

CONTENTIONS OF THE PARTIES

Claimant contends that he was injured as the result of falling from the log hauling truck to which he was assigned. There was a heavy snowfall over the weekend and Claimant climbed on the log protection rack behind the cab (referred to as a headache rack) to scrape an accumulation of snow off the cab before heading to his assigned loading destination in the early hours of Monday morning. Claimant explained that he slipped, struck the fuel tank and fell to the ground, landing on his right side. He sought treatment at the emergency room within a few hours of the injury and was diagnosed with acute right sciatica and a right knee contusion. Claimant seeks a determination that he sustained a compensable work-related injury.

Defendants contend that it is unlikely that the accident occurred as described by Claimant and assert that Claimant failed to meet his burden of proof. Defendants maintain that scraping the roof of the cab with a sharp shovel is contrary to custom; that Claimant described an inaccurate loading destination on the date of injury; that the timing of Claimant's emergency room evaluation is inconsistent with the chronology of events alleged by Claimant and that Claimant lacked objective signs of injury upon examination at the emergency room.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits C 1 through C 11 admitted at hearing;
2. Defendants' Exhibits 1 through 9 admitted at hearing;
3. Testimony taken at hearing from Claimant and Employer representative, Kevin Buell;
4. The post-hearing deposition of Bjorn Handeen, patient access manager at Kootenai Medical Center, taken on July 9, 2009 with one exhibit attached; and

5. 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 conclusion of law for review by the Commission.

FINDINGS OF FACT

Background

1. At the time of hearing, Claimant was 55 years old and resided in Athol, Idaho. He completed school through the 8th grade but dropped-out during the 9th grade to start working. Claimant subsequently obtained a GED. Claimant's primary work experience has been as a truck driver and mechanic. He served in the Marines in the early 1970s and received an honorable discharge.

Claimant's Past Medical History Regarding Lumbar and Radicular Complaints

2. In the mid-1980s, Claimant was working as a truck driver and fell off a parked semi-truck. He caught his right leg on the edge of the trailer and landed on his buttocks on concrete. He experienced back pain and radicular symptoms, including right sciatica. Claimant describes two back surgeries in his distant past. One of the surgeries was a laminectomy, discectomy and foraminotomy at L5-S1 performed in December 1988.

3. On April 29, 1997, Claimant was shoveling sawdust off his trailer when he fell backwards onto the headache rack and injured his neck and shoulder.

4. In November 2006, Claimant was treated for low-back pain in the emergency room. Claimant reported no recent trauma but reported increased pain with motion. He described it as a different pain than what he experienced in the past and noted pain radiating into his right buttock.

5. In July 2007, Claimant sought emergency room treatment for back pain and burning-type pain radiating into his legs after he jumped into shallow water and landed on his buttocks. Lumbar x-rays revealed degenerative changes without acute fracture.

Time of Injury Employment and Accident

6. Claimant was hired by Employer in May 2007 to drive a log truck. Log truck drivers generally reported to pick-up sites in the early morning hours and commenced loading at approximately 4:00am. Employer permitted its drivers to take their assigned trucks home so that the drivers could travel directly to the load site from home. Claimant regularly parked his assigned truck at his residence in Athol.

7. Claimant did not work or otherwise drive his assigned log truck during the weekend of January 26 and 27, 2008. He was scheduled to work on Monday, January 28, 2008 and was planning to depart from his house at approximately 2:00am that morning. There had been an unusually heavy snowfall over the weekend.

Claimant's Version of Facts Surrounding Injury

8. Claimant recalls that his weekend was uneventful and that he went to bed at approximately 6:00pm on Sunday, January 27, 2008. He was supposed to be at the loading site at 2:00am on Monday morning as he was scheduled to be the second truck in line.

9. At the time of his deposition in September 2008, Claimant recalled that he was scheduled to haul logs from the Coeur d'Alene River drainage that was up-river from Pritchard. However, Claimant was provided information from Employer the day prior to hearing that indicated he was actually scheduled to haul logs from the St. Joe area on the morning of January 28, 2008. He testified at hearing that he would have hauled logs from the St. Joe River area that involved a different route.

10. Claimant woke up at approximately 12:30am on January 28, 2008 and started clearing the snow off his assigned truck at approximately 1:00am. He estimated that between two and three feet of snow accumulated on the truck during the weekend. He used a metal shovel to rake the snow off the cab of the truck while standing on a rung of the headache rack. He slipped off the headache rack, struck the fuel tank and landed on the ground.

11. Claimant's step-daughter, Nicole, was living with him at the time of the injury and was awake when Claimant fell. Nicole was awake during the early morning hours because she was tending to her newborn baby. Nicole took Claimant to the emergency room approximately an hour after the injury.

12. Claimant is certain that his injury occurred in the early morning hours of Monday, January 28, 2008 and that he sought medical treatment at the emergency room within a few hours of being injured.

Claimant's Step-Daughter's Recollection

13. Surety obtained a recorded statement from Nicole as part of their investigation. Nicole did not provide testimony at hearing or via deposition.

14. Nicole recalls that the injury occurred between midnight and 2:00am during January 2008 but does not recall the specific date.

15. She was outside the house smoking a cigarette when Claimant fell off his truck. Her son was one month old and she was planning to go to bed. She observed Claimant standing on the fender and clearing the snow from the hood. The truck was running and Claimant was preparing to go to work which he usually did by 12:45am. Claimant slipped and fell.

16. Nicole went into the house to go to sleep and Claimant woke her up a couple of hours later to take him to the hospital because he was in pain. They arrived at Kootenai Medical Center (KMC) at approximately 3:45am. The roads were snow-packed.

What the Medical Records Reflect

17. Claimant was admitted to the KMC emergency room at 2:35am on Tuesday, January 29, 2008. He reported that he had been involved in an employment-related accident on January 28, 2008 at 11:30pm.

18. Claimant reported:

...right knee and right hip pain since falling last night on the snow at 2330. He apparently was cleaning off his truck when he fell and landed on his right side. He has increased pain while attempting to sleep.

Defendants' Exhibit 3, p.12.

19. Claimant was diagnosed with acute right sciatica and an acute right knee contusion. He was prescribed medication and given a knee immobilizer. X-rays were unremarkable. Claimant reported pain and tenderness on range-of-motion. No effusion or edema of the right knee was detected. Claimant's back was described as non-tender.

Date of Treatment Discrepancy

20. Claimant testified that he received treatment in the emergency room in the early morning hours of Monday, January 28, 2008. The medical records reflect that claimant was evaluated in the early morning hours of Tuesday, January 29, 2008.

21. Claimant does not know why the emergency room record date differs from his recollection of when treatment was sought and believes that the date on the medical records is incorrect.

22. Bjorn Handeen is the patient access manager for KMC. He provided deposition testimony to describe the manner in which medical and billing records are dated at the facility and reviewed Claimant's records. Mr. Handeen concluded that Claimant's records reflect that he was evaluated on January 29, 2008 and that the date is correctly stated in multiple entries on the records.

23. The date and time entries are computer generated on KMC records through Meditech servers with a company based in Spokane. If the system generated an incorrect date it would impact records at multiple facilities and would have been brought to the attention of KMC. The only way that human error could have occurred was if the computer system was down and the dates had to be manually entered by the service providers, but this did not occur at the time Claimant was evaluated.

Employer Testimony

24. Kevin Buell has worked for Employer in various capacities over the past 45 years, having entered the family business as a child. He was a log truck driver for 18 years and currently supervises the log truck drivers.

25. Mr. Buell has been involved in the operation of log trucks for 33 years and has never seen a driver get up on the headache rack to scrape snow off a truck cab with a shovel. The cab lights and air horn are positioned on the top of the cab and could be damaged by use of a sharp tool. The positioning of the piggy-back trailer and wings of the headache rack help break up snow and prevent a certain amount of accumulation on the roof of the cab. Snow comes off easily once the truck is in motion.

26. Claimant was assigned to pick up logs at a site on the Coeur d'Alene River during the week of January 21, 2008 and was assigned to a pick up logs at a site on the St. Joe River

during the week of January 28, 2008. Claimant did not show up for work on January 28, 2008 and has not worked for Employer since that time. Employer eventually went to Claimant's residence to pick up their logging truck.

DISCUSSION AND FURTHER FINDINGS

Accident and Injury

27. 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 worker's 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).

28. Claimant articulated a possible mechanism of injury that is corroborated by the KMC records and, if the injury occurred how Claimant described, would establish an injury caused by an accident arising out of and in the course of his employment. Defendants have presented evidence indicating that the injury may not have occurred how or when Claimant alleges.

29. Testimony from Mr. Buell that there would not have been a need to scrape snow from the cab of the truck and that it would be ill-advised for someone to use a sharp implement to clear snow is credible, but merely reflects his experience and opinions. Mr. Buell's testimony establishes that Claimant's manner of snow removal is not common in the industry and that Claimant was not instructed to undertake the task by Employer, but does not negate the

possibility that Claimant was injured in the manner he described. Although use of a sharp shovel to remove snow could result in damage to Employer's vehicle, it is conceivable that a shovel could be successfully used to brush off snow without apparent damage. Claimant's preference to remove two to three feet of accumulated snow from the cab of the truck before operating the vehicle is not unreasonable or unbelievable, even if it was not mandatory or standard practice in the industry.

30. The fact that Claimant initially provided incorrect information about where he was scheduled to load logs on the morning of January 28, 2008 establishes that Claimant is a poor historian and negatively impacts Claimant's credibility to some degree. However, it is undisputed that Claimant never departed from his house to the loading site on the morning of the claimed injury and Claimant's incorrect recollection of his scheduled route is not fatal to his claim.

31. A claimant's mistake in identifying his or her precise date of injury does not necessarily defeat their claim. This is particularly true when dealing with work shifts that span two calendar days or when an injury is claimed to have occurred near midnight. However, a claimant's mistake in identifying the correct date of injury becomes more relevant when the difference between alleged injury dates conflicts with other substantiating evidence.

32. Records from KMC along with the testimony of Mr. Handeen establish that Claimant was treated for his claimed injury in the early morning hours of Tuesday, January 29, 2008 and not on Monday, January 28, 2008.

33. In the present case, the date of injury is more than a mere technicality and impacts Claimant's credibility. If the injury occurred on Monday, January 28, 2008 as alleged by Claimant, then Claimant went to the emergency room roughly 24 hours following the injury.

While this scenario is possible, the evidence fails to establish it is more likely than not because such a conclusion conflicts with the testimony of Claimant and statement of Nicole which both reflect that Claimant sought treatment within a few hours of his fall. The emergency room records also reflect that the injury occurred a few hours prior to Claimant's arrival.

34. Another possibility is to conclude that Claimant's injury occurred in the late hours of Monday, January 28, 2008 or the early hours of Tuesday, January 29, 2008. However, if Claimant's injury occurred no earlier than 11:00pm on Monday, January 28, 2008, there is no explanation as to why Claimant failed to work on Monday morning. Further, Claimant's testimony that the snow build-up on the truck occurred over the weekend is consistent with a Monday morning injury but not a Monday night/Tuesday morning injury.

35. Claimant's only explanation for the inconsistency in the evidence was that the records from KMC were incorrect. Claimant's explanation is rejected based on the testimony of Mr. Handeen. Claimant has failed to provide evidence of a scenario establishing that he sustained a work-related injury on or about January 28, 2008 on a more likely than not basis.

CONCLUSION OF LAW

Claimant failed to meet his burden to prove he suffered an injury caused by an accident arising out of and in the course of employment on or about January 28, 2008.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 5 day of October , 2009.

INDUSTRIAL COMMISSION

 /s/
Susan Veltman, Referee

ATTEST:

 /s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of October , 2009 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

THOMAS B AMBERSON
P O BOX 1319
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P O BOX 7426
BOISE ID 83707

jkc

 /s/

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __14__ day of _October____, 2009, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

THOMAS B AMBERSON
P O BOX 1319
COEUR D'ALENE ID 83816-1319

ALAN HULL
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