

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BILLY J. FREEMAN,)
)
 Claimant,)
)
 v.)
)
 HAMILTON MANUFACTURING,)
)
 Employer,)
)
 and)
)
 TOWER INSURANCE COMPANY)
 OF NEW YORK,)
)
 Surety,)
 Defendants.)
 _____)

IC 2008-011444

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

Filed: December 30, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on August 5, 2009. Dennis R. Petersen of Idaho Falls represented Claimant. R. Daniel Bowen of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing and filed post-hearing briefs. The matter came under advisement on December 1, 2009 and is now ready for decision.

ISSUE

By agreement of the parties at hearing, the sole issue to be decided is:

1. Whether Claimant was involved in an industrial accident on March 20, 2008.

CONTENTIONS OF THE PARTIES

Claimant asserts that on March 20, 2008, he was working on the skid loader. He got off the loader to help a colleague, and slipped in a puddle of hydraulic fluid, wrenching his back. These events occurred between noon and 1:00 p.m.

Defendants contend that on March 20, 2008, the only skid loader on Employer's premises was in the shop for repair and maintenance from 7:00 a.m. until 3:00 p.m. Claimant cannot have been in an accident at the time and place asserted.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Christy Eames, Calvin Johnson, and Roger Ramirez, taken at hearing;
2. Claimant's Exhibits 1 through 12, admitted at hearing; and
3. Defendants' Exhibits 2 through 9 and pages 2, 3, and 5 of Exhibit 1, admitted at hearing.

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

1. Tom and Christy Eames are the owners of Hamilton Manufacturing, Employer. The business manufactures mulch and insulation from paper products. Claimant started working for Employer on September 4, 2008. He worked on the production line, which involved creating a pile of paper and cardboard, mixing it with the skid loader or a hyster, and then using the loader or hyster to push the pile onto a conveyor belt. The belt carried the material to a shredder,

which broke down the paper and cardboard into small pieces used to make a finished product.

2. In his deposition, Claimant initially testified that his accident occurred on Friday, March 20, 2008. In fact, March 20 was a Thursday, and Claimant ultimately agreed with the records that the accident occurred on Thursday, March 20.

3. Claimant testified in both his deposition and at hearing that on March 20, sometime between noon and 1:00 p.m., he got off the skid loader to help a co-worker (Gabriel) cut baling wire from a bale of paper. While walking from the skid loader to Gabriel's location, he slipped in a puddle of hydraulic fluid. Claimant did not fall, but in regaining his balance, he heard a pop in his mid-back. He felt no immediate pain, and continued on his way to assist Gabriel. Claimant worked the remainder of the day, experienced no pain, and did not mention the incident to Gabriel or report it to his supervisors.

4. Claimant was not scheduled to work on Friday, March 21. Claimant was suffering from an upper respiratory malady and was not feeling well that day, so did very little on his day away from work. Claimant stated that, by Friday, he had only a little pain in his mid-back.

5. Claimant testified that by Saturday, March 22, he was feeling a little sore in his mid-back on the left side. Later in the day, Claimant and his wife decided to go to Hagerman to a place with hot tubs for soaking. He hoped that the hot water would ease the soreness in his back. After about half an hour in the hot water, Claimant's back began to hurt much worse. Claimant and his wife went immediately from Hagerman to the emergency room at St. Luke's Magic Valley Regional Medical Center (SLMVRMC) seeking medical care. Medical records from SLMVRMC confirm that Claimant sought care on Saturday evening. The records discuss a diagnosis of sinusitis and thoracic strain. The note references the March 20 incident in relation

to the thoracic injury.

6. Claimant testified that on Sunday, March 23, he called Christy Eames, his Employer, and told her of the March 20 slipping incident, and advised that he had sought medical care on Saturday evening.

7. At hearing, Ms. Eames testified that she had no recollection of receiving a call from Claimant on Sunday, but that she had received a call from SLMVRMC on Sunday seeking information regarding Employer's workers' compensation surety.

8. On Monday, March 24, Claimant had a follow-up appointment with the occupational medicine clinic at SLMVRMC and did not go to work.

9. On Tuesday, March 25, Claimant clocked in at 12:25 p.m. He went to the office and filled out the First Report of Injury or Illness. Claimant testified that he got the form from Ms. Eames and filled it out himself, returning it to Ms. Eames. The form, dated March 25, 2008, lists the date of injury as March 20, and the date that Claimant gave notice was March 23. Ms. Eames testified that she did not handle workers' compensation claims, and that Claimant would have received the form from the comptroller, Mr. Probasco.

10. Claimant initially testified at hearing that he believed that he had a good relationship with his Employer. Upon further questioning, he admitted that he had received verbal warnings about his cell phone use:

Q. [by Bowen] Okay. At any rate, you told me that you thought it [your relationship with Employer prior to the accident] was pretty good?

A. Yes.

Q. Is that what you thought?

A. I thought so, yes.

Q. The fact of the matter is, you had been written up, you'd been given several warnings?

A. I was given one warning.

Q. One warning? What was that for?

A. I believe for cell phone use.

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 4

Q. That's your recollection, that you had only been given one warning?

A. I believe so.

Q. Were you unaware that they considered you to have given, to have given you several warnings and had given you your final warning? Were you unaware of that?

A. I knew we [sic] had Tom [Eames] talk to me on several occasions, but that was all.

Q. Were those occasions by any chance fairly close to the occurrence of this accident?

A. No.

Q. How far removed from [sic] were they?

A. I don't remember.

Tr., pp. 40-41.

11. Claimant's personnel file, Defendants' Exhibit 3, documents that on February 25, 2008, Claimant received a written warning regarding poor work performance, excessive absenteeism, and personal cell phone use while working. This written warning followed at least two verbal warnings for the same behavior. On March 12, Claimant was placed on a three-day suspension (March 13, 14, and 17th) for the same issues. According to the testimony of Christy Eames, a suspension was the final step before dismissing an employee. Following the suspension, Claimant returned to work March 18—two days before the alleged accident.

12. Employer employs a full-time mechanic, Calvin Johnson, to maintain the rolling stock of the business. Mr. Johnson knew the skid loader was leaking hydraulic fluid and had ordered the parts necessary to make repairs and perform scheduled maintenance. The parts arrived on March 19, and on the following morning, Mr. Johnson took the skid loader from the plant to the nearby maintenance shop to work on it. Mr. Johnson keeps a maintenance record on each item of rolling stock that records both regular maintenance and repairs. Mr. Johnson updates the maintenance record at the time he completes the work. According to the maintenance record for the skid loader, Mr. Johnson took it out of service at the plant at 7:00

a.m. on March 20 and did not return it to service until he completed the work about 3:00 p.m. that same day. Mr. Johnson's testimony is consistent with his written statement dated March 24, 2008, prepared as part of Employer's investigation into Claimant's workers' compensation claim.

13. Roger Ramirez has worked for Employer for eight years. He drives truck and assists Mr. Johnson with maintenance of equipment. Mr. Ramirez testified that he was working in the shop with Mr. Johnson on March 20, and that the skid loader was in the shop for repairs that day. Mr. Ramirez' testimony is consistent with a written statement made March 24 as part of Employer's investigation of Claimant's workers' compensation claim.

14. The Referee found Claimant to be an unreliable witness. This is not to suggest that Claimant was less than truthful, merely that he was less than forthcoming. Claimant was reticent to admit well-documented events that occurred close in time to the alleged accident and might provide a reason to fabricate an injury. At the same time, his insistence that he was using the skid loader on March 20 despite substantial evidence that the skid loader was out-of-service that day is troubling. Confronted with hard evidence contrary to his testimony, it would be natural for Claimant to try to reconcile such disparate facts by questioning his recollection as to the date or the equipment used. Claimant did neither. The Referee also notes that while Claimant had good recall of the details surrounding the alleged accident, his recall regarding other events was vague—he had no independent recollection of what time he started work that day, or what time he left. Neither could he state with any specificity when he started working for Employer or when he quit working for Employer.

DISCUSSION AND FURTHER FINDINGS

15. A claimant in a worker's compensation case has the burden of proving that he is entitled to benefits. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). In this particular proceeding, that means that Claimant must prove by a preponderance of the evidence that an accident occurred at the time when and place where he asserts that it occurred.

16. On the facts before the Commission, the Claimant cannot carry his burden of proving that an accident occurred on March 20, 2008. His story is plausible—the skid loader was known to have been leaking hydraulic fluid and the medical records corroborate the date of the alleged accident. But it is not difficult to construct a story around a leaky skid loader; then the time line creates itself. But this story had an unexpected twist: invoices, contemporaneous maintenance records, and the testimony of Messrs. Johnson and Ramirez are persuasive evidence that the skid loader was out of service on March 20. If the skid loader was in the shop, and Claimant insists he was using the skid loader, then someone has their facts wrong. It is far easier for one person to create a story than it is to construct a conspiracy of testimony and fabricated documents to refute it. The Referee finds Messrs. Johnson and Ramirez and the maintenance log to be more credible than Claimant's testimony, particularly in light of the reliability issues outlined herein.

CONCLUSION OF LAW

1. Claimant failed to carry his burden of proving that he was involved in an accident on March 20, 2008.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusion of Law, and Recommendation,

the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 18 day of December, 2009.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

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ORDER

Filed: December 30, 2009

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusion 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 conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant failed to carry his burden of proving that he was involved in an accident on March 20, 2008.

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

DATED this 30 day of December, 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 30 day of December, 2009, a true and correct copy of the foregoing **FINDINGS, CONCLUSION,** and **ORDER** were served by regular United States Mail upon each of the following persons:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

djb

/s/ _____