

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

DAVID KNIGHT, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 WOODGRAIN MILLWORK, INC., )  
 )  
 Employer, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**IC 2008-005773**

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

Filed August 11, 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 March 19, 2009. Claimant was present and represented himself. Max M. Sheils, Jr., of Boise represented the self-insured Employer. Oral and documentary evidence was presented. No post-hearing depositions were taken but the parties submitted post-hearing briefs. This matter came under advisement on June 8, 2009, and is now ready for decision.

**ISSUES**

The issues to be decided as the result of the hearing are:

1. Whether Claimant gave timely notice of his alleged accident pursuant to Idaho Code § 72-701.
2. If not, whether Employer was prejudiced by the untimely notice.
3. Whether Claimant timely filed his claim for compensation pursuant to Idaho Code §72-701.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that he suffered a series of three pulmonary emboli. The first occurred on August 31, 2002, and the other two on September 1, 2002. Claimant relates the emboli to a work-related out-of-town trip the week of August 26. Claimant believes he told his supervisor of the work-related nature of the emboli when the supervisor visited with him at the hospital on September 1. Claimant further contends that Employer received notice in September 2002 because an unsigned and undated "Employee's Report of Accident for Bodily Injury/Illness" indicates that Claimant was off work for a period of time "... due to the industrial injury/illness on (dates)." Claimant also argues that because Employer had set up an Independent Medical Evaluation before denying the claim on notice grounds, they are somehow estopped from asserting that defense.

Employer contends that, while Claimant's supervisor did visit with Claimant at the hospital, Claimant at no time informed him that he was contending that his pulmonary emboli were in any way work-related. Further, the printed form Claimant relies on to establish notice was not even in existence at the time Claimant allegedly filled it out, implying that Claimant back-dated it. Moreover, Claimant has failed to prove that Employer was not prejudiced by the lack of timely notice. Finally, even if notice is found to be timely and/or Employer was not prejudiced, Claimant's claim must still fail because it was not filed within one year of his alleged accident.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant; Claimant's immediate supervisor David Lindsay; Employer's human resources manager Judy Wise; and claims manager/adjuster Steve Haase.

2. Claimant's Exhibits 1-5.
3. Employer's Exhibits 1-2.

### **FINDINGS OF FACT**

1. Claimant was 65 years of age and resided in Ontario, Oregon at the time of the hearing. He had worked for Employer as a Controller in its Fruitland facility since 1997. He has since retired due to the effects of Parkinson's Disease, a condition he acknowledges is not employment-related.

2. On August 26, 2002, Claimant flew to Portland, Oregon, then on to Medford to visit Employer's facility near there. He returned to Boise from Medford via Portland and drove from the Boise Airport to his home in Caldwell on August 31, 2002. Once he arrived at his residence, Claimant testified that he ". . . had just arrived home, parked my truck in the garage, got out and went around to one side of my truck, got a very feverish kind of sensation and a stiffness in my chest and had some difficulty breathing. I think I went to my knees, it was that powerful." Hearing Transcript, p. 11. Claimant then went into his house and lay down.

3. The following day, September 1, Claimant experienced two more pulmonary "episodes." The last one, ". . . took me to my knees and I couldn't get up." *Id.*, p. 12. Claimant then presented to West Valley Medical Center where he spent the next couple of weeks on blood-thinning therapy. He returned to work on or about September 17, 2002. He has not had any further pulmonary emboli.

### **DISCUSSION AND FURTHER FINDINGS**

Idaho Code § 72-701 provides:

**Notice of injury and claim for compensation for injury -- Limitations** – 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 sixty (60) days after the happening thereof, and unless a claim for compensation

with respect thereto shall have been made within one (1) year of the date of the accident . . .

Idaho Code § 72-704 provides that lack of notice shall not be a bar to proceedings if the employer had actual knowledge of an accident or that the employer has not been prejudiced by delay or want of notice.

Claimant bears the burden of proving lack of prejudice. *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 535, 960 P.2d 1254 (1998).

4. Claimant testified that he informed his general manager, David Lindsay, at the ICU at West Valley on September 1 of the work-relatedness of his pulmonary emboli:

Q. (By Mr. Powers): And who is David Lindsay?

A. David Lindsay was my GM at the time, my general manager, my direct report. I directly reported to him I should say. I worked for David.

Q. All right.

A. And he came and visited me in the hospital.

Q. Did you have a conversation with Mr. Lindsay?

A. Yes, but exactly what conversation was - - I was - - **I don't know if I was real rational then or not.**

Q. Is this when you were in ICU or just - -

A. Yes. I was in intensive care. I basically told him what happened **I think.**

Q. Did you tell him you thought your condition was related somehow to your work?

A. I told him I thought it had something to do with the trip.

Hearing Transcript, p. 16. Emphases added.

5. Mr. Lindsay, now retired, testified that in the hospital, Claimant told him that his pulmonary emboli were related to his military experience,<sup>1</sup> not to his work. Mr. Lindsay stressed the importance of timely reporting of injuries and his testimony in that regard was corroborated

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<sup>1</sup> Claimant suffered a previous pulmonary embolism while in the military in 1971 after a long train ride.

by the testimony of Employer's human resources manager, Judy Wise, as well as an independent adjuster who adjusted Employer's workers' compensation claims. Mr. Lindsay testified that had Claimant informed him that he believed his pulmonary emboli were work-related, he would have immediately informed Ms. Wise so that she could initiate the proper paperwork and investigation. Mr. Lindsay is positive that Claimant did not convey to him at anytime in 2002 that he was contending his pulmonary emboli were work-related.

6. Judy Wise testified that she was the "Queen Bee" when it came to all things workers' compensation at Employer's Fruitland facility. Company policy dictated that all accidents were to be reported within 24 hours of the happening thereof. Further, Mr. Lindsay was a "real stickler" on reporting work accidents. Ms. Wise credibly testified that it was not until Claimant sent her an e-mail on January 25, 2008, that she first learned he was claiming his pulmonary emboli as being work-related.

7. Steve Haase, at times relevant hereto, owned a claims adjusting company that adjusted Employer's workers' compensation claims. He testified that he first became aware of Claimant's claim when he received the first report of injury on February 14, 2008. Mr. Haase originally denied the claim based on Claimant's 1971 pulmonary embolism. After receiving Claimant's Complaint and conversing with counsel for Employer, it was decided that the reason for the denial should be changed to address the notice issue. Mr. Haase also testified that Employer had an excellent light-duty return-to-work program and was very safety conscious; they would never fail to follow-up on a reported work injury.

8. The Referee finds that Claimant did not report his pulmonary emboli as work-related until January 25, 2008, well beyond the requirements of Idaho Code § 72- 701. Claimant admitted that he was somewhat "out of it" when he talked to Mr. Lindsay at the hospital on

September 1, 2002. Mr. Lindsay credibly testified that he was positive and/or confident that Claimant did not tell him he had an industrial accident causing his pulmonary emboli. It simply does not make sense that Claimant would pay for his treatment with his private health insurance and let almost six years go by without making inquiry as to the status of his workers' compensation claim.

9. Claimant's argument that a form he filled out, but failed to date or sign, gave notice to Employer is not persuasive. The line in question reads: Worker was absent due to the industrial injury/accident on (dates) SEP 2 to 16 2002. The form provides no other option but to fill in the dates in the space provided regarding return to work. In other words, if a worker was off due to an accident clearly not work-related, he or she would still be required to fill in the dates after the printed language regarding an industrial accident. Also, there is no evidence that Employer ever received the form. Troubling is the testimony of Mr. Lindsay that the form in question was not even in existence in 2002. Claimant's argument that the form somehow gave Employment notice that his injury was work-related lacks merit.

10. Also without merit is Claimant's argument that because Employer had arranged for an Independent Medical Examination, Employer is precluded from arguing the notice issue. This Referee is unaware of any authority, and Claimant cites none, that prohibits an employer or its surety from asserting different reasons for denying a claim as their investigation proceeds. Here, rather than continue with the expense of a medical evaluation, it was decided to attack the obvious; lack of timely notice.

11. The Referee also finds that Claimant has failed to prove his lack of timely notice did not prejudice Employer. No evidence whatsoever was presented in that regard.

12. Finally, the Referee finds that even if timely notice was found, Claimant's claim nonetheless fails, as he did not file a claim within a year of his alleged accident.

### **CONCLUSIONS OF LAW**

1. Claimant has failed to prove that he gave timely notice of his alleged accident to Employer within the meaning of Idaho Code § 72-701.

2. Claimant has failed to prove Employer was not prejudiced by the lack of timely notice.

3. Claimant failed to file a claim for compensation within one year from the date of his alleged accident.

4. Claimant's Complaint should be dismissed with prejudice.

### **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 \_\_\_5<sup>th</sup>\_\_\_ day of August, 2009.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the \_\_11<sup>th</sup>\_\_\_\_ day of August, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DAVID L KNIGHT  
1485 NW 7<sup>TH</sup> AVE  
ONTARIO OR 97914-1203

MAX M SHEILS JR  
PO BOX 388  
BOISE ID 83701-0388

*Gina Espinoza*

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**ORDER**

Filed August 11, 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 failed to prove that he gave timely notice of his alleged accident to Employer within the meaning of Idaho Code § 72-701.
2. Claimant has failed to prove Employer was not prejudiced by the lack of timely notice.
3. Claimant failed to file a claim for compensation within one year from the date of his alleged accident.
4. Claimant's Complaint is dismissed with prejudice.

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

DATED this \_\_\_11<sup>th</sup>\_\_\_ day of \_\_\_August\_\_\_, 2009.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
R.D. Maynard, Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

Com. Baskin recuses himself from participating  
Thomas P. Baskin, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_11<sup>th</sup>\_\_\_ day of \_\_\_August\_\_\_ 2009, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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**ORDER - 2**