

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEFF HASH,)
)
 Claimant,)
)
 v.)
)
 RIVERSIDE, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

**IC 2007-039976
2007-015227**

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

Filed December 5, 2008

INTRODUCTION

Pursuant to Idaho Code §72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on August 6, 2008. Claimant was present and represented by Richard S. Owen of Nampa. Monte R. Whittier of Boise represented Employer/Surety. Oral and documentary evidence was presented. There were no post-hearing depositions. The parties submitted post-hearing briefs and this matter came under advisement on October 27, 2008.

ISSUES

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

1. Whether Claimant suffered an accident as alleged on January 3, 2007; and, if so
2. Did Claimant timely report the same within the meaning of Idaho Code § 72-701.

CONTENTIONS OF THE PARTIES

Claimant contends that while setting up a water well drilling rig, a rubber hose he was attempting to attach came loose and struck him on the top of his head. He further argues that he reported this accident to a co-owner of the company the next day.

Defendants assert that the accident did not occur and, if it did, Claimant did not report it to Employer, in spite of numerous opportunities to do so, until April of 2007. Further, the co-owner to whom Claimant allegedly gave notice does not remember that any such notice was given to him.

Claimant responds that there was an eyewitness to the accident that Defendants never bothered interviewing who would have corroborated Claimant's version of events. Finally, the co-owner to whom he gave notice testified that he did not remember Claimant giving him notice, which is different than denying that notice was, in fact, given.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, his co-worker Justin Cleaver, Employer's secretary Danielle Oakley, and Surety's case manager, Lori Kofoed, taken at the hearing.
2. Claimant's Exhibits 1-4 admitted at the hearing.
3. Defendants' Exhibits A-M admitted at the hearing.

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 AND DISCUSSION

1. Claimant was 53 years of age and resided in Nampa at the time of the hearing. He was employed as a water well drilling supervisor for Employer. He was in charge of a one- to two-person drilling crew. It was his responsibility to transport the drilling equipment to the

drilling site, prepare the site for drilling, and “. . . get the job done and run the crew.” Deposition of co-owner Terry Daugherty, p. 6.

2. On January 3, 2007, Claimant was in the process of hooking up an eight-inch diameter rubber hose to a flange on the drill rig. While difficult to visualize, Claimant described what happened as follows at the hearing:

Well, Justin [Clever – Claimant’s co-worker] was lowering it [the hose]¹ down to get the proper height, and I was standing underneath it, and we didn’t have it secured good enough yet, and it slipped off and hit me on top of the head.

* * *

Q. (By Mr. Owen): Did that [Claimant’s hard-hat] cushion the blow of this hose?

A. It didn’t feel like it.

Q. Tell me what you felt when this hose hit you on top of the head.

A. Well, it was stinging pain, almost like an electrical shock that went right through me and knocked me to my knees.

Hearing Transcript, pp. 24, 26.

Accident

An accident is defined as 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. Idaho Code §72-102(18)(b).

3. If believed, Claimant’s description of the events of January 3, 2007, would constitute an accident. Claimant’s testimony in that regard was corroborated at hearing by the testimony of his co-worker Justin Cleaver:

Q. (By Mr. Owen): Do you remember Mr. Hash getting hit on the head with this pipe?

A. Yeah. It’s a big rubber hose, but, yeah.

Q. Tell us what you remember, Justin.

A. Well, we were bolting it up. And when you come up and down with the hose, it spins so you’ve got to match a flange pattern because if you get it

¹ A backhoe was used to lower the hose into place on the drill rig. The hose is “very heavy.”

off, you will actually twist the hose and kink it. And it's rather expensive, so you try to get it right.

So, usually, you'll match one hole, slide the bolt in, and you lower it up and down until you get the other seven matched. And the bolt came out and hit him in the head.

Q. Okay. And what were you doing when this happened?

A. I was running the controls.

* * *

Q. Do you remember seeing this accident happening to Jeff pretty clearly?

A. Yeah.

Q. Is there any doubt in your mind that it happened?

A. Oh, yeah, it happened.

Hearing transcript, pp. 50, 53-54.

4. The Referee can find no support in the record for the proposition that Claimant testified any way other than truthfully when he described his accident at hearing. Likewise with Justin Cleaver's testimony. Claimant listed Mr. Cleaver as a witness in his First Report of Injury or Illness filed on or about April 27, 2007, and also mentioned him as a witness in his recorded statement taken on August 17, 2007. A case manager for Surety testified at hearing that it was an "oversight" that Mr. Cleaver was never contacted by Surety. Had he been contacted, Surety could have made a more informed decision regarding their denial and launched an earlier investigation of the medical issues presented.

5. While Defendants may have an argument that Claimant's late reporting of his accident to his health care providers may weaken his argument that the injuries for which he is seeking compensation were a result of his accident, nonetheless, the Referee finds that Claimant suffered an accident on January 3, 2007, based on the un rebutted testimony of Claimant and Mr. Cleaver.

Notice

Idaho Code § 72-701 provides in pertinent part: “No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than 60 days after the happening thereof . . .”

6. Claimant testified that he informed Terry Daugherty, a co-owner of Employer, of his accident the day following its occurrence. Regarding that conversation, Claimant testified:

Q. (By Mr. Owen): Do you remember what you said to him?

A. I told him that I got hit on the top of the head with that hose. And he’s familiar because he’s been hit on top of the head the exact same way with the same hose.

Q. Okay. Did you tell him anything else?

A. I told him that I was hurting real bad.

Q. Okay. What did he say to you?

A. Just, you know, “Take it easy and do what you can do.”

Hearing Transcript, p. 31.

7. Mr. Daugherty testified in his deposition that he was unaware of Claimant’s neck injury until April of 2007. However, he could not remember if Claimant told him about the hose falling on his head:

Q. (By Mr. Owen): Is it your testimony that Jeff never told you about getting hit on the head with this hose fitting?

A. I don’t recall it; no. Until later on.

* * *

Q. If Jeff comes to court and says that “I told Mr. Daugherty in the shop the day after this happened in a passing conversation,” are you here to tell me that it didn’t happen? Or are you telling me that you just don’t remember?

A. I’m telling you a year and a half ago I don’t remember.

Q. You are not telling us he is a liar? You just can’t remember?

A. Correct.

Terry Daugherty Deposition, pp. 13-14.

8. Further supportive of Claimant’s testimony regarding notice is Mr. Daugherty’s testimony that Claimant is a good employee who is trusted with expensive machinery, which

speaks to his credibility. Finally, when Claimant provided the information to Employer's secretary in order to fill out the "IC Form 1" in April of 2007, Claimant informed her that he informed Mr. Daugherty of the same on January 4, 2007.

9. Based on Mr. Daugherty's candid testimony that he simply does not now remember Claimant telling him of his accident, and Claimant's affirmative testimony that he, in fact, told Mr. Daugherty of his accident, the Referee finds that, more likely than not, he did so inform Mr. Daugherty as he testified. Thus, the Referee finds that Claimant gave timely notice of his accident. Whether the same can be said regarding any alleged injury is left for another day.

CONCLUSIONS OF LAW

1. Claimant has met his burden of proof that he suffered an accident on January 3, 2007.
2. Claimant has met his burden of proof that he timely reported his accident.
3. All other issues are reserved.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this ___25th___ day of November, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

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ORDER

Filed December 5, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended 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 met his burden of proof that he suffered an accident on January 3, 2007.
2. Claimant has met his burden of proof that he timely reported his accident.
3. All other issues are reserved.

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

DATED this ___5th___ day of _____December_____, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R.D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___5th___ day of _____December_____, 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

RICHARD S OWEN
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MONTE R WHITTIER
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BOISE ID 83707-6358

ge _____/s/_____