

ISSUES

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

1. Whether Claimant suffered an industrial accident and injury on November 18, 2003, while acting within the course and scope of his employment;
2. Whether Claimant suffered an industrial injury on September 23, 2003, while acting within the course and scope of his employment;
3. Whether Claimant's claim for benefits regarding the November 18, 2003 incident is barred by the provisions of Idaho Code § 72-701;
4. Whether Claimant's claim for benefits regarding the September 23, 2003 incident is barred by the provisions of Idaho Code §§ 72-701 and 72-706;
5. Whether apportionment for a pre-existing condition is appropriate, pursuant to Idaho Code § 72-406;
6. Whether Claimant is entitled to medical benefits, temporary total disability benefits (TTD), and temporary partial disability benefits (TPD); and
7. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant had an accident on September 23, 2003, while acting within the course and scope of his employment. Claimant contends that he injured his lower back while lifting an ink bucket and ink pump. The injury resulted in a herniated disk at L4-5, for which Claimant has received four surgeries. Claimant is entitled to medical care and TTD/TPD benefits. He is also entitled to attorney fees, because Defendants unreasonably denied his claim.

Defendants deny that the industrial accident caused Claimant's condition and need for surgical intervention. Defendants also contend that Claimant's claim for benefits is barred by the

provisions of Idaho Code §§ 72-701 and 72-706, because his workers' compensation complaint was filed more than one year after the accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits A through R;
2. Defendants' Exhibits 1 through 14;
3. The testimony of Claimant, Camille Fowler, and Larry Smith at the January 23, 2007 hearing;
4. The post-hearing depositions of John Holland, D.C., Joseph Ippolito, M.D., David Verst, M.D., and Clinton Dillé, M.D.;
5. Joint Exhibits AA and BB;
6. Claimant's testimony at the August 6, 2008 hearing; and
7. The Industrial Commission legal file pertaining to this claim.

All objections posed during the depositions are overruled.

After having considered the above evidence and the briefs of the parties, the Commission adopts the following findings of fact and conclusions of law.

FINDINGS OF FACT

Accident and Medical Treatment

1. Claimant was born on May 5, 1960, and was 48 years old at the time of the second hearing. He is a high school graduate and has taken some college courses. He began working for Employer in 1985. At the time of his accident, he worked as the operator of a flexographic printing machine.
2. On September 23, 2003, Claimant had to change the ink in his machine to work

on a new print order. He lifted an ink bucket with an ink pump on top; together, these items weighed approximately 70 to 80 pounds. As he was lifting, Claimant felt a sharp pain in his lower back.

3. Claimant reported his accident to his supervisor, Larry Smith. Mr. Smith wrote an incident report. He summarized the accident as “While lifting ink pump from ink bucket platform, [Claimant] felt pain in right side of lower back.” The incident report noted the time and date of the accident as September 23, 2003 at 10:55 a.m. Claimant also reported on his September 23, 2003 timecard that he had sustained an injury.

4. Claimant finished his shift for the day and did not go to the doctor. Because Claimant did not miss any work and did not go to the doctor, Mr. Smith kept the incident report in his own file, rather than turning the report over to the human resources clerk who handled workers’ compensation forms for Employer.

5. Over the next several days, Claimant’s back felt sore. On September 25, two days after the accident, he presented to John Holland, D.C., his chiropractor. Claimant complained of achiness and soreness in the lower right lumbar-sacrum region and right gluteal region. Dr. Holland had previously treated Claimant for neck and shoulder pain and a few isolated episodes of back pain. Prior to September 2003, Dr. Holland had most recently treated Claimant for lower back pain on March 6, 2003.

6. Larry Smith accommodated Claimant’s sore back at work by having other employees do heavy lifting for Claimant. Between September 25 and November 20, 2003, Claimant did not visit Dr. Holland. During this time period, Claimant missed a significant amount of work, including thirteen days taken off under the Family and Medical Leave Act (FMLA). Claimant has gout, which qualifies as a serious health condition under FMLA.

7. Claimant testified that during this time period, his leg and feet were hurting, and he believed he was having a gout flare-up. On November 20, he presented to Joseph Ippolito, M.D., his primary care physician. Claimant's chief complaint was foot and ankle pain. Claimant returned to Dr. Ippolito on December 2, again complaining of foot and ankle pain, particularly right forefoot pain. Claimant reported feeling a tingling in his right foot.

Dr. Ippolito attributed the ankle pain to Claimant's gout as well as to degenerative joint disease, but he was concerned about the foot pain. He believed Claimant was displaying symptoms of peripheral neuropathy and referred Claimant to a podiatrist for a diagnosis.

8. On November 20, Claimant also presented to Dr. Holland, complaining of back pain. Dr. Holland wrote the following progress note:

Patient presents [with] LBP [low back pain] which began when he picked up a bucket of ink [and] a pump in it while at work...he felt a sharp pain in L/S region. Reported it to his supervisor that he had injured his LB [lower back].

9. Dr. Holland treated Claimant for back pain on several days in December. Dr. Holland became concerned that Claimant's condition was not improving and referred Claimant to Dr. Clinton Dillé for additional treatment.

10. On December 24, 2003, Claimant met with Clinton Dillé, M.D. Claimant reported pain in his right lower back with radicular pain in his right buttock, calf and foot, with numbness in the foot. Claimant told Dr. Dillé that his pain had been progressing and worsening since October. Dr. Dillé ordered diagnostic studies, which revealed that Claimant had a herniated disk at L4-5. Claimant agreed to undergo lumbar epidural steroid injections. He also continued to treat with Dr. Holland.

11. Claimant received three injections over the course of several weeks in December 2003 and January 2004. He reported some improvement after the first and second injections, but

none after the third. On February 18, 2004, Dr. Dillé noted that, though Claimant had undergone “extensive” conservative treatment, including injections and physical therapy, he continued to experience pain in his back and right leg. Dr. Dillé believed surgical intervention might be warranted and referred Claimant to David Verst, M.D., who specializes in spinal surgery.

12. Claimant presented to Dr. Verst on March 1, 2004. Claimant reported that he had low back pain with radiculopathy, which began on November 18, 2003. Dr. Verst diagnosed Claimant with degenerative disk disease, facet syndrome, herniated nucleus pulposis at the L4-5 level, and foraminal stenosis at L5-S1. Dr. Verst recommended surgery, specifically an L4-5 discectomy and L5-S1 nerve root decompression.

13. Claimant agreed to the surgery, which Dr. Verst performed on March 23, 2004. Claimant’s condition did not improve, and Dr. Verst redid the surgery. Following the second surgery, Claimant’s condition initially improved, but he began to struggle with pain again. In August 2004, Dr. Verst performed an L4-S1 360 fusion. Again, Claimant improved initially, but by November 2004, he reported that his pain was as bad as it had been before the fusion. In October 2007, Dr. Verst performed another L4-S1 fusion, finding a nonunion of the prior fusion.

14. The parties stipulate that Claimant has permanent partial disability, inclusive of impairment, of 21.5%.

Workers’ Compensation Claim

15. In late December 2003, Claimant contacted Employer and requested a copy of the accident report. He was told there was no accident report. He spoke to both Camille Fowler, a human resources clerk, and Cindy Gibson, Employer’s office manager. Claimant testified that either Ms. Fowler or Ms. Gibson told him that he had begun to take a significant amount of time off around November 18. Ms. Fowler testified that she remembers having conversations with

Claimant in late 2003 and early 2004. She recalls that Claimant requested FMLA papers, because he had a new illness or injury. She thinks he said that his new injury had something to do with his back.

16. Claimant's last day of work for Employer was on December 22, 2003. He was terminated in December 2004, because he had not worked in the last year.

17. In the summer of 2004, Claimant notified Employer that he was seeking workers' compensation benefits for his back injury. Employer prepared a First Report of Injury and filed it with the Commission on July 27, 2004. The report states that the date of the accident was November 18, 2003 and describes the accident as "[Claimant] was lifting ink bucket and ink pump and felt a pop in his upper back, resulting in a strain." Surety investigated the incident and denied the claim on the grounds that Claimant did not report an accident on November 18. Claimant was not at work on November 18.

18. On October 20, 2004, Claimant filed a complaint with the Commission. The complaint cites November 18, 2003 as the date of the accident and describes the accident and injury as "Claimant was lifting an ink bucket with pump and felt immediate pain in his back." The complaint says oral notice was given to Employer on November 18, 2003, when Claimant informed his supervisor, Larry Smith, of the accident.

19. During initial discovery in this case, Defendants denied that there was an accident report. However, in November 2006, Defendants turned over the September 23, 2003 incident report drafted by Larry Smith. At the first hearing, on January 23, 2007, Claimant informed Defendants and Referee Breen that he was amending the date of the accident to September 23, 2003. Referee Breen gave Claimant leave to amend the complaint, and Defendants did not object. Claimant filed an amended complaint on May 29, 2007.

20. Also at the January hearing, Claimant's attorney said he wanted to leave the November 18 date and issues open, and Defendants' attorney replied that they ought to proceed as if there were two separate complaints. Referee Breen said she would treat the two dates of injury as if they were two different cases that had been consolidated.

DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW

Withdrawn Issues

21. Claimant has denied that an industrial accident occurred on November 18, 2003. For that reason, the first and third issues are deemed withdrawn.

Credibility

22. Defendants contend that Claimant is not a credible witness, because Claimant has been inconsistent about when his accident occurred, and because he did not tell most of his medical providers about the accident. While testifying, Claimant was prone to exaggeration, and he was not always an accurate historian. That does not impede his overall credibility. From the day of the accident, when he told Mr. Smith what happened, Claimant has been consistent in describing how his accident occurred. Dr. Holland's notes are consistent with Claimant's description. Two days after the accident, Claimant visited Dr. Holland, complaining of an aching back. On November 20, Claimant returned to Dr. Holland and said his back pain began when he was lifting an ink pump and ink bucket at work. Claimant told Dr. Dillé that his back pain had been progressing and worsening since October — close enough in time to the accident to allow for some natural flaws in memory. And Claimant did not tell Dr. Verst that his back pain began on November 18, 2003 until after Claimant had contacted Employer to find out the date of the accident.

23. Had Claimant set out to invent an accident, as Defendants allege, it is doubtful he

would have chosen a day he was not at work as the date of the accident. His testimony that he was told the November 18, 2003 date by someone in Employer's office is credible under the circumstances of the case. Camille Fowler's recollection that she spoke with Claimant about his back in late 2003 is consistent with Claimant's testimony that he contacted Employer around that time to find out when his accident occurred.

24. The Commission finds that Claimant is a credible witness.

Statute of Limitations

25. A case under the workers' compensation law shall not be maintained unless a claim for compensation was made within one year after the date of the accident. Idaho Code § 72-701. A claim for compensation is not a complaint filed with the Commission; it is the claim for workers' compensation benefits made by the claimant to the employer. *Tonahill v. LeGrand Johnson Construction Co.*, 131 Idaho 737, 740, 963 P.2d 1174, 1177 (1998). When a claim for compensation has been made and no compensation has been paid, a claimant shall have one year from the date of making claim to file an application for hearing with the Commission. Idaho Code § 72-706(1). A complaint is an application for hearing. J.R.P. 3(a)(1).

A notice given under the provisions of Idaho Code § 72-701 shall not be held invalid or insufficient by reason of any inaccuracy in stating the time of injury, unless it is shown by the employer that he was in fact prejudiced thereby. Idaho Code § 72-704. A claimant is not required to establish a specific time of injury. *Hazen v. Gen. Store*, 111 Idaho 972, 974, 729 P.2d 1035, 1037 (1986). Rather, an accident need only be reasonably located as to the time when it occurred. *Id.*

26. Defendants argue that Claimant's claim for benefits is barred under Idaho Code §§ 72-701 and 72-706(1), because Claimant filed his complaint alleging a September 23, 2003

accident in 2007, more than one year following the date of the accident. Even if the Commission accepts that the complaint filed in October 2004 (alleging a November 18 accident) actually pertains to a September 23 accident, the complaint was still filed more than one year after the accident.

27. It is important to clarify the difference between the limitations provisions of Idaho Code §§ 72-701 and 72-706. Section 72-701 specifies that a claimant has one year from the date of the accident to make his claim for benefits with an employer. Section 72-706(1) specifies that a claimant has one year from the date of making claim to file an application for hearing — i.e., a complaint — with the Commission.

In this case, Claimant made his claim to Employer in July 2004, well within one year after the accident, and thus within the provisions of Idaho Code § 72-701. Consequently, Claimant had until July 2005 to file a complaint, which he did in October 2004.

28. Defendants argue that the October 2004 complaint does not pertain to the September 23 accident. According to Defendants, a separate complaint alleging a September 23 accident was filed post-hearing in 2007. Defendants overlook the fact that the 2007 “complaint” was titled “Amended Complaint,” to which Defendants filed an “Amended Response.” Referee Breen gave Claimant leave to amend the complaint at the January 23, 2007 hearing. It is important to recognize that this dispute involves a claim for one and only one accident, i.e., the accident which occurred while Claimant was lifting an ink bucket and pump. Confusion has arisen only when it comes to identifying the date on which the undisputed accident occurred. The amended complaint was intended only to correctly identify the date of injury, following discovery of the supervisor’s incident report. It was not intended to allege another accident and injury.

29. The law does not require a claimant to be accurate in stating the time of injury; it requires him to reasonably locate the time. Throughout this case, Claimant has alleged that he injured his back while lifting an ink bucket and ink pump at work in the fall of 2003. Throughout this case, Claimant has alleged that he provided oral notice of his accident to his supervisor, Larry Smith. When Claimant contacted Employer to find out the specific date of his accident, he was told there was no incident report. It is not Claimant's fault that Employer failed to keep its records in order. To bar Claimant's claim because his memory is not exact would violate the mandate that the law be liberally construed in a claimant's favor. *See Jensen v. City of Pocatello*, 135 Idaho 406, 413, 18 P.3d 211, 218 (2000).

30. The Commission finds that the complaint filed in 2007 was not a new complaint, but an amendment to the complaint filed in 2004. Claimant's complaint was timely filed within a year of making his claim, and thus is not barred by the limitations provisions of Idaho Code §§ 72-701 and 72-706.

Injury and Causation

31. An "injury" is a personal injury caused by an accident that results in "violence to the physical structure of the body." Idaho Code § 72-102(18). 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, 751, 918 P.2d 1192, 1196 (1996). To prevail on a workers' compensation claim, a 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.*

32. Defendants contend that Claimant has not met his burden of proof on this issue.

Defendants have not denied that a herniated disk requiring surgical intervention is an injury. Rather, they argue that Claimant has not been able to show, on a more probable than not basis, that his back condition was caused by the industrial accident.

33. Four doctors were deposed in this case: Dr. Holland, Dr. Ippolito, Dr. Dillé, and Dr. Verst. None of the doctors deposed denied that Claimant's accident could have caused his injury.

34. Dr. Holland believes that Claimant's condition was caused by the accident. Prior to September 23, 2003, Dr. Holland treated Claimant for only a "couple of small episodes" of back pain, and those episodes of pain resolved after treatment. But Claimant's condition changed so substantially in late 2003 that Dr. Holland referred Claimant to Dr. Dillé for more intensive treatment.

35. Dr. Ippolito has no causation opinion; he defers to Dr. Verst.

36. Dr. Dillé testified that he is unable to state, on a more probable than not basis, what caused Claimant's condition.

37. Dr. Verst's opinion is problematic. He initially indicated, in a letter drafted by Surety but signed by him, that Claimant's condition was due to severe degenerative disk disease. He changed that opinion when he found out about Claimant's industrial accident. Dr. Verst believes that Claimant's accident is of a kind that would cause his condition. Dr. Verst testified that he cannot state with certainty what caused Claimant's condition, and he acknowledged that Claimant displayed symptoms of a herniated disk when he was treated by Dr. Holland in March 2003, six months prior to the accident. However, Dr. Verst also stated that Claimant was not a candidate for surgery in March 2003, and that the industrial accident was a substantial contributing factor in creating the need for surgery.

38. Dr. Holland's opinion is significant; he is the only medical provider in this case who treated Claimant's back both pre- and post-accident, and he observed a substantial change in Claimant's back condition in late 2003.

39. It is also significant that no medical provider offered an alternate opinion. Dr. Ippolito and Dr. Dillé chose not to opine, but neither contradicted Dr. Holland.

40. On its own, Dr. Verst's opinion might not be sufficient to establish causation. Taken in concert with Dr. Holland's opinion, however, it does work to establish, on a more probable than not basis, that Claimant's condition was caused by his accident.

41. In this case, there is more evidence that Claimant's injury was caused by his accident than there is evidence against. The Commission finds that Claimant's back condition was caused by the industrial accident.

Apportionment

42. If the degree or duration of permanent disability resulting from an industrial injury is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury. Idaho Code § 72-406(1). There is no evidence in the record that Claimant had a pre-existing condition that increased the degree or duration of his disability. The Commission thus finds that apportionment is not appropriate.¹

¹ Idaho case law is conflicting on whether Claimant or Defendants bear the burden of proof on the issue of apportionment. Past case law has established that Defendants bear the burden of proving that apportionment is appropriate. *See e.g. Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40 P.3d 91 (2002). Recently, however, the Supreme Court appears to have excused Defendants from this burden. In *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008), the Court stated in a footnote, "There is no support for the proposition that apportionment is an affirmative defense." The footnote was dicta, and the Court did not clarify whether it was overturning the holding in *Eacret*. The Commission does not reach the question of who bears the burden of proof on apportionment in this case, as the evidence establishes that Claimant's disability was the result of the industrial accident, not a pre-existing condition.

Medical Care

43. An employer shall provide for reasonable medical care for an injured employee immediately after an injury and for a reasonable time thereafter. Idaho Code § 72-432. Defendants have not challenged the reasonableness of the treatment Claimant received. Because Claimant's condition was caused by the accident, the Commission finds that he is entitled to medical care benefits covering the treatment received from Dr. Holland, Dr. Dillé, and Dr. Verst.

TTD/TPD

44. Income benefits for total and partial disability shall be paid to disabled employees during the period of recovery. Idaho Code § 72-408. The burden is on the 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, 763, 605 P.2d 939, 942 (1980). Once a claimant establishes by medical evidence that he is within the period of recovery, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light-duty work and that: (1) his former employer has made a reasonable and legitimate offer of employment which he is capable of performing under the terms of his release and which employment is likely to continue throughout his period of recovery, or (2) there is employment available in the general labor market which Claimant has a reasonable opportunity of securing, which employment is consistent with the terms of his light-duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1219 (1986).

45. Claimant's testimony and supporting medical records establish that he was taken off work on December 23, 2003. He continued to be off work throughout 2004, while he received treatment and recovered from his multiple surgeries. Claimant remained off work in

2005, while he undertook a comprehensive program of pain management and conditioning in an effort to avoid a fourth surgery. Dr. Dillé's notes of February 16, 2006 indicate that Claimant was still in severe pain and unable to work at that time.

Claimant began to work as a technical support specialist for Dell on November 25, 2006. He was taken off work on October 5, 2007 for the redo fusion, which was performed on October 31, 2007. Claimant was released to work full-time on February 25, 2008.

46. Claimant is entitled to receive TTD benefits for the period from December 23, 2003 to November 24, 2006. He is entitled to receive TPD benefits for the period from November 25, 2006 to October 4, 2007. He is entitled to receive TTD benefits for the period from October 5, 2007 to February 24, 2008.

47. The record is unclear on the issue of when Claimant reached a state of maximum medical improvement, but the parties stipulated on August 6, 2008 that Claimant had permanent partial disability, inclusive of impairment, of 21.5%. A determination of permanent impairment cannot be made before a claimant reaches maximum medical improvement. Idaho Code § 72-422. Because the parties have stipulated to permanent impairment and disability, the Commission finds that Claimant achieved maximum medical improvement on the date of the stipulation.

48. Claimant argues that he has an ongoing entitlement to TPD benefits, because he is paid less at Dell than he was in his time-of-injury position. A claimant may receive temporary income benefits only during the period of recovery. Claimant is entitled to TPD benefits from February 25, 2008 through August 5, 2008, but not after.

Attorney Fees

49. If an employer or surety contests a claim for compensation without reasonable

grounds, the claimant is entitled to attorney fees. Idaho Code § 72-804. Claimant argues he is entitled to attorney fees because Defendants acted unreasonably by denying his claim.

50. Defendants were not without reasonable grounds when they contested this claim. Claimant initially alleged a date of accident when he had not been at work. Even when the correct date of accident came to light, Defendants still were not unreasonable in contesting the claim, as the causation evidence, particularly Dr. Verst's opinion, was not without ambiguities. Claimant is not entitled to attorney fees.

ORDER

Based upon the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant sustained an injury on September 23, 2003, while acting within the course and scope of his employment.
2. Claimant's claim for benefits is not barred by the provisions of Idaho Code §§ 72-701 and 706.
3. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.
4. Claimant is entitled to medical care benefits for the treatment he received from Dr. Holland, Dr. Dillé, and Dr. Verst.
5. Claimant is entitled to TTD benefits for the periods from December 23, 2003 to November 24, 2006 and October 5, 2007 to February 24, 2008. Claimant is entitled to TPD benefits for the periods from November 25, 2006 to October 4, 2007 and February 25, 2008 to August 5, 2008.
6. Claimant is not entitled to attorney fees.
7. The issues pertaining to a November 18, 2003 accident are deemed withdrawn.

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

DATED this ___19th_ day of June, 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 _19th day of June, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

PATRICK D BROWN
HUTCHINSON & BROWN LLP
PO BOX 207
TWIN FALLS ID 83303-0207

ERIC BAILEY
BOWEN & BAILEY LLP
PO BOX 1007
BOISE ID 83701

eb/cjh

/s/