

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SHAWN W. LOWDER,)
)
 Claimant,)
)
 v.)
)
 TUCWAHTSE BUILDERS, LLC,)
)
 Employer,)
)
 and)
)
 IDAHO STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 2007-002654

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

Filed: August 11, 2010

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 Idaho Falls, Idaho, on April 14, 2010. Michael J. Whyte of Idaho Falls represented Claimant. Steven R. Fuller of Preston represented Defendants. The parties submitted oral and documentary evidence. Neither party took post-hearing depositions. The parties filed post-hearing briefs and the matter came under advisement on June 30, 2010.

ISSUES

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

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;

2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

3. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;

4. Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;

b. Temporary partial and/or temporary total disability benefits (TPD/TTD);

and

5. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate.

In his post-hearing briefing, Claimant withdrew the issue of his entitlement to temporary partial or temporary total disability benefits. All other issues were reserved for future determination pending the outcome of this proceeding.

CONTENTIONS OF THE PARTIES

Claimant asserts that he injured his low back on November 18, 2006 when he fell off the roof of a house where he was working. Claimant asserts that he is entitled to reimbursement for medical care he received as a result of the accident and injury, together with such continuing care as his treating physicians have recommended.

Defendants allege that Claimant's claim is barred for failure to provide timely notice of his injury pursuant to Idaho Code § 72-701 and his failure to timely file a request for hearing (Complaint) pursuant to Idaho Code § 72-706. Alternatively, Defendants argue that Claimant is not entitled to workers' compensation benefits because he failed to establish that it was more likely than not that the industrial accident caused the low back injury for which he sought treatment.

Claimant responds to the notice defense by asserting that Employer knew about the fall on the day that it happened, because Employer was at the job site when the accident occurred. Further, Claimant told Employer he was receiving medical care several weeks after the incident. Finally, since Claimant never filed a workers' compensation claim, the one-year limitation on filing a complaint was not tolled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Lyle Paul, Roxanne Lowder, Faustino Ivarra and Aaron Blonquist, taken at hearing; and
2. Exhibits 1 through 25, 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 conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of the hearing, Claimant was twenty-nine years of age and lived in Idaho Falls, Idaho, with his wife, Roxanne.
2. Claimant is a construction worker. He began working for Employer (Aaron Blonquist) on October 23, 2005.

ACCIDENT

3. In November 2006, Employer, Claimant, and his co-workers Messrs. Paul and Ivarra, were working on a house in Coyote Canyon near Chubbuck, Idaho. Claimant was on the roof installing plywood sheets that Mr. Paul was handing up to him through the roof trusses. Claimant placed each sheet of plywood into a clip that held it in place until he nailed the sheet to the roof trusses. At about 11:30 a.m., Claimant attempted to place a piece of plywood into a clip.

The plywood missed the clip, and started to slide back down the incline of the roof. Claimant was below the sheet, and as it slid, it took him with it. Claimant described the event as like riding a magic carpet. As the plywood slipped off the roof, Claimant pushed himself away from the falling sheet and landed on his feet in a large pile of soft topsoil. After landing, Claimant fell onto his back.

4. Mr. Paul looked out of the house to see Claimant lying on his back, laughing. Mr. Paul called to Messrs. Ivarra and Blonquist, who were working on the other side of the house. Ivarra and Blonquist had heard the commotion and came around to see what had happened. Mr. Blonquist inquired as to whether Claimant was injured, and Claimant assured him that he was fine. Claimant described the fall to his colleagues, re-enacting the landing and the fall onto his back. Footprints in the soft soil clearly indicated where Claimant had landed, and other contours in the topsoil revealed where he had fallen onto his back. The men laughed and joked about the incident and then took their lunch break.

DATE OF INJURY

5. The precise date of the accident is unclear. Claimant initially asserted that the accident happened on November 19, 2006—a Sunday. Later, he determined that he was mistaken and the incident actually occurred Saturday, November 18. Employer's time records indicate that Claimant worked on November 18. Claimant asserted that Mr. Paul, Mr. Ivarra, and Mr. Blonquist were all at the construction site when he suffered his fall, and all three men testified that they were working when Claimant fell. Time records for Messrs. Paul, Ivarra, and Blonquist include no reported work hours on Saturday, November 18. Mr. Blonquist testified that the crew always worked together, and that Claimant would not be the only worker at a construction site. Mr. Paul believed that the incident occurred either Thursday, November 16 or

Friday, November 17. Mr. Blonquist testified that the fall occurred on Friday, November 17. It is undisputed that the four men were all working at the site when Claimant fell.

MEDICAL CARE

6. Claimant denied any injury immediately after the fall, and worked the remainder of the day. Claimant returned to work on Monday, and worked a full day. Claimant first sought medical care after work on Monday, November 20, when he presented at the offices of Fred Sermon, D.C.¹ Claimant's presenting symptoms, according to Dr. Sermon's records, included low back pain, left hip pain, mid-back pain, left shoulder pain, a feeling of pins and needles in his legs and a stiff neck. Claimant told Dr. Sermon about the fall from the roof, and that he felt no pain on the day of the accident, but began to experience pain on Sunday morning, November 19. Claimant described the pain as like a sharp poke in his low back. Dr. Sermon diagnosed lumbosacral sprain/strain, sciatic neuritis, and myalgia—all secondary to the fall from the roof.

7. Claimant treated with Dr. Sermon on fifteen occasions from November 20, 2006 through February 23, 2007.

CONTINUING WORK RELATIONSHIP

8. Claimant continued to work for Employer until January 13, 2007. On that date, Claimant quit over an unspecified disagreement with Employer. From the date of the accident, until he left Employer, Claimant sustained no time loss as a result of the accident.

9. During the time that Claimant worked for Employer, he carpooled with Messrs. Paul and Ivarra from Idaho Falls to various job sites. Both men were certain that Claimant did

¹ Claimant had been treated by Dr. Sermon following a motor vehicle accident in August, 2005.

not complain of pain when driving home on Friday, November 17, or on the following Monday, November 20, or at any subsequent time during the remainder of his tenure with Employer.

10. Upon leaving the employ of Defendant, Claimant immediately went to work for another construction company at a higher hourly rate and higher annual wage. Claimant was still working for that employer at the time of the hearing.

WORKERS' COMPENSATION CLAIM

11. At the time of Claimant's fall, and later that same day, Employer asked Claimant if he was sure that he was not injured, and offered medical care. Claimant assured Employer that he was fine. Claimant admitted at hearing that he did not tell Employer when he began treating with Dr. Sermon. Claimant does aver that, a couple of weeks later, he told Employer that he was receiving chiropractic treatment as a result of the fall. Claimant alleges that Employer told Claimant to bring in the bill from the chiropractor. Claimant did not present Employer with any medical bills during the time he remained employed, nor did he direct Dr. Sermon's office to bill Employer for his care.

12. Employer denies having any conversation with Claimant about treatment for an injury resulting from the fall. Employer stated that he would never tell an employee that he would pay medical bills, because that was what workers' compensation insurance was for. Employer does recall conversations with Claimant prior to the November 2006 fall, and dating from the time of Claimant's hire, that Claimant had back pain as a result of his 2005 automobile accident.

13. On January 17, 2007, Employer received faxed billings from Dr. Sermon for the chiropractic care that Claimant had received since the accident. Employer contacted Claimant

and asked why he was receiving the bills. Claimant told Employer that the bills were related to the treatment he was receiving as a result of the injury he suffered in the fall from the roof.

14. At Employer's request, Claimant called Employer's wife and provided her the information she needed to fill out a First Report of Injury or Illness (first report). Surety received the first report, dated January 17, 2007, on January 19, 2007. As of the date of hearing, Claimant had not received indemnity or medical benefits related to the November 2006 incident.

15. Claimant filed his Complaint seeking past and future medical care, temporary total disability (TTD) and permanent partial impairment (PPI), on March 31, 2008.

DISCUSSION AND FURTHER FINDINGS

16. Idaho Code § 72-701 precludes any proceeding under the Idaho Workers' Compensation laws unless the injured worker shall have given notice of the accident to the employer "as soon as practicable but not later than sixty (60) days after the happening thereof." The notice shall state the nature of the injury. Idaho Code § 72-702.

17. It is undisputed that Employer was aware that Claimant fell off the roof of a house under construction sometime between November 16 and November 18, 2006, but the evidence is conflicting as to when Employer became aware that Claimant was asserting a work-related *injury*. It is possible that Employer did not become aware of the injury until more than sixty days had passed, depending on the date of the accident. If the accident occurred on November 16 or November 17, and Employer did not become aware of the asserted injury until January 17, 2007, then the notice falls outside the sixty-day period prescribed by Idaho Code § 72-701. If the accident occurred on November 18, then notice was timely. The Referee need not make a finding as to the issue of notice, however. Regardless of whether notice was timely, Claimant's claim is barred by Idaho Code § 72-706(1) and (6), which provide:

(1) When no compensation paid. When a claim for compensation has been made and no compensation has been paid thereon, the claimant, unless misled to his prejudice by the employer or surety, shall have one (1) year from the date of making claim within which to make and file with the commission an application requesting a hearing and an award under such claim.

* * *

(6) Relief barred. In the event an application is not made and filed as in this section provide, relief on any such claim shall be forever barred.

18. Claimant made his claim for workers' compensation benefits on January 17, 2007—the date that Employer received the faxed medical bills. Claimant admitted at hearing that he told Employer the same day that he wanted to make a workers' compensation claim. It is undisputed that Claimant received no compensation on his claim, and Claimant failed to prove that either Employer or Surety misled him to his prejudice, so pursuant to Idaho Code § 72-706(1), Claimant had one year, or until January 17, 2008, to file an application for hearing (Complaint) with the Commission. Claimant filed his Complaint on March 31, 2008—clearly beyond the one-year statute of limitations.

19. In his post-hearing brief, Claimant asserts that he was unaware of the process for making a claim for workers' compensation benefits, and since he did not prepare the first report, he had no knowledge that a claim was made on his behalf until he received notice that Surety had denied the claim. However, Claimant testified at hearing that he made a claim for benefits for this injury on January 17, 2007, when he spoke to Employer about the faxed medical bills. Thus, as is clear from the record, no one made a claim for benefits on Claimant's behalf—Claimant made the claim himself. To assert that he was unaware of the claim is contrary to Claimant's own testimony.

20. Claimant further argues that he did not fill out the first report, nor did he sign it. Since the first report was prepared without his knowledge and did not include his signature, the one-year statute on filing a Complaint should be tolled until such time as Claimant had actual

knowledge that a notice of injury was filed with Surety. This argument equates filing the first report of injury or illness with a claim for benefits. Making a claim for benefits and filing a first report are two entirely different events. An employer is required to file a first report when it learns of a work-related injury. It is not a claim for benefits; it is a notice to a surety that an employee sustained a work-related injury that might result in an entitlement to benefits. A claim, on the other hand, is made by the worker when he or she demands that employer and surety provide workers' compensation benefits. Claimant admitted that he made his claim for benefits on January 17, 2007. Employer prepared the first report the same day. The timely filing of the first report by Employer does not toll the requirement that Claimant file his Complaint within the one year statute.

CONCLUSIONS OF LAW

1. Claimant failed to comply with the provisions of Idaho Code § 72-706, and therefore his claim for workers' compensation benefits is time-barred.
2. All other issues are moot.

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 26 day of July, 2010.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

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ORDER

Filed: August 11, 2010

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 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 failed to comply with the provisions of Idaho Code § 72-706, and therefore his claim for workers' compensation benefits is time-barred.
2. All other issues are moot.

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

DATED this 11 day of August, 2010.

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 11 day of August, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

MICHAEL J WHYTE
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STEVEN R FULLER
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djb/cjh

/s/ _____