BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEFF BARKER, Claimant, v. WOODS MEAT PROCESSING, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2013-023220** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed April 29, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Coeur d'Alene on January 9, 2015. Claimant appeared and gave testimony *pro se*. Bradley Stoddard represented Defendants Employer and Surety. Claimant presented oral evidence; Defendants presented oral and documentary evidence. Post-hearing, Claimant waived his opening brief but, in a timely manner after receipt of Defendants' brief, submitted a letter deemed a reply brief. The case came under advisement on March 19, 2015. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing and as agreed to by the parties at hearing are:

1. Whether Claimant has complied with the notice and limitations requirements 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 Claimant suffered an injury caused by an accident arising out of and in the course of employment;

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

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

   a) Temporary disability (TTD/TPD),
   b) Permanent partial impairment (PPI),
   c) Permanent disability in excess of PPI, and
   d) Medical care.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered a low back injury as a result of a compensable accident on June 12, 2013.

Defendants contend Claimant did not suffer an accident as claimed. If he did, he gave untimely notice. Regardless, his condition is pre-existing and not compensable under any statute or theory.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and Employer's owner Louise Wood; and

2. Defendants' exhibits A through H admitted at hearing (pages 22-25 of exhibit C, Claimant's deposition, are missing).

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Claimant worked for Employer, a meat processor as a janitor, on the kill floor, and as a meat cutter and processor. When hired in October 2006 Claimant disclosed a low back

condition. In deposition, Claimant testified he was first diagnosed with a low back condition in the mid-1980s.

2. Claimant last worked for Employer on July 6, 2013. At that time neither Claimant nor Employer intended that his employment was terminated. Claimant merely asked for some time off. He has not worked since.

3. Claimant alleges a June 12, 2013 unwitnessed work accident. He missed no work in the days immediately following and did not seek medical care.

4. Claimant alleges that on the day it happened he "joked" with a co-worker and a supervisor about falling. He did not report that he had been injured.

5. On June 17, 2013, Claimant visited Boundary Community Hospital ER. He reported back and right buttock pain lasting "5-6 weeks" and denied a "recent injury". A pain diagram indicates right hip and leg pain.

6. On June 18, 2013, Claimant visited Daniel Moore, D.C. He again noted a six-week history of symptoms. Claimant did not respond to questions on the intake form about whether this was an accident or injury and, if so, on what date.

7. On July 16, 2013, Claimant visited Bonners Ferry Family Medicine. That record notes a four-month history of symptoms, worse for the last four weeks. It does not mention a relationship to work. The next note from that office is dated September 16, 2013 and states "workers comp injury (Back MRI) under the heading "Chief Complaint."

8. Claimant testified he did not want to seek workers' compensation until after a hospital nurse told him to do so at a visit to Bonner General Hospital on August 20, 2013. The ER record for that date represents the earliest written mention of having fallen at work. It shows Claimant reported his symptoms having been present for "3 months."

9. Claimant first notified Employer of a workers' compensation claim on or after August 22, 2013.

10. Medical records support a longstanding history of low back problems, frequent to continuous, which flare at times requiring infrequent medical attention.

11. Clamant admitted the co-worker has denied any recollection that Claimant alleged or joked that he fell. Ms. Woods investigated; the supervisor denied to her any recollection of such a conversation. Claimant did not give notice to anyone at work that he had been injured before his last day of work, July 6, 2013. He first gave such notice on or after August 22, 2013.

DISCUSSION AND FURTHER FINDINGS OF FACT

12. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

Accident and Causation

13. An accident is "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." Idaho Code § 72-102(18)(b).

14. A claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical

opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973), overruled on other grounds by *Jones v. Emmett Manor*, 135 Idaho 160, 997 P.2d 621 (2000).

15. Claimant asserts that on June 12, 2013, he suffered an untoward mishap or event when he slipped and fell in a blood pit while hanging a pig. While Claimant's description of the alleged accident is plausible, it was unwitnessed, and there is no other evidence of record, besides Claimant's assertion, to corroborate the occurrence of the mishap/event. Claimant contends that he immediately told his manager and a co-worker about the accident. However, neither of these individuals has any recollection of such conversation. Claimant did not immediately fill out an accident report as required by company policy, nor did he immediately seek medical care for treatment of his injuries. Claimant eventually sought medical care on June 17, 2013, but gave a history of having had five to six weeks of low back pain, and denied recent injury. On June 18, 2013, Claimant sought treatment from Daniel Moore, D.C., and gave a history of low back symptoms for six weeks. Again, he gave no history of a June 12, 2013 accident. On July 16, 2013, Claimant was seen at Bonners Ferry Family Medicine where he gave a history of low back symptoms for four months, worse in the last four weeks. No reference to a work related mishap is contained in those notes. It was not until September 16, 2013, that any reference to a work related injury is found in the medical records. Finally,

pre-injury medical records demonstrate that Claimant has suffered from low back pain for many years prior to the subject accident.

16. Based on the foregoing, the Commission concludes that Claimant has failed to establish the occurrence of an untoward mishap/event of June 12, 2013.

Notice

17. Even if Claimant had shown an accident and injury occurred, Claimant must still give appropriate 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 sixty (60) days after the happening thereof.

18. Idaho Code § 72-702 requires that the notice must be in writing. However, notice required under Idaho Code § 72-201 is sufficient, even if the formal requirements are not met, so long as ". . . the employer, his agent or representative had knowledge of the injury or occupational disease or . . . the employer has not been prejudiced by such delay or want of notice." Idaho Code § 72-704.

19. Claimant alleged a June 12, 2013 work accident and injury. Claimant first gave written notice to Employer of a workers' compensation claim on August 22, 2013. Claimant's written notice was 71 days after the alleged incident and is untimely.

Actual Knowledge

20. If Employer had actual knowledge of Claimant's alleged June 12, 2013 industrial accident within 60 days of its occurrence, then his claim remains viable under Idaho Code § 72-704. That statute provides "actual knowledge" is imputed to the employer if the employer or its "agent or representative" had knowledge of the injury. Claimant argues that Employer had actual knowledge, because he told his manager, Mr. Travers, about the accident. C. Dep., p. 57.

Claimant testified that he was joking to his manager about slipping on the kill floor. Employer disputes any knowledge of the alleged June 12, 2013 accident and injury prior to Claimant's written notice on August 22, 2013. Defendants argue that even if Employer took Claimant's joking seriously, there is no evidence that Employer knew Claimant injured himself at work. Claimant did not immediately seek medical care or take time off work. Employer testified that its employees are expected to inform Mrs. Louise Wood, and either the immediate manager or the plant manager. Claimant did not follow the standard procedure.

21. Under *Murray Donahue v. National Car Rental Licensee Association*, 127 Idaho 337, 900 P.2d 1348 (1995), where it is demonstrated that Employer had "considerable knowledge" of an accident or injury, the required written notice may be excused. Thus, where Employer witnessed the accident or was otherwise apprised of the occurrence of an injury, lack of written notice may be excused. See also *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005). Here the alleged accident was unwitnessed. Although Claimant contends he told his manager about the fall, he said he did so in a joking manner. There is no evidence that Claimant told his manager that he had suffered some injury as a result of said fall. Of course Claimant's manager denies ever learning of Claimant's fall. From the foregoing, we find that the evidence fails to establish that Employer had "considerable knowledge" of Claimant's accident/injury sufficient to excuse the requirement of written notice.

22. Therefore, Claimant must establish that the delayed notice did not prejudice Employer. *Jackson v. JST Manufacturing*, 142 Idaho 836, 136 p.3d 307 (2006). The Commission has acknowledged in *Mora v. Pheasant Ridge Development, Inc.*, 2008 IIC 0548, that the claimant bears a difficult burden to establish that an employer was not prejudiced. Here, Clamant has set forth no affirmative proof establishing that Employer was not prejudiced by the

reporting delay. Employer was unable to investigate the validity of the alleged accident until several months had passed. Employer did not have the opportunity to provide medical treatment. With Claimant's longstanding history of back complaints, it would have been very helpful to allow Employer the opportunity to evaluate Claimant's back complaints related to the alleged accident. Claimant has not shown that Employer was not prejudiced by his delay in reporting his industrial accident. The record shows Claimant did not provide Employer timely notification that he had been injured at work.

CONCLUSIONS OF LAW AND ORDER

1. Claimant failed to demonstrate the occurrence of an unlooked for mishap or untoward event constituting an accident.

2. Claimant failed to provide timely notice of a work accident.

3. Claimant failed to show it likely that his condition was caused by the alleged work accident.

4. All other issues are moot.

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

DATED this 29th day of April, 2015.

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 29th day of April, 2015, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

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_/s/_____