisher for Central Pre-Mix immediately before being hired by Employer. Claimant quit his job with Central Pre-Mix and went to work for Employer in May 2007 because Employer was hiring through the union and paid better wages. Claimant was hired out of the Spokane union hall as a concrete finisher.

3. Joe O'Rourke is a concrete finisher with whom Claimant worked at Central Pre-Mix. O'Rourke was also a union member and began working for Employer a couple of weeks before Claimant. O'Rourke became Claimant's foreman and routinely worked with Claimant. Claimant and O'Rourke regularly carpooled to work for Employer.

4. Claimant was hired by Employer to perform highway construction. Claimant went back and forth between projects in Mead, Washington, and Worley, Idaho. Both projects involved the construction of bridges. Claimant performed the same type of work at both job sites.

5. Concrete pours would generally take place at night and in the early morning hours because lower temperatures were needed for optimal results with the concrete. Pours usually started at 8pm and took between eight and ten hours to complete. Sections of 275 yards would be poured at a time. A Bidwell is a paving machine that rides on rails. The Bidwell paver did not go perfectly from side to side and would leave 12 to 18 inches on either side that required hand finishing. Claimant and O'Rourke performed the hand finishing. The work required repetitive pushing and pulling. The project in Worley required heavier exertion than usual because of the density of concrete or "mud" used.

Claimant's Testimony

6. Claimant testified that he was injured while working with O'Rourke at the Worley project on an overnight pour that started on August 28, 2007. During the early morning hours of August 29, 2007, Claimant explained that he was bent over to do rodding and, as he pulled, felt a pop in his back with pain radiating up into his neck and down into his legs. The machinery was too noisy to converse, but he grabbed his back and gestured to O'Rourke that he hurt his back. O'Rourke acknowledged Claimant with a similar "me too" gesture.

7. Claimant explained that he finished the pour in an extreme amount of pain and told O'Rourke after the pour that his back was killing him and he needed to go home. Both Claimant and O'Rourke told the labor foreman, Dan Lawrence, that their backs were hurting and they wanted to go home. Claimant and O'Rourke left an hour early. The next morning, Claimant could not get out of bed because of back pain and told O'Rourke that he could not come into work because his back hurt.

8. Claimant attempted to get medical treatment the day after his injury and contacted his family physician, Duncan Lahtinen, D.O. He was not able to get an appointment until September 14, 2007.

9. Claimant remembers participating in one additional pour after the pour on which he was injured. However, he performed lighter work than usual on that pour. Claimant recalls that he worked light-duty after the injury and that he did not work full shifts.

10. Claimant's work hours fluctuated and were irregular because of the night pours and different job sites. O'Rourke kept track of Claimant's work hours and recorded them in a booklet. There were occasionally discrepancies in hours worked versus hours paid and O'Rourke would argue with Lawrence when the paychecks did not reflect hours documented on the timesheets.

Medical Records

11. Dr. Lahtinen evaluated Claimant on September 14, 2007 and identified the chief complaint as right shoulder pain. Dr. Lahtinen's records do not reflect a mechanism of injury or indication that Claimant's condition was work-related. Claimant's group health insurance through the union was billed for the initial visit. There is no mention of neck or back complaints and Claimant testified that Dr. Lahtinen declined to treat more than one complaint at a time and suggested that Claimant make another appointment for his back.

12. Claimant was evaluated by Dr. Lahtinen on September 19, 2007 for back, shoulder, and neck pain. Dr. Lahtinen ordered a lumbar MRI and Claimant followed up with Dr. Lahtinen to review MRI results.¹ Dr. Lahtinen placed Claimant in a no-work status from October 3, 2007 through October 15, 2007 for severe back pain. The follow-up chart notes do not address Claimant's mechanism of injury or whether Claimant's condition was connected with an industrial injury. After Claimant's initial evaluation, Claimant's group health insurance through his wife's employer was billed.

13. Claimant initiated treatment with William R. Loomis, D.O., on October 9, 2007. Dr. Loomis documented Claimant's history of injury as:

I was 'rodding' 5-7 hours a day straight. Normally we work in crews of (approximately 6) and rotate, but another guy and I were doing it by ourselves because we are short of help on the job. They put us on 10 hour shifts at night. As I was working I started feeling this incredible pain throughout my neck and back It was burning with some pain and numbness. The next day I could hardly walk and haven't been back to work since. I couldn't move when I tried to go back to work.

(Claimant's Exhibit C., p.1).

14. Dr. Loomis diagnosed cervical, thoracic, and lumbar strain with non-specific neuralgia of the lower extremities and a negative neurological exam. Dr. Loomis felt that

¹ The only MRI in evidence is a lumbar MRI performed on January 8, 2008 through the emergency room. Results of the MRI performed at the direction of Dr. Lahtinen are unknown.

Claimant's condition was work-related and initiated paperwork to file an L&I claim in Washington. Dr. Loomis treated Claimant on eight occasions from October 9, 2007 through November 19, 2007. He performed osteopathic manipulative therapy and range of motion treatment of Claimant's spine, shoulders and ribs. Dr. Loomis recommended physical therapy.

15. Dr. Loomis and/or his office staff completed an injury report which Claimant signed. The form was submitted to Washington L&I within a few days of Claimant's initial evaluation by Dr. Loomis. On the form, Dr. Loomis diagnosed cervical, thoracic, and lumbosacral strains. Claimant's condition was noted to be due to a specific incident on August 28, 2007 around 11:00 p. m. or midnight. (Claimant's Exhibit F, p.1).

16. Claimant presented to the Holy Family Hospital's emergency room in Spokane on January 8, 2008 with an exacerbation of low back pain. Claimant reported to Troy E. Mattox, M.D., that:

in 09/07, he was working as a cement pourer, felt a pop in his low back and has had pain ever since. He has an ongoing L&I claim over this. He has had increased pain in his low back that he gives a 7/10...and describes it as a tightness and aching with spasms and he says the aching goes into bilateral shoulders and legs and a shooting right knee pain goes down his right leg on the inside part of his right leg to his toes...both of his legs have been giving out when he has been having this pain. He also states he [sic] has been difficult to sleep at night because his muscles get so tight in his back and he actually has tremors and spasms...He has been disabled since his back injury and not able to work.

(Claimant's Exhibit D, p.4).

17. A lumbar MRI was performed and revealed mild multilevel degenerative changes with a small disc protrusion at L5-S1 in contact with both S1 nerve roots. Dr. Mattox reviewed the MRI and identified "a slightly pinched nerve" that did not correlate very well with Claimant's reported symptoms. He described Claimant as neurologically intact with no signs or evidence for acute surgical intervention. Dr. Mattox noted that, statistically, 85% of people with Claimant's type of injury are back to their baseline condition within six weeks and that Claimant

was apparently one of the unlucky 15% who have a slower recovery. (Claimant's Exhibit D, p.5).

18. On January 15, 2008, Dr. Loomis issued a statement in which he opined that, on a more probable than not basis, Claimant sustained an industrial injury to his spine on August 28, 2007. He opined that Claimant is in need of additional treatment, has not reached maximum medical improvement and should not return to work in his current trade. (Claimant's Exhibit C, p.15).

20. Claimant did not receive additional medical care for his injury after the January 2008 emergency room visit. Additional medical treatment has not been authorized through workers' compensation. He continued to have health insurance through his wife's employer, but could not afford the co-payment for continued treatment. At the time of hearing, Claimant felt that he was unable to return to work. Everyday activities aggravate his pain and he still experiences pain radiating into his lower extremities.

Employer Testimony and Documentary Evidence

Valerie Whitman

21. Valerie Whitman performs multiple job functions for Employer and has been the human resource manager for the past ten years. Employer was founded by Whitman's great-grandfather and remains a family owned business in which she has a financial interest. Whitman is not the payroll clerk and can not personally verify information contained in the payroll records. She has access to the payroll data system, is able to run reports, and knows what the codes stand for and what the various entries represent.

22. Whitman is aware of situations when there have been errors made in the reporting of hours worked. Errors regarding either rate of pay or amount of hours worked are corrected immediately upon being brought to her attention.

23. Whitman first learned that Claimant was alleging an industrial injury on October 22, 2007, when she received documents in the mail from L&I. She checked her files for an incident report and found none. She verified that Claimant was no longer an employee and confirmed that Claimant was working on the Idaho project on the date of the claimed injury. She contacted the site superintendent, Bob Milner, to discuss his recollection of events. Whitman completed an Employer's First Report of Injury on October 26, 2007.

24. Employer's time card history report includes codes to identify job sites. (The Washington code is 66 and the Idaho code is 61). Cost codes identify the activity performed. (Sacking and grinding is 3356-500 and a concrete pour is 3079-500). These codes confirm that Claimant worked on concrete pours that began on August 27, August 29, and September 5, 2007. Claimant was doing preparation work in the form of sacking and grinding on August 28, 2007 and did not begin a pour that night. (Defendants' Exhibit A, pp.1-4).

25. A separate manner by which Whitman verified the dates of the concrete pours was by review of records identifying back-charges made to their suppliers for concrete. These records confirm overnight pours beginning on August 27, August 29, and September 5, 2007. (Defendants' Exhibit B, p.1).

26. Payroll records reflect that Claimant did not work from August 22 through 26, 2007. He worked nine hours on August 27, 2007; five hours on August 28, 2007; and eleven and a half hours on August 29, 2007. There are no work hours documented for Claimant on August 30, 2007. Claimant worked during 15 days in September 2007, with his last day of work for Employer being September 28, 2007. However, Whitman's testimony and Employer documentation establish that work hours for overnight shifts were routinely designated as hours worked on the day the shift began, even if some of the work hours are actually on the following calendar day. For example, the 11.5 hours credited to Claimant as work on August 29, 2007 actually includes hours that Claimant worked in the early morning of August 30, 2007.

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27. Each superintendant carries a voice recorder and dictates daily reports. The tapes are forwarded to a transcriptionist and are transcribed. Milner was the only superintendant on the Worley project. Whitman reviews the daily reports which is often how she becomes aware of an incident or injury. Employer keeps track of any incidents on the job, including near-miss incidents that do not require medical attention.

Bob Milner

28. Milner has worked for Employer for nine years and was the site superintendant on the Worley project. He dictated daily reports while working on the project. He advises all employees to report injuries, not matter how minor. If Claimant would have reported an injury to him, he would have initiated paper-work and had someone take Claimant to a doctor or hospital. Light-duty work would have been made available to Claimant.

29. There were three overlay concrete pours on the Worley bridge. The Bidwell paving machine was used on all three pours and Milner usually rode on the Bidwell with the operator. When they were shorthanded as far as concrete finishers, carpenters would fill-in. It was typical to have one finisher on each side of the Bidwell. They were not shorthanded when Claimant and O'Rourke were working on the bridge pours.

30. Claimant mentioned having a sore right shoulder to him soon after he began the project and before any of the three pours were performed. Milner asked Claimant on multiple occasions whether the shoulder problems were an L&I claim or job related. Claimant said that they were not and his shoulder was sore because of years of rubbing concrete. Claimant never mentioned back pain.

31. Milner verified that concrete pours commenced at either 8:00 p. m. or 9:00 p. m. on August 27, August 29, and September 5, 2007. The pours lasted until 3:00 a. m. or 4:00 a. m. the following day. On August 28, 2007, they were doing preparation work and did not start a pour. Milner's daily notes are consistent with his testimony.

32. Milner never saw a doctor's note and was not aware of any medical restrictions, but knew that Claimant was receiving treatment for his right shoulder. Claimant was a good worker and Milner wanted to keep him. Milner advised Claimant to work as his pain would allow and to let him know if the pain got worse.

33. Milner specifically asked Claimant if his shoulder problems were the result of an on-the-job injury and Claimant indicated that they were not. Milner was in disbelief when he learned that Claimant was alleging an on-the-job injury. Milner spoke with every foreman that had been on the project. They were all aware of Claimant's shoulder problems, but none of them knew anything about a back injury.

34. Claimant continued on the Worley project until it was finished. He had the option of working on the Mead project upon completion of the Worley project. The Mead project lasted until the summer of 2008. Milner sent both O'Rourke and Claimant to the Mead project. O'Rourke showed up and Claimant did not.

35. Milner considers that an incident or accident arises when something happens such as a machine running over a body part or being struck with an object. He could not say whether the onset of pain while pulling concrete constituted an incident. He would routinely ask employees whether or not their condition was work related.

DISCUSSION AND FURTHER FINDINGS

Injury

36. 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 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 workers' 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.*

37. Generally, a claimant’s inability to identify an exact date of injury does not preclude a finding that he or she sustained a compensable industrial injury. In the present case, there is understandable confusion regarding the date of injury based on the fact that Claimant’s shift would sometimes span two calendar days. However, an analysis regarding the correct date of injury is relevant in this case in light of the fact that it gives an indication as to whether or not Claimant’s injury occurred as he describes.

38. There were only three occasions on which Claimant performed work on overnight pours in Worley. Claimant contends that the injury occurred in the early morning hours of August 29, 2007 after beginning a concrete pour on the night of August 28, 2008. Claimant maintains that his pain was significant enough that he was unable to go to work the day following his injury. Claimant recalls working on one additional pour after his injury which translates into Claimant’s injury occurring during the second of the three overnight pours in Worley.

39. Employer testimony and corroborating documentation are persuasive as to the dates on which concrete pours occurred. Claimant’s assertion that Employer documentation is unreliable and/or improperly considered due to lack of authentication is rejected. No objections were made to the admission of the documentary evidence at hearing and no persuasive evidence was admitted that indicates erroneous or false information is contained in Employer’s payroll documents. Employer’s documentation is consistent with testimony from both Whitman and Milner.

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40. Claimant credibly testified that his onset of pain occurred while bending over and pulling concrete during an overnight concrete pour. However, the evidence establishes that this occurred during the early hours of August 30, 2007 and not on August 29, 2007 as alleged by Claimant. At first glance, this is an absurd conclusion based on the fact that Claimant testified he did not work on August 30, 2007 and because Employer's payroll data does not reflect hours worked by Claimant on that day. However, the evidence establishes that Claimant began a concrete pour at approximately 9:00pm on August 29, 2007 and that the pour lasted into the morning of August 30, 2007. As described in previous finding 26, Employer credited the entire shift to August 29, 2007 even though the shift ended on August 30, 2007.

41. The testimony of Milner that Claimant complained of shoulder pain prior to the concrete pours does not preclude a finding that Claimant was injured as he alleged. There is no indication that Claimant previously sought medical treatment for shoulder complaints or that he experienced significant limitation prior to September 2007. It is undisputed that Employer permitted Claimant to self-modify his job duties during September 2007 and informally allowed Claimant to perform light-duty work. The evidence indicates that Claimant experienced a worsening of his condition in late August 2007.

42. Claimant failed to effectively communicate to Milner that he was alleging an on-the-job injury to his right shoulder and did not mention back problems. It is believable that Employer was unaware that Claimant was pursuing a claim until paperwork was received on October 22, 2007. Although Milner credibly testified that Claimant did not mention back problems to him, the testimony of Claimant that he mentioned his back pain to O'Rourke and Anderson was not refuted.²

² Testimony from O'Rourke would have been helpful in resolving the disputed issues. Both parties indicated they had an interest in obtaining testimony from O'Rourke but had been unable to secure such testimony.

43. Employer records indicate that Claimant worked five hours on August 31, 2007, but did not work again until September 5, 2007. These records tend to support that Claimant was limiting his work hours following his injury. Claimant's recollection of events was not entirely accurate and some of his testimony is difficult to reconcile with other evidence. Discrepancies include the date of injury and his ability to work the day after his injury. However, when the record as a whole is considered, Claimant has met his burden of proving that he sustained an industrial injury.

Medical Benefits

44. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Idaho Code § 72-432(1) further permits an injured employee to obtain treatment on their own, at the expense of the employer, if the employer fails to provide reasonable medical treatment for the industrial injury.

45. Claimant has established entitlement to past medical benefits for treatment rendered by Drs. Lahtinen, Loomis and Mattox for his industrial injury. Claimant is entitled to necessary and reasonable future medical benefits. Specific future medical benefits to which Claimant is entitled cannot be identified because Claimant has not received treatment since January 2008 and his current medical status is unknown. Physical therapy was previously recommended.

Temporary Disability Benefits

46. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant

to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to temporary disability benefits unless and until such evidence is presented that he has been released for work, or light duty work and the employer makes light duty work available to him. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

47. Claimant continued to work as a concrete finisher for approximately four weeks after his injury during which time Employer allowed him to self-modify tasks that were too strenuous. Milner testified that additional work was made available to Claimant on the Mead project, but that Claimant did not report for additional work after completion of the Worley project on September 28, 2007.

48. Claimant was placed in an off-work status from October 3, 2007 through October 15, 2007 due to severe back pain by a nurse practitioner at The Doctors' Clinic where he received treatment from Dr. Lahtinen. Claimant did not return to Dr. Lahtinen after October 2, 2007.

49. Claimant initiated treatment with Dr. Loomis on October 9, 2007 at which time he reported to Dr. Loomis that he had not been able to work since the day of his injury. Dr. Loomis completed paperwork for the Washington L&I claim on October 23, 2007 and indicated that Claimant was unable to return to any type of work from September 27, 2007 through "the present." He noted that Claimant's condition was improving. Dr. Loomis evaluated Claimant on eight occasions. He recommended a 30 day course of physical therapy. Dr. Loomis documented a negative neurological examination and did not recommend diagnostic studies.

50. Claimant's most recent medical evaluation prior to hearing was the emergency room visit of January 2008. At that time, Claimant's complaints did not correlate with his lumbar MRI findings.

51. The open-ended statement by Dr. Loomis of January 15, 2008 that Claimant should not return to work in his current trade pending treatment is not persuasive. Dr. Loomis routinely documented Claimant's subjective complaints in detail, but provided scant information in his contemporaneous chart notes about Claimant's return to work status. Dr. Loomis last evaluated Claimant in mid-November 2007. There is no indication that Dr. Loomis considered Claimant's lumbar MRI findings (either from January 2008 or earlier) or the fact that Claimant managed to work for four weeks following his injury.

52. It is understandable that financial circumstances and denial of this claim have prevented Claimant from obtaining regular medical treatment and completing the recommended physical therapy. Nonetheless, Claimant bears the burden of proving that he remains in a period of recovery and that his inability to return to work is causally related to his compensable injury.

53. Claimant did not avail himself of ongoing employment with Employer at the Mead project and has not attempted to return to work in any capacity.

54. The medical evidence is at odds with the severity of complaints described by Claimant. Claimant's claim for temporary disability benefits of 45 weeks, and continuing, is not supported by the other credible evidence.

55. The evidence establishes a 14 week period of temporary disability from October 3, 2007 when Claimant was taken off of work at the Doctor's Clinic until January 8, 2008, when Dr. Mattox indicated that Claimant's symptoms did not correlate with his lumbar MRI findings.

Attorney Fees

56. Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglects to pay an injured employee compensation within a reasonable time.

57. This is not an attorney fees case. Claimant met his burden of proof to establish a compensable injury by a preponderance of the evidence, but just barely. Defendants' denial of the claim was understandable and reasonable. The lack of evidence from O'Rourke or any other employee to substantiate Claimant's assertions; Claimant's failure to articulate an injury to Milner when questioned; and the lack of documentation of an industrial injury in the initial medical records support a reasonable denial of this claim by Defendants.

CONCLUSIONS OF LAW

1. Claimant suffered an injury from an accident arising out of and in the course of his employment.
2. Claimant is entitled to medical care pursuant to Idaho Code § 72-432.
3. Claimant is entitled to temporary total disability benefits from October 3, 2007 through January 8, 2008.
4. Claimant is not entitled to an award of attorney fees.

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 __16__ day of __December____ 2008.

INDUSTRIAL COMMISSION

/s/
Susan Veltman, Referee

ATTEST:

/s/
Assistant Commission Secretary

RECOMMENDATION - 17