

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DONALD DAVIS,)
)
 Claimant,)
)
 v.)
)
 45TH PARALLEL ELECTRIC, LLC,)
)
 Employer,)
)
 and)
)
 HARTFORD CASUALTY INSURANCE)
 COMPANY,)
)
 Surety,)
 Defendants.)
 _____)

**IC 2007-043709
2008-021629**

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

filed November 24, 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 July 21, 2009. Claimant was present and represented by Richard S. Owen of Nampa. R. Daniel Bowen of Boise represented Employer/Surety. Oral and documentary evidence was presented and the parties took three post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on October 5, 2009. The Referee submitted his recommendation, the Commissioners, having reviewed the same, have prepared modified findings and conclusions.

ISSUES

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

1. Whether Claimant gave timely notice of his accident pursuant to Idaho Code § 72-701;
2. If not, whether Claimant has proven Defendants were not prejudiced thereby; and
3. Whether Claimant is entitled to an award of permanent partial impairment (PPI) benefits.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered an industrial accident causing a cervical injury on March 6, 2008. He further contends that on two separate occasions he attempted to timely inform Employer but that Employer ignored him, as he did when he reported a December 2007 shoulder injury. Even if it is found that his notice was untimely, Defendants were not prejudiced. Finally, Claimant is entitled to PPI benefits of 25% of the whole person.

Defendants contend that Claimant failed to timely notify them of his accident. They deny that Claimant ever told Employer of his accident, and Employer did not find out until Claimant left a “resignation letter” in one of Employer’s vans after the statutory 60-day period. Defendants were prejudiced by the lack of timely notice in that they were precluded from conducting a prompt investigation of the events surrounding Claimant’s accident and the ability to have Claimant promptly examined to better determine the extent, if any, of Claimant’s alleged injuries resulting from the accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Erin Simms, Denise Janes, David Nelson, Jeff Ormsby, and Eli Meyers taken at the hearing.
2. Claimant’s Exhibits 1-13 admitted at the hearing.
3. Defendants’ Exhibits 1-15 admitted at the hearing.

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4. The post-hearing depositions of: Maria Kuhnhausen, taken by Defendants on July 23, 2009, Michael D. Anderson, taken by Claimant also on July 23, and that of Christian Gussner, M.D., taken by Claimant on July 29, 2009.

After having considered all the above evidence and briefs of the parties, the Commission issues that the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Background

1. Claimant was 41 years of age and resided in Nampa at the time of the hearing. At all times pertinent hereto, Claimant was a journeyman electrician.

2. Claimant began work as an electrician for Employer, David Nelson, in October 2007 for \$26.00 an hour. His duties included residential wiring. In December 2007, Claimant fell at a job site and injured his left shoulder. Claimant testified that Nelson showed up shortly after Claimant fell and when Claimant inquired about filling out the appropriate workers' compensation paperwork, Nelson responded, "I don't do forms." Surety eventually accepted the claim.

3. Claimant began treating with Roman Schwartsman, M.D., an orthopedic surgeon, for his shoulder injury. He missed approximately eight days of work and was thereafter placed on restricted duty. Claimant testified, and Nelson denied, that when Claimant asked Nelson to turn documentation regarding his time-loss in to his workers' compensation carrier, Nelson told Claimant that he did not believe he was entitled to time-loss and to turn the documentation in to his own private insurance company, which Claimant refused to do.

4. Claimant continued to treat conservatively with Dr. Schwartsman. He was experiencing difficulty at work with his left shoulder, even on light duty. Claimant testified that between his December injury and the subject accident on March 6, 2008, Nelson conducted a

safety meeting wherein he angrily indicated that if his current employees could not do their jobs, due to injuries or otherwise, they would be replaced.¹ Because Claimant was on light duty at the time and could not perform his regular duties, Claimant believed Nelson's message was aimed directly at him. Nelson placed the safety meeting in June, rather than before Claimant's March 6 accident.

5. On March 6, 2008, Claimant "somersaulted" over a four-foot ladder at a job site and landed on his right arm and head. After "collecting his thoughts" for a moment, Claimant got up and began experiencing numbness in his right arm and fingers, and pain at the base of his neck, near the shoulder line. As time went on, Claimant was unable to grip or hold his hammer in his right hand.

6. In December 2008, Dr. Schwartzman referred Claimant to Paul Montalbano, M.D., a neurosurgeon, for his cervical problem. On January 15, 2009, Dr. Montalbano performed a C5-6 discectomy and fusion. Electrodiagnostic studies performed on June 19, 2009, revealed a radiculopathy at C7. A pain specialist performed an epidural steroid injection on June 29, 2009. It is presently unknown whether additional cervical surgery is in Claimant's future.

DISCUSSION AND FURTHER FINDINGS

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

¹ Nelson had recently obtained a contract from Hubble Homes, a major residential builder in the Treasure Valley, to wire all of their homes. Nelson testified that Hubble Homes was his "lifeblood."

7. Claimant contends that he twice told Nelson of the ladder incident but that each time he did so, Nelson walked away without comment. On the other hand, Claimant contends that he was afraid to tell Nelson of his March 2008 injury because Nelson discouraged the reporting of work-related injuries, and he was afraid of losing his well-paying job in tough economic times. These two positions are inconsistent and irreconcilable.

8. Claimant testified that he first told Nelson of his accident about two weeks after it happened:

Well, it all started with my wife was telling me that I needed to. And I kept telling her “no.” You know, “If I’m incapable, I’ll lose my job.” And then we showed up at the shop that morning. And I was standing there with Mike and Erin. And I told them I was going to tell him. And I walked up and approached him. And I told him. And I said, you know, “I fell off that ladder. And I got hurt.” He just turns around and walks away. He didn’t listen to anything that came out of my mouth.

Q. Did you intend to tell him more?

A. I intended to try to, roundabout, tell him, to not be as blatant as the first injury, to be more - - I don’t know - - compassionate and whatnot. But I had intended to get everything out. But I just kind of wanted to get the first part out and see what his reaction would be.

Hearing Transcript, p. 42.

9. In a recorded statement taken by Surety on June 28, 2008, Claimant reported that he first gave notice to Nelson on or about May 20, 2008, at a job site, not at the shop. According to Claimant, Nelson turned and walked away without comment. Claimant further indicated that

he told Nelson of his accident/injury in a “roundabout” way and had to wait until he was no longer employed by Nelson to provide written notice because he “threatened us all.”

10. Also telling is this exchange during Claimant’s recorded statement:

Q. All right. And let’s see if there’s anything else I needed to ask you. All right. During your attempts to discuss the accident with your employer, Mr. Nelson, were you ever able to actually say the words to him that you had fallen at work and the date and the time and those types of things? Had you ever been able to actually do that?

A. Not for the second claim, no. There was no way I could. Not after what he told me on the first one. He told me on the first one straight up that, well, if I couldn’t do the work, I would just have to change my lifestyle, and he told me - - he tried to get me to claim it on my personal insurance.

Defendants’ Exhibit 14, p. 18.

11. In Claimant’s February 20, 2009, deposition, he indicated that he told Nelson sometime before May 19, 2008, that “. . . I fell off a ladder and pinched a nerve or something.” Claimant’s Deposition, p. 46. He did not tell Nelson that he needed to see a physician. Then, on or about May 19th, Claimant told Nelson “. . . with a little more force, and he pulled out his cell phone, hopped in his truck and drove away.” *Id.*, p. 53.

12. Claimant presented witnesses to the two conversations he allegedly had with Nelson regarding his accident. Michael Anderson was Claimant’s apprentice who, like Claimant, quit over a pay dispute. Mr. Anderson testified that he was present at the shop on March 20, 2008, when he overheard Claimant tell Nelson about falling off the ladder:

It was - - we just got through with the safety meeting, and he started to say that he wanted to talk to him about his shoulder - - or about - - not his shoulder, but about falling off the ladder, is what he said. And that’s - - **I can’t remember what the words were, because I wasn’t listening.** It wasn’t my involvement in that to - - to go about it.

So I pretty much started to load - - go out and load everything that we needed to do for work for that day.

Anderson Deposition, pp. 11-12, emphasis added.

13. Mr. Anderson also testified about a May 19, 2008, conversation between Claimant and Nelson at a job site wherein Claimant allegedly told Nelson of the ladder incident. However, Mr. Anderson testified that he did not hear the conversation.

14. Erin Simms, another of Claimant's, co-workers, witnessed his accident and testified that a day or two after, at the shop, he overheard Claimant tell Nelson he had fallen off the ladder and Nelson "... shook his head and just walked away." Hearing Transcript, p. 93.

15. Claimant saw Dr. Schwartzman, who was treating Claimant's shoulder injury, on March 11, 2008; he did not mention any cervical problems or the ladder incident. At that time, Dr. Schwartzman released Claimant to unrestricted work regarding his shoulder. Claimant testified that due to a series of personal tragedies shortly before this appointment, he does not remember what he told Dr. Schwartzman on that date. Claimant testified that "I would think I would have" told Dr. Schwartzman in March of 2008 of his accident.

16. Claimant presented to Mercy Medical Center ER on May 20, 2008, with a chief complaint of neck pain beginning when he woke up two weeks previously. Claimant did not mention the ladder incident. When reminded on cross-examination that by May 20 Claimant had already told Nelson about the ladder incident twice Claimant responded:

Q. (By Mr. Bowen): So, obviously you're not concerned anymore about him firing you or anything like that. You've already told him. The cat's out of the bag, so to speak?

A. So to speak, but not exactly. It hasn't been laid out in black and white. It hasn't all been explained in every detail. So it's not really - - **it's not really out there to him because he can ignore it.**

Hearing Transcript, p. 73, emphasis added.

17. On conflicting evidence, the Commission finds, more probably than not, that Claimant did not report the ladder incident until his letter of resignation found in one of Nelson's

vehicles in mid-June 2008.² The Commission further finds that Nelson did not have actual knowledge of Claimant's accident/injury. By Claimant's own admission, it was not until he wrote the letter that Claimant was ". . . able to actually write out everything and tell him exactly all of the things that he would never listen to before." *Id.*, p. 52. It does not make sense that Claimant, who was injured to the point where he could not even hold a hammer in his right hand, would not tell his physician of the problem for fear that Nelson would find out after Claimant alleges he has already told Nelson. Claimant "kinda-sorta" told Nelson in (Claimant's words) a "roundabout way" of his accident due to his sincere, although in this Referee's opinion, unfounded, fear of being fired. Nelson has denied, under oath, of being informed of Claimant's accident until at least mid-June. It is difficult to discern any motivation on Nelson's part to commit perjury to ostensibly save a few bucks in workers' compensation insurance premiums. If, as Claimant contends, Nelson ignored his attempts to give timely notice, Claimant could have easily "hounded" Nelson to fill out the appropriate paperwork.³ Claimant's position that he could not tell Nelson of the ladder incident for fear of losing his job but that he did, indeed, tell him is untenable.

Prejudice

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." A 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).

² The letter is not in evidence so the date Nelson testified that he was made aware of the letter will be used as the date the notice was given.

³ Claimant testified that he had to "prompt" Nelson to contact his workers' compensation surety to convince them to authorize an MRI for his shoulder injury.

18. Claimant argues that he has proven Employer/Surety was not prejudiced by his late reporting of his accident, if found to be the case, because Claimant was already under the care of Dr. Schwartzman at the time of the ladder incident, received appropriate testing, as well as a referral to a well-respected physician who provided appropriate treatment. Further, Claimant was only off work for three days following his cervical surgery and did not waste any time attempting a conservative approach. As a corollary to the foregoing, Claimant argues that Defendants were not prejudiced by late notice because its medical expenses were not increased thereby. Indeed, he argues, Defendants saved medical costs in that had Claimant timely reported his accident, he likely would have been sent to Defendants' preferred provider (usually a general practitioner) who would recommend conservative care. When that did not work, Claimant would have then been sent to a specialist who would have provided the same care that Claimant received here. Moreover, Defendants were not deprived the opportunity to investigate the claim and, in fact, did so and verified through witnesses that Claimant's accident did take place as was ultimately reported. Finally, there is no evidence that Claimant suffered any pre-existing cervical problems or suffered any other accident causing any neck injuries.⁴

19. Defendants assert that they were indeed prejudiced by Claimant's failing to timely report his accident. Defendants were unable to conduct a prompt investigation and provide prompt medical testing and treatment. Had Claimant told Dr. Schwartzman of the ladder incident at his March 11, 2008, appointment, Defendants could have obtained baseline data of

⁴ Defendants presented evidence at hearing that Claimant may have been involved in a skydiving accident of some sort after the ladder incident. Claimant denied any such event and called as a witness the owner of the skydiving company to corroborate his testimony in that regard. The Commission is not persuaded by that evidence and finds that Claimant was not involved in any skydiving accident. But it is clear that Claimant did skydive several times after his March 2008 accident.

his injuries, if any, to be used as a comparison regarding subsequent complaints. Having lost the opportunity to timely investigate the circumstances surrounding Claimant's alleged accident, both factually and medically, the impact of the medical outcome of this case will now never be known. It will also never be known what impact, if any, Claimant's continuing to work after his accident until he quit may have had on worsening his cervical condition.

20. There are several Idaho Supreme Court cases that discuss the lack of prejudice requirement in untimely notice situations. The Court in *Jackson v. JST Manufacturing*, 142 Idaho 836, 136 P.3d 307 (2006), observed that Idaho Code § 72-704 gives the employer a favorable presumption and it is the claimant's burden to affirmatively prove that the employer was not prejudiced by lack of timely notice. The employer's statement that it would not have done anything differently had notice been timely provided does not prove the employer was not prejudiced. In *Kennedy v. Evergreen Logging Co.*, 97 Idaho 270, 272, 543 P.2d 495, 497 (1975), the Court rejected an argument that the employer was not prejudiced by untimely notice because the surety made as complete an investigation of the accident as was possible had notice of the accident and injury been given on the day it occurred and because the treatment the claimant eventually received was the same as it would have been had the surety been given proper notice. In *Dick v. Amalgamated Sugar Co.*, 100 Idaho 742, 744, 605 P.2d 506, 508 (1980), the Court noted that where a claimant contends the medical treatment would have been the same regardless of timeliness of notice, the claimant has still failed to carry his or her burden.

Claimant bears the difficult burden to prove that Employer was not prejudiced by the untimely notice. It is fundamental to the workers' compensation system in Idaho that employers may direct employees to a designated provider. Employees do not have a statutory right to choose their medical provider. Idaho Code §72-432. In this case, Defendants were denied the right to direct Claimant's care.

If Claimant would have informed Dr. Schwartzman of the March 6, 2008 accident at his March 11, 2008 appointment, there would have been a better opportunity for Employer to establish a medical baseline regarding the injury. Defendants were denied an opportunity to have a prompt examination and testing done to confirm and treat the injury. As important, Defendants were denied the opportunity to direct the course of Claimant's medical care immediately following the injury. Although Defendants may have been content to allow Claimant to continue with Dr. Schwartzman, it is also possible they might have directed him to someone else. Regardless, by reason of Claimant's lack of notice, Defendants were denied this opportunity to direct initial treatment.

Additionally, Claimant continued to skydive in April, May, June, July, and August, after his March accident. Davis Deposition, pp. 67-68. Claimant admitted that he felt substantial pain when skydiving, or upon landing, which arguably suggests that these activities were causing further injury/exacerbation of Claimant's accident produced condition. Had Defendants been notified of this accident and injury, they would have been in a position to employ medical management to discourage Claimant from engaging in this activity. The record does not affirmatively show that Defendant was not prejudiced by the lack of timely notice.

21. All other issues are moot.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to prove he gave timely notice of his accident pursuant to Idaho Code § 72-701.

2. Claimant has not proven that the bar to his claim arising from Idaho Code § 72-701 is averted by satisfaction of Idaho Code § 72-704.

3. The remaining issues are moot.

4. The Complaint herein is dismissed with prejudice.

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

DATED this ___24th_ day of _November____, 2009.

INDUSTRIAL COMMISSION

__Participated but did not sign_____
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 _24th_ day of _November__ 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:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

sb/cjh

_/s/_____

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