

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRAD McGUIRE,

Claimant,

v.

JAK'S REFINISHING CORPORATION,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,
Defendants.

IC 2012-018513

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

Filed February 6, 2014

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 Boise on June 6, 2013. Daniel Luker represented Claimant. James Ford represented Defendants Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on October 7, 2013. This matter is now ready for decision. 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.

ISSUES

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

1. Whether the Claimant suffered an injury caused by an accident arising out of and in the course of employment;
2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
3. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause; and

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4. Whether and to what extent Claimant is entitled to benefits for:
 - a) Temporary disability (TTD/TPD), and
 - b) Medical care.

All other issues were reserved.

CONTENTIONS OF THE PARTIES

Claimant contends that on July 18, 2012, he injured his low back while lifting and working with pieces of a bedroom set in a stripping tank. He was fired on July 20. He is entitled to temporary disability and is still in a period of recovery with ongoing pain and radiculopathy. He is entitled to medical benefits including an L4-5 surgery to be scheduled in the near future.

Defendants contend Claimant has offered variable descriptions surrounding his claim of increased back pain. The variability in his descriptions undermines Claimant's credibility. These descriptions do not constitute an accident under Idaho Workers' Compensation Law. Claimant did not claim a work-related event until after Employer fired him. He has a longstanding, preexisting, symptomatic low back condition. If the events are deemed an accident, he did not suffer an injury caused by that accident. Temporary disability benefits are not awardable based on a lack of causation. Even if medical benefits are awardable, insufficient indicia are present to order surgery without additional medical foundation.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, his girlfriend, her sister and the owner of the corporate Employer;
2. Claimant's exhibits A through E admitted at hearing;
3. Defendants' exhibits 1 through 23, admitted at hearing; and
4. Posthearing depositions of treating physician Jacob Kammer, M.D., spine surgeons Joseph Verska, M.D., and Timothy Doerr, M.D., together with two exhibits appended to Dr. Verska's deposition.

All objections raised in posthearing depositions are overruled.

FINDINGS OF FACT

Introduction and 2012 Medical Care

1. Claimant worked for Employer on July 18, 2012. He was assigned to strip green paint from a bedroom set.

2. During the day he felt an increase in low back pain. Claimant has reported inconsistently whether this pain arose gradually or suddenly.

3. He left work early that afternoon for reasons unrelated to his increased back pain. He did not tell Employer about his increased pain on that day.

4. The following afternoon on July 19, 2012, Claimant visited St. Alphonsus Regional Medical Center ER. By history, Brian Reynolds, M.D., the ER physician, stated:

This is a 41-year-old male who was at work today, putting furniture into a dipping bath, which he does everyday at work. He strained his lower back when he did this. He said he lives with chronic pain in his back but this made it a lot worse this morning. He occasionally has pain that shoots down his left leg to his knee, but no weakness, bowel or bladder dysfunction. He says the pain right now is about 4/10 if he does not move. If he gets up and tries to walk around, it goes up to about a 7 or 8/10. It is achey. The rest of his 10 review of systems are negative.

C. Exh. C., p. 92.

On examination, Dr. Reynolds noted tenderness in Claimant's left lower lumbar region and SI joint without evidence of trauma. At the end of that visit, Dr. Reynolds completed a release to return to work without restrictions effective either July 22 or 23 (handwriting illegibility). The release clearly shows the date of injury was July 18 and not July 19 as the use of the word "today" in the history suggested.

5. The following morning, July 20, Claimant telephoned Employer to report that he would not be coming to work because he would see a physician.

6. Claimant visited Jacob Kammer, M.D., later that morning. Dr. Kammer took a history and examined Claimant. An “Industrial Accident Report” stated as reason for a delay in reporting: “Back slowly tightened up over the rest of the day.” Dr. Kammer was aware Claimant underwent an L5-S1 fusion in 2001. Dr. Kammer recorded that Claimant represented he had been pain free since that surgery. An X-ray showed lumbar degeneration or osteoarthritis which Dr. Kammer explained in deposition is a preexisting, progressive, and chronic condition. Dr. Kammer diagnosed a lumbar strain with possible left leg radiculitis. He completed a release to return to work with significant restrictions. Dr. Kammer provided Claimant with a Form 1 or similar document for Claimant to complete and file with Employer. His note includes a suggestion to refer Claimant to the surgeon who performed the 2001 fusion, Joseph Verska, M.D. A later note indicates Dr. Kammer was informed Surety refused to authorize the referral.

7. Upon returning home from visiting Dr. Kammer, Claimant telephoned Employer. He reported he needed to take a few days off. Employer fired him. Claimant reported that the pain arose from an accident at work and he had paperwork to complete.

8. Claimant attended two physical therapy sessions. When Surety denied his claim, Claimant felt financially unable to continue physical therapy.

9. Claimant again visited Dr. Kammer on July 27, the day following his last physical therapy visit. Dr. Kammer added a diagnosis of left lumbar radiculitis because of Claimant’s complaints of leg symptoms.

10. Without further contact with Claimant, Dr. Kammer, on November 16, 2012, responded in writing to an inquiry by Claimant’s counsel. Dr. Kammer recommended an MRI and opined Claimant’s radiculitis was related to the work “injury” of July 18. He again wrote specifically that Claimant had reported he was free of back pain between his 2001 surgery and

July 18, 2012.

11. In deposition, Dr. Kammer agreed that Claimant's reported history of no back pain for over ten years was an important factor in forming his causation opinion, but that he would not be very surprised if Claimant had actually suffered occasional back pain in those intervening years. He explained that he would distinguish "occasional" pain from "chronic" pain and that by "injury" he merely meant the usual motions of bending and lifting.

12. Claimant failed to show for his August 3 visit with Dr. Kammer. Claimant sought no medical treatment between July 27, 2012 and January 2, 2013.

2013 Medical Care

13. On January 2, 2013, Claimant visited St. Al's ER for back pain. ER physician Matthew Conklin, M.D., recorded by history "acute on chronic back pain that started two weeks ago." A lumbar MRI taken later that day was compromised by the metal from Claimant's earlier fusion. Nevertheless, degenerative changes were seen and no acute or traumatic findings were reported.

14. On February 18, 2013, Claimant visited Dr. Verska for evaluation as requested by Claimant's attorney. By history, Dr. Verska reported that Claimant represented he had been asymptomatic since recovering from the 2001 surgery and had not sought "any care" for his low back. Dr. Verska reviewed records and examined Claimant. He diagnosed sciatica, a small spondylolisthesis at L4-5 and status post L5-S1 fusion. He ordered a CT myelogram because of difficulty reading the MRI. He opined Claimant's condition and work were causally related, expressly relying upon Claimant's representation of having been asymptomatic previously.

15. The myelogram showed degenerative changes without documenting any acute or traumatic changes.

16. An MRI of Claimant's neck showed degeneration in his cervical spine as well. The report shows Claimant reported neck pain beginning December 2012 when he visited Dr. Verska.

17. Upon review of the diagnostic imaging, Dr. Verska again opined—expressly founded upon a prior lack of symptoms—that Claimant aggravated his preexisting condition in a work-related way. He suggested a possible lumbar surgery, but in deposition testified that he would not be available to perform it.

18. On March 6, 2013, Dr. Verska offered his legal opinion that “Under Idaho state law, the patient was working full-time, had no problems, injured himself at work, and now has a very clear-cut worker’s compensation claim.”

19. In deposition, Dr. Verska testified that he had not viewed Claimant’s medical records for the period between recovery from the 2001 surgery and the alleged injury of July 18, 2012.

20. Also in deposition, Dr. Verska opined that Claimant’s condition was accelerated or aggravated by work on July 18, 2012. He testified that despite Claimant’s report of being asymptomatic Dr. Verska would expect and did believe that Claimant had occasional back pain after the surgery. He opined that Claimant’s injury occurred when Claimant “tweaked something in his back for him to start new symptoms.” He speculated that increased movement of spondylolisthesis “caused a subtle shift of his anatomy that caused some inflammation” and swelling which caused pain.

21. Dr. Verska had imposed restrictions after he performed the 2001 surgery. In deposition he testified that working beyond those restrictions would not likely have caused his degenerative condition to accelerate.

22. Dr. Verska did not think there was a relationship between work and the C-spine symptoms for which that MRI was ordered.

Defendants' Retained Medical Expert

23. Defendants retained Timothy Doerr, M.D., to evaluate Claimant's medical condition. He reviewed records, including the diagnostic imaging, and on February 28, 2013, examined Claimant. He noted that Claimant misrepresented his history compared to prior medical records. He noted that he observed that Claimant exhibited more pain behaviors in his office which suddenly disappeared when Claimant was outside the building walking to his car. He opined that Claimant's reporting of nonorganic complaints raised concern that Claimant was malingering. He opined that Claimant suffered no injury working for Employer. He opined that Claimant's reported increase in back pain at that time was consistent with medical records which showed multiple episodes of back pain since the 2001 surgery. Having suffered no injury related to any July 18, 2012, Claimant was at maximum medical improvement. D. Exh. 10, p. 538. He opined that Claimant should have received restrictions as a result of the 2001 surgery and that there was no sufficient basis to increase those restrictions based upon the clinical picture he saw upon examination. He opined that Claimant's underlying degenerative condition was, by definition and imaging shown to be progressive; that Claimant was not medically stable concerning the underlying degenerative condition; that surgery to stabilize the segment above the prior fusion would be a reasonable procedure, but had some reservations concerning Claimant's misrepresentations and lifestyle contraindications.

24. In deposition, Dr. Doerr, clarified and well explained his bases for his opinions. He explained how arthritis develops and inherent risks to the segment above a fusion can result in further degeneration over time. He testified that Claimant showed no traumatic injury which could be related to his work. He explained in detail how and why the nonorganic findings arose

and raised concern about Claimant's attempts to exaggerate his physical condition.

Prior Medical Care

25. In 1984, at age 14, Claimant visited St. Luke's ER following an assault after school. He complained of having injured his back. He was treated for "some small scratches" on his left flank which were "superficial."

26. In January 2001, Claimant visited St. Luke's ER following a work accident. He complained of lumbar back pain without radiation. He returned the next with added leg symptoms. He made multiple ER visits to both St. Luke's and St. Al's before surgery was performed in late March.

27. In March 2001, Dr. Verska performed an L5-S1 fusion upon a diagnosis of spondylolisthesis at that level. Before the surgery Claimant complained of low back pain with referred pain into his legs. An X-ray confirmed the spondylolisthesis and reported mild osteoarthritis, mild degenerative disk disease at L4-5 and L5-S1, a bilateral pars interarticularis defect, and an L5-S1 disk bulge with an observed disk fragment. An MRI confirmed these findings.

28. Claimant spent a year in recovery, with significant pain complaints and use of narcotic pain relievers. On March 1, 2002, Dr. Verska released Claimant to work with permanent restrictions of lifting no more than 50 pounds, 35 pounds repetitively.

29. In February 2002, Claimant visited St. Al's ER for symptoms of bronchitis. He reported "chronic back pain" and his continuing post-surgical pain management treatment. The ER physician included "chronic pain syndrome" as a diagnosis after evaluating and treating the bronchitis.

30. In September 2003, Claimant visited St. Luke's ER at Meridian complaining of back pain after a lifting event as a cab driver. He reported this as an exacerbation of

the intermittent back pain he was still experiencing after the 2001 surgery.

31. In March 2005, Claimant visited St. Luke's ER complaining of back pain which included some transient left leg involvement after a lifting event as a cab driver.

32. A September 2005 visit to Primary Health for follow-up on a wrist injury notes that Claimant reported a history "positive for chronic low back and physical therapy." It goes on to note the 2001 surgery "which he says completely cured his back pain. He has no back pain remaining now."

33. In July 2011, Claimant visited St. Al's ER for a leg laceration. He reported he had occasional back pain.

34. In October 2011, Claimant visited St. Al's ER for a rash. He reported he had chronic back pain.

35. Between 2001 and the instant claim, Claimant visited hospital emergency rooms on many occasions for unrelated, relatively minor complaints and conditions. He visited both St. Luke's and St. Al's for the same complaints on several occasions. Except as otherwise noted above, he made no back complaints. On the very few occasions when any examination of Claimant's back is noted in conjunction with these otherwise irrelevant visits, no back abnormalities are noted.

Prior Workers' Compensation Claims

36. Claimant worked for Employer on more than one occasion. During a prior employment with Employer in 1996, Claimant filed a workers' compensation claim for a chemical exposure to his eyes.

37. In 2001, Claimant filed a workers' compensation claim for an alleged low back injury while working for another employer. That claim involved the surgical fusion of Claimant's back at L5-S1.

38. Claimant's other prior workers' compensation claims did not involve either his low back or Employer.

DISCUSSION AND FURTHER FINDINGS OF FACT

39. 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). Facts need not be construed in a worker's favor when the evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 834 P.2d 878 (1992).

40. Although Claimant has provided varying accounts of the onset of his pain on July 18, 2012 and has provided inconsistent accounts of his medical history to his physicians, he is not deemed to lack credibility. However, to the extent that his medical records provide contemporaneous written accounts, they are deemed to possess greater evidentiary weight than Claimant's oral memory. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility

Accident and Injury

41. 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). Hard work is not an accident. *Perez v. J.R. Simplot Co.*, 120 Idaho 435, 816 P.2d 992 (1991). An increase of pain over a period of weeks without a discernible causative event is not an accident. *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004). However, when the demands of a job overcome a body's resistance to injury in a sudden and spontaneous moment, an accident is inferred to have occurred. *Wynn v. J.R. Simplot Co.*,

105 Idaho 102, 666 P.2d 629 (1983).

42. Claimant's story of how this unwitnessed event occurred has varied among the various statements and testimony he has provided – from a report of a gradual onset of pain worsening throughout that day and into the next morning, to a report of two specific moments of increased pain while working.

43. Here even if the gradual increase of pain version of Claimant's story is accepted, it occurred within a few hours—part of one shift—and while performing a discrete task, stripping the bedroom set. Although Claimant's credibility makes this a closer question, he did identify the specific task as he described the onset of his pain to the ER physician at his initial visit for medical care the next day. On balance, there is nothing persuasive in the evidence to denigrate Claimant's assertion that he suffered an accident.

44. However, in order to be compensable the accident must produce an injury. Here the evidence fails to establish that the events of July 18th caused damage to the physical structure of Claimant's body. Claimant complained of both back and leg symptoms. Neither was verifiable by objective medical examination. Claimant attended two visits with Dr. Kammer but failed to show for a scheduled third visit and did not attempt to make another appointment. He attended only two physical therapy visits as well. He made no attempt to seek medical care for more than five months. When he did again seek medical attention he reported an increase in back pain for the past two weeks.

45. A claimant has the burden of proving that 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).

46. Dr. Doerr's opinions about the nature of Claimant's conditions and their causes are entitled to greater weight. Both Drs. Verska and Kammer expressly depended upon the history provided by Claimant. That history was contrary to medical records which establish that Claimant suffered from back pain between the 2001 surgery and July of 2012.

47. Aside from his testimony of an increase in symptoms following the 2012 accident, testimony which the Commission finds unpersuasive, Claimant has adduced no credible medical evidence demonstrating that he suffered damage to the physical structure of his body as a consequence of the events of July 18, 2012. Claimant has failed to meet his burden of proving the occurrence of an accident causing an injury.

48. Having failed to prove the occurrence of a compensable accident/injury, all other issues are moot.

CONCLUSIONS AND ORDER

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

1. While the events of July 18, 2012 are sufficient to constitute an accident, Claimant failed to prove that such accident caused an injury.
2. Claimant is not entitled to workers' compensation benefits.

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

DATED this __6th__ day of __February_____, 2014.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Chairman

/s/
R. D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __6th__ day of __February_____, 2014, 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:

DANIEL J. LUKER
P.O. BOX 6190
BOISE, ID 83707-6190

JAMES A. FORD
P.O. BOX 1539
BOISE, ID 83701-1539

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/s/