

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALDEN ADAM'E,)
)
 Claimant,)
)
 v.)
)
 LACY MECHANICAL, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2008-017618

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

Filed April 2, 2009

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 January 9, 2009. Claimant was present and represented by Darin G. Monroe of Boise. E. Scott Harmon, also of Boise, represented Defendant Employer and its Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on March 11, 2009.

ISSUES

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

1. Whether Claimant suffered an accident on or about February 21, 2008;
2. If so, whether Claimant gave timely notice thereof to Employer;
3. If not, were Defendants prejudiced thereby.

CONTENTIONS OF THE PARTIES

Claimant is a journeyman plumber. He contends that he slipped on an icy surface going down a hill and fell. His accident was witnessed by at least three other workers at the job site. Claimant immediately called his supervisor and informed him of his accident. Even if the Commission finds a lack of timely notice, Defendants are not prejudiced because they had the opportunity to investigate the claim by interviewing witnesses, reviewing medical records generated within the 60-day notice period, and arranging for two IMEs. Defendants chose to forego managing Claimant's medical care, choosing instead to deny his claim on notice grounds and have not been prejudiced.

Defendants contend that there are too many inconsistencies in Claimant's version of his alleged fall, and the timing thereof, to support a finding that he, in fact, fell. If it is found that Claimant did suffer a slip and fall, he did not report the same within 60 days. Claimant's supervisor does not remember Claimant's phone call reporting the fall and he had no knowledge thereof until well after 60 days had passed. In the event the Commission finds that Claimant did not timely report the accident, they have been prejudiced because most of the subcontractors and their employees at the job site are now long gone and unavailable for interviews. Further, Defendants were denied the opportunity to manage Claimant's medical care.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, witnesses to the fall Terry Leverenz and Richard Allen, the general contractor's assistant superintendent Jade Johnson, and Employer's project manager Richard Church.
2. Claimant's Exhibits 1-7 admitted at the hearing.
3. Defendants' Exhibits A-P 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

1. Claimant was 42 years of age and resided in Caldwell at the time of the hearing. He is a journeyman plumber. Employer is a plumbing contractor that acted as a subcontractor on the Boise Water Shed project.¹

2. On or about February 21, 2008, Claimant was walking from the building site down a “fairly steep” gravel road to a supply container when, “. . . I slipped, both feet went straight up, and my hard hat - - the hard hat snapped forward and did some damage.” Hearing Transcript, p. 25. After Claimant fell, he “. . . jumped back up, my hands on my knees, and I was bending down, because I was sick to my stomach and I was getting sick and I walked - - from that point it’s vague. From that point on it’s vague, my memory. I jumped back up, because these guys were watching me, I was embarrassed that I fell like that.” *Id.*, pp. 26-27.

3. Claimant testified that he experienced immediate symptoms including cramping in his neck and legs, and seeing and tasting “lightning.”

4. After his fall, Claimant returned to the building within which he was working and called his supervisor, Robert Church (Church). “He asked me if I was okay, did I need to see a doctor. I told him I felt okay. I’m just going to shake it off. I think it’s going to be okay. He said to keep him posted.” *Id.*, p. 30. Church remembers no such call.

DISCUSSION AND FURTHER FINDINGS

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

¹ The Boise Water Shed is described as a “green” building utilized in reclaiming water at Boise’s sewer treatment plant near Joplin Road in West Boise.

located as to time when and place where it occurred, causing an injury.² Idaho Code § 72-102(18)(b).

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, 793 P.2d 187 (1990). However, the Commission need not construe facts liberally in favor of the injured worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

5. Claimant's testimony regarding his alleged slip and fall is uncontested and, despite some minor inconsistencies, is credible. Further, two witnesses testified at the hearing that they observed Claimant fall and get back up.³ While Claimant and his witnesses were not sure of the exact date of the fall, it likely occurred on February 19, 2008, rather than the 21st as there is a phone record for the 19th that indicates Claimant called Church at 12:03 p.m., which is close to the time Claimant testified that he placed the call. In any event, the Referee finds that Claimant has reasonably located the time and place when and where he slipped and fell and, thus, has proven he suffered an accident.

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 . . .**" (Emphasis added).

The Idaho Supreme Court has held that the notice must be sufficient to apprise the employer of

² By agreement of the parties, Claimant need not prove at this juncture whether his alleged accident caused any injury or injuries.

³ Claimant testified that he felt sick to his stomach and may have vomited shortly after his fall. The two eyewitnesses who testified did not see Claimant vomit. Claimant has been diagnosed with a closed head injury and post-concussive syndrome as a result of the fall, which may explain Claimant's testimony that his memory is "vague" regarding some of the events of his fall and the course of events that followed.

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). Idaho Code § 72-704 provides in pertinent part: “Want of notice or delay in giving notice shall not be a bar to proceeding under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of knowledge.” The claimant bears the burden of proving that timely notice was given or that employer was not prejudiced by the lack of timely notice. *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 535, 960 P.2d 1254 (1998).

6. There is no dispute that Claimant failed to give written notice of his accident within 60 days of the happening thereof pursuant to Idaho Code § 72-702.

7. As previously indicated, Church testified that he had no memory of Claimant’s phone call regarding Claimant’s accident. Claimant’s testimony as to the exact time he made the call is not crystal clear. However, exactitude is not the standard. What Claimant told Church about an injury is also not crystal clear. At hearing Claimant testified he told Church that he felt okay and was merely going to “shake it off.” In his recorded statement to a representative of Surety (Defendants’ Exhibit B), Claimant indicated that he told Church he had a bad headache and was going to “get myself okay.”

8. The Referee finds that Claimant gave sufficient notice to apprise Church that he had had an accident causing an injury. The fact that Church does not remember the conversation does not mean it did not take place. Church testified that he would have several conversations with Claimant each day.⁴ It can be reasonably inferred that because Claimant did not know the extent of his alleged injuries at the time and merely indicated that he had a headache or was “okay” and needed some time to work it out, Church would have no real reason to remember the

⁴ In his recorded statement to a representative of Surety (Defendants’ Exhibit C), Church indicated that he had nine or ten telephone conversations daily with Claimant during the relevant time period.

conversation, as nothing Claimant said would have triggered a need to investigate or file a first report of injury.

Prejudice

9. Even though the Referee finds that Employer had actual knowledge of Claimant's accident, it would not have been prejudiced had a finding been made that there was no such knowledge. While it is true that employees of subcontractors come and go on a regular basis, it is unlikely that Defendants could have located anybody to refute Claimant's accident had an investigation been launched immediately thereafter. Further, Claimant's medical treatment post-accident would have been the same, as Defendants would have likely denied the claim based on pre-existing symptomatology identified in the medical records, and no treatment would have been authorized in any event.

CONCLUSIONS OF LAW

1. Claimant has proven he suffered an accident on or about February 21, 2008.
2. Defendants had actual knowledge of Claimant's accident.
3. The issue of prejudice is moot.

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 ___27th___ day of March, 2009.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

RECOMMENDATION - 6

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ORDER

Filed April 2, 2009

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 proven he suffered an accident on or about February 21, 2008.
2. Defendants had actual knowledge of Claimant's accident.
3. The issue of prejudice is moot.

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

DATED this 2nd day of April, 2009.

INDUSTRIAL COMMISSION

/s/
R.D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April 2009, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

DARIN G MONROE
PO BOX 50313
BOISE ID 83705

SCOTT HARMON
PO BOX 6358
BOISE ID 83707

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ORDER - 2

Gina Espinosa