BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENNETH WINN, Claimant, v. GORDON TRUCKING, INC., Employer, and XL SPECIALTIES INSURANCE COMPANY, Surety, Defendants.	**IC 2013-005604** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed September 11, 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 Boise on September 15, 2014. Dennis Petersen represented Claimant. Nathan Gamel represented Defendants Employer and Surety. The parties presented oral and documentary evidence. The parties took post-hearing depositions and later submitted briefs. The case came under advisement on June 5, 2014. This matter is now ready for decision.

ISSUES

The following issues are to be decided at this time:

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 Claimant has suffered an event arising out of and in the course of employment which, *if it also caused an injury*, would constitute an accident as defined by Idaho Worker's Compensation Law.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant, a long-haul trucker, contends he kicked a chock block from under a wheel

and hurt his right big toe. The event was unwitnessed, but he telephoned a supervisor that day to report it. He did not seek medical care at that time. He reported it several times in and about December 2012 because he recognized he needed medical care. By the time he did seek medical care, his injury had progressed. Ultimately, his leg was amputated above the knee. Claimant is diabetic.

Defendants contend the event did not occur as claimed. Even if it is determined to have occurred, Claimant did not provide timely notice as required by statute. No person recalls having received any of the alleged telephone calls. Claimant's medical records suggest Claimant belatedly fabricated his story of this event to try to make compensable a condition wholly caused by his failure to control his diabetes.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Claimant's oral testimony at hearing;
2. Claimant's exhibits A through N, admitted at hearing;
3. Defendants' exhibits 1 through 5 admitted at hearing; and
4. Posthearing deposition transcript of Employer's former driver manager Diane Brosseau.

All objections posed during deposition are overruled. Having analyzed all evidence of record, the Referee submits the following findings of fact and conclusions of law for review and adoption by the Commission.

FINDINGS OF FACT

(The issues in this matter having been bifurcated, evidence relevant to reserved issues is not intended here. No findings herein are intended to be applicable to issues not related to the questions of notice, limitations, or accident. An issue of credibility is subsumed in

the questions of accident and notice.)

Claimant's Testimony About the Chock Block Event

(Because credibility is central to analysis of the issues, the findings of fact in this section represent findings of fact only as to what Claimant has testified. The Referee's findings of fact as to what actually occurred will be presented elsewhere in this decision.)

1. Around September 1, 2012 Claimant was working in Effingham, Illinois. In the course of hooking up an empty trailer to his tractor, Claimant crawled under the trailer and, after unsuccessfully trying to remove a chock block from under the left front wheels, kicked it free with his right foot. He felt pain in his right big toe and thought he had broken a bone in it. ("Chock Block Event").

2. Claimant continued to work and walked around the rig to complete the hook-up. He reentered the cab, and checked his toe. Claimant telephoned Employer from inside the cab and informed Harry Domek of the Chock Block Event and injury. Claimant told Mr. Domek that he broke his big toe and how. Mr. Domek informed him there was no need to report it to the customer, and Domek inquired about whether Claimant intended to seek medical care. When Claimant denied an immediate need for medical care, Domek said, "I will take care of it." Claimant ended the telephone call and continued to work the rest of the day.

3. Over the next few days Claimant continued working. He periodically observed the toe. It was swollen and bruised. He taped it to his second toe. He did not seek medical care.

4. Nearly one week later Claimant again talked by telephone with Mr. Domek. Domek asked about the foot; Claimant denied any new problems.

5. Eventually, perhaps within one week of the Chock Block Event, a callus on Claimant's anterior right big toe cracked. The callus had existed for some time before. Over

time a fissure developed.

6. Claimant returned to Boise in late October 2012. His right foot "was fine." The fissure had healed. He no longer taped the toes. There was still some swelling. He did not seek medical care.

7. Claimant was back on the road three days later. He worked steadily until just before Thanksgiving when he noticed a little swelling in his big toe.

8. Near Claimant's birthday, December 16, it was "a little bit worse." Another fissure appeared on the big toe, facing the second toe and near the bottom. He wrapped a Band-Aid around it. He informed the new driver manager, Diane, that he needed medical care in Boise. He did not describe the Chock Block Event to her.

9. Claimant continued to work. Just before Christmas he again requested Diane allow him to come back to Boise for medical care.

10. Claimant's foot continued to worsen. On New Year's Day he again contacted Diane and requested to be allowed to return to Boise for medical care. He continued to work.

11. On January 6, 2013 driving from Arkansas to California, Claimant telephoned Employer, spoke to "Jimmy" the night dispatcher, and made arrangements for another driver to take the load.

12. Claimant called an ambulance, passed out, and about three weeks later woke up without a right leg.

13. Claimant admitted that he never told Employer he was diabetic or that he had prior foot issues.

Supervisors' Testimony

(Because credibility is central to analysis of the issues, the findings of fact in this section

represent findings of fact only as to what supervisors have testified. The Referee's findings of fact as to what actually occurred will be presented elsewhere in this decision.)

14. Harry Domek was Claimant's driver manager for refrigerated loads from the time Claimant began working for Employer. Mr. Domek recalls meeting Claimant and that he enjoyed working with Claimant. Mr. Domek left Employer on October 28, 2012. Shortly before that date Claimant had been reassigned to driver manager Diane Brosseau. Employer's file should reflect the date of reassignment.

15. If any driver reported a personal accident or injury Mr. Domek would have instructed the driver to telephone Employer's safety department through Employer's 800 number. Mr. Domek had the communications capability to directly transfer a driver's call to the safety department if the driver so requested. Mr. Domek was not expected by Employer to make any written record of any driver's injury report.

16. When Employer first made Mr. Domek aware, in early 2013, of Claimant's claim, he could not recall Claimant ever advising him of the Chock Block Event or any injury.

17. Dianne Brosseau did not recall Claimant ever telling her about the Chock Block Event. She does not remember dealing with Claimant at all. If a driver had reported an injury to her, she would have referred him to Employer's HR department. If notified by telephone Ms. Brosseau would have transferred the call to HR.

18. James Pitman is fleet manager for Employer. He does not go by "Jimmy," but no other company employee could reasonably be the "Jimmy" night dispatcher that Claimant referred to. In late Summer and Fall 2012 Mr. Pitman was a support shift driver manager for refrigerated loads; he dispatched on nights and weekends. He did not specifically recall Claimant. If a driver reported an injury, Mr. Pitman would refer him to Employer's

"L&I" or safety department. Mr. Pitman was not expected to make a written record of any event or injury in which the driver denied a need for medical care.

19. Mr. Pitman recalls Claimant telephoned him from New Mexico when he could no longer drive. This was Mr. Pitman's first awareness of any health issue related to Claimant. Mr. Pitman does not recall Claimant ever describing to him the Chock Block Event.

20. Kelly Sanchez is Employer's occupational health supervisor. She deals with about 140 workers' compensation claims annually. Ms. Sanchez does not recall meeting Claimant in orientation. All work injuries are reported to her or to Andrea Teal. As supervisor, Ms. Sanchez would promptly be made aware of any injury calls received by Ms. Teal. A written record would be made beginning with the first report of an injury. A written record would be made for drivers who reported but did not seek medical attention. Ms. Sanchez first heard about Claimant upon his hospitalization in January 2013. Mr. Pitman reported it. Ms. Sanchez was informed Claimant was hospitalized for a diabetic condition.

21. Ms. Sanchez first heard from Claimant about February 19, 2013. It was at this contact that she first learned Claimant considered his condition to be work related and heard Claimant's description of the Chock Block Event. Ms. Sanchez promptly contacted Harry Domek, Diane Brosseau, and Jim Pitman. All three reported no recollection of Claimant ever asserting an injury or mentioning the Chock Block Event before January 2013. Ms. Sanchez has reviewed company records and found no indication of Claimant reporting an injury, requesting medical care, or describing the Chock Block Event before his January 2013 hospitalization.

22. Regardless of the name of the department, supervisors agreed an injured driver would be referred to Kelly Sanchez or Andrea Teal.

Medical Records

(Because credibility is central to analysis of the issues, the findings of fact in this section represent only specific details of certain medical records which are pertinent as being consistent or inconsistent with Claimant's testimony. Nevertheless, the Referee analyzed the entire record carefully. The findings of fact in this section are intended to represent only what the medical records say and are not intended to implicate any issue other than credibility. The Referee's findings of fact as to what actually occurred will be presented elsewhere in this decision.)

23. About 1989 or 1990 Claimant was diagnosed as having diabetes, type 2. Medical records refer to Claimant's diabetes as "uncontrolled." His A1c numbers of record include:

- 8.3 on August 12, 2009,
- 7.0 on April 5, 2010,
- 8.6 on December 1, 2010 (according to lab report, a physician's progress report erroneously records it at "8.16"),
- 11.1 on January 14, 2011,
- 9.7 on December 12, 2011,
- 12.1 on March 11, 2012,
- 9.4 on May 11, 2012,
- 20 on January 6, 2013 (handwritten, not supported by lab record),
- 9.0 on May 9, 2013,
- 10.7 on November 11, 2013.

Lab data reports deem all of these results to be "high," any result above 6.0 representing diabetes. Some physicians, referring to the majority of these results, have called Claimant's diabetes "uncontrolled." Some physicians, referring to the fluctuations of these results over time, have called Claimant's diabetes "uncontrolled." Moreover, Claimant's point-in-time blood glucose levels have been recorded in a range from 70 to 372, with physicians mentioning levels around 500. Lab data reports deem fasting blood glucose levels of 70 to 100 as "normal," everything above that is considered "high." Where physicians' records have mentioned

the correlation between A1c averages and point-in-time blood glucose levels, they support a conversion formula in which A1c of 6.0 indicates blood glucose averages 125—the higher end of normal, non-diabetic, and every additional 0.1 of A1c implies about an additional 3 points to average blood glucose.

24. In July 2009 Claimant's second and third left toes were amputated. About one month later Claimant began treatment at the Center for Wound Healing and Hyperbaric Medicine ("Wound Center"), sponsored by St. Lukes and Elks, in Ada County. Later, a transmetarsal amputation around the prior amputation was performed.

25. Another "wound" or "ulcer"—medical records use these terms interchangeably—on the bottom of his left foot was treated beginning about October 2010. Frequent treatment continued for months without significant healing. Claimant's compliance with recommendations was uneven. The problem increased when Claimant was absent from wound care between April 21 and June 21, 2011. On September 9, 2011 it was deemed healed. On September 13, 2011 Claimant returned for care. He had not been wearing his diabetic shoes and noticed a new "blister" in the same area. It progressed into an ulcer; care resumed.

26. On October 3, 2011 treatment began for a wound on the bottom of Claimant's right foot, about the right plantar first metatarsal head. As treatment continued, the right foot ulcer became as significant to physicians as the left, if not more so. In February 2012 the Wound Center performed a procedure without local anesthesia because Claimant's diabetic neuropathy left him without sensation in his right plantar first metatarsal head. Concerns about noncompliance with diabetes regimen and footwear were reiterated frequently. Claimant's repeated assurances of future compliance were unsupported by consistent action.

27. On March 12, 2012 the Wound Center noted Claimant's left foot ulcer had closed.

A right foot ulcer at the fourth toe remained. However, by March 19, 2012 the left foot ulcer had returned.

28. A Wound Center record is erroneously dated March 18, 2012. It should be dated May 18, 2012.

29. On April 12, 2012 the Wound Center noted a new ulcer over Claimant's left Achilles.

30. On April 26, 2012 the Wound Center noted the right foot ulcer was "resolved." Exam notes specifically stated the ulcer measured "0.1 X 0.1 cm with a depth of 0.1 cm."

31. Claimant maintained frequent treatment at the Wound Center until May 2012. On May 14, 2012 Wound Center notes state that Claimant's memory was inconsistent with documented notes about compliance warnings.

32. On May 16, 2012 the Wound Center counselled Claimant that a below knee amputation was probable unless he complied with footwear recommendations and his diabetic regimen. On May 18, 2012 Claimant was anticipating returning to truck driving. The Wound Center repeated its cautions about regular care and treatment.

33. May 25, 2012 was Claimant's last visit with the Wound Center. The note states:

> The patient is now in a total-contact cast on the left, Darco on the right; however, he comes in today with his New Balance shoe on the right, but he is in his total-contact on the left. He notes that he starts his new job and has orientation in Seattle starting on Tuesday and plans on not wearing his total-contact cast, as he does not want it to be known to his new employer that he is with a disability.

At hearing Claimant denied that he made these statements to Wound Center physicians. Further, the note states, "[H]e notes that he also wants to go get a pair of work boots or cowboy boots to wear as well." Another note of that visit states, He "was strongly advised not to do so." Moreover, the note continues, "Pt is aware that his wounds may rapidly decline [with]

inconsistent tx & has been told that returning to truck driving is not advised at this time." The examination on this date noted ulcers on both the left and right feet.

34. On May 29, 2012 Claimant underwent a DOT medical examination to begin work for Employer. It noted his diabetes, lost toes, and bilateral forefoot ulcers. He received a medical card which cleared him to drive.

35. About June 25, 2012 Claimant underwent another medical examination required by Employer. Claimant testified its purpose was to evaluate sleep apnea. The report falsely denies diabetes and foot problems.

Additional Findings of Fact

36. Claimant has worked for various trucking companies since about 1981.

37. In 2010 Claimant filed a workers' compensation claim for a low back injury. He promptly reported an accident and sought medical care.

38. ICRD provided assistance for Claimant's 2010 low back claim until March 2012 when Claimant discontinued contact. ICRD closed its file on May 1, 2012.

39. At the end of May 2012, Claimant attended Employer's new driver orientation in Washington State. It included instructions about how to report a traffic accident. Evidence of record does not show it likely whether the orientation included instructions about reporting other, non-traffic accidents or injuries; Claimant testified he did not recall being so instructed. Claimant's official hire date was June 1, 2012.

40. Employer primarily uses two communications systems to receive and send messages to its drivers. One is an 800 number. The other is Qualcomm, a computer-controlled written messaging system. Qualcomm notes are archived by Employer for about three months before they are unavailable to driver managers or fleet managers. E-mail is uncommonly used.

41. Claimant worked over the road from June 2012 through January 6, 2013. He took three days off in Boise at the end of October ("October break").

42. On January 6, 2013 Claimant phoned Employer's dispatcher, Mr. Pitman, and made arrangements for another driver to take the load from Albuquerque to California. Claimant contacted an ambulance which transported him to a hospital. Claimant's right leg was amputated on an emergency basis with significant follow-up procedures, including subsequent amputations and debridement at successively higher levels. Treatment also included treatment of ulcerations on Claimant's left foot as well as evaluation and treatment of a shoulder condition. Employer's health care provider paid these medical bills. Claimant was hospitalized from January 6 through 24 at Presbyterian Hospital in Albuquerque then transferred to Kindred Hospital for long-term acute rehabilitation. Presbyterian Hospital records show Claimant was admitted with Employer's health care insurer identified; no workers' compensation involvement was mentioned.

43. Presbyterian Hospital records, recorded by various physicians, do not mention that Claimant provided any history alleging the Chock Block Event or other work-related event. Infections consultant, Christine Boehringer, D.O., recorded Claimant "has had a chronic left foot ulcer for the last 7 to 8 months on the dorsum of his left foot. His right great toe, he said had a bruise initially about 4 months ago, which then developed into a blister which then ruptured and he has had an ulcer, which he states was rather large for about 3 months."

44. The first written reference to Claimant alleging a workers' compensation claim is dated February 19, 2013. Claimant's right leg had already been amputated. Physicians were anticipating left foot surgery. For about one week authorization was being sought to perform that surgery. Employer's health care provider informed the physicians that Claimant's coverage

had lapsed because he had not worked for more than 30 days and had not paid COBRA premiums to continue his health care coverage. A February 19, 2013 note of nurse Bishop states:

> Summary Notes: case management—met with pt. several times today to discuss the fact that his insurance with BC/BS has lapsed. I verified this with CM/Jean at Regents BC/BS. Met with pt. while he called his employer, Gordon Trucking Company (1–800–426–8486) and he spoke to HRD and was told that his insurance has in fact lapsed because he hasn't worked enough in the last month to have insurance coverage. Pt. was told the amount that it would cost for Cobra benefits. Pt. discussed the fact that this should have been a workman's comp claim secondary to the fact that in his words that he injured himself while on the job. HRD stated that they had no documentation regarding that and transferred the pt. to the workman's comp claim department. Pt. spoke to Kelly while I listened on speaker phone. The company has not received a claim for workman's comp at this point and so Kelly took all of the information from the patient regarding the original accident. She stated that she will investigate the claim and get back to the pt. either tonight or in the a.m. I then called Pres. Hospital, authorization nurse and notified her of delay in surgery until we can get this straightened out with the workman's comp. Called Dr. Uchenna Chukwurah's office and spoke to Stacey and notified her that we need to delay the surgery until the workman's comp claim is in place and workman's comp can approve the surgery. Told pt. that we would have to delay the surgery until this issue of insurance was straightened out and he agreed with the new plan. Also called the provider and notified her of delay in surgery and the reason for the delay. bb

45. Nurse Bishop's note dated February 25, 2013 reflects that Kelly informed her that the workers' compensation claim was being denied. Later that day the nurse's note records that Claimant "said that he called the dispatcher the day after his injury and reported the accident and talked to them nearly everyday with updates . . ." The note further states Claimant alleged "the injury did occur on the job which caused the loss of limb."

46. Nurse Campbell's note dated February 25, 2013 states in part, "Even[]though the patient said that he called the dispatcher the day after his injury and reported his accident, and talked to them nearly everyday with updates the workers comp informed Becque Bishop that they would deny his application because of untimely reporting."

47. While coverage was still being sorted out a March 4, 2013 nurse's note mentions

that "a new abscess of the stump was found."

48. A hospital paid two months of Claimant's COBRA premiums in order to proceed with the proposed surgery. When the health care insurer required an additional month's COBRA payment before authorizing surgery and an acute rehabilitation facility required proof of that payment before accepting Claimant into its care, Claimant's mother paid it.

49. In November 2013 Claimant's left leg was amputated below the knee.

50. Claimant's Form 1 and initial Complaint allege an injury date of August 9, 2012. His Amended Complaint alleges an injury date of September 1, 2012.

DISCUSSION AND FURTHER FINDINGS OF FACT

51. 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). However, facts need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc*., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

52. Claimant's demeanor at hearing gave no perceptible indicia of untruthfulness. To the contrary, he makes a good first impression. He tended to be somewhat suspicious of questions and evasive in answers upon cross-examination, but not outside that normally encountered in an adversarial proceeding.

53. In determining credibility, it is the substance of Claimant's testimony, rather than his demeanor, that causes concern.

54. Claimant's testimony about the Chock Block Event differs slightly between the hearing "(H)" and his deposition "(D)" in the following details: Whether the Chock Block

Event occurred nearer to September 1, 2012 (H) or (D) nearer to August 9, 2012; whether Claimant telephoned Mr. Domek while in the customer's yard (H) or (D) had left the customer before telephoning[1]; whether he taped his toes together because of the presumed fracture within 24 hours of the Chock Block Event (H) or (D) one month later because he was trying to keep the swelling down; whether his toe showed bruising (H) or (D) not; whether Diane began working as driver manager after Claimant took days off in late October 2012, and between December 16 and 25, 2012 he first mentioned to her the Chock Block Event (H) or (D) he spoke with Diane before his October break and mentioned a need to "go have my foot looked at," which began a conversation in which Claimant told Diane about the Chock Block Event or (D also) whether in December he told Diane he needed to "take time off just after Christmas, before New Years . . . because I had to go see the doctor (in Boise)"; whether a callus fissure on the side of the big toe healed by Thanksgiving and a new one appeared on the bottom of the big toe nearest the second toe, which new fissure steadily worsened through December (H) or (D) his wound was "on top of the toe" and healed so much he decided against seeking medical care during his October break and remained well enough that he "hadn't even thought about it anymore" until Thanksgiving or into December.

55. At hearing Claimant described his prior amputation as including his left second and third toes, but at deposition testified his left big and second toes were amputated.

56. At hearing Claimant testified he wore tennis shoes expressly approved by his wound doctors at all times while working for Employer. At deposition he testified he wore work boots, not tennis shoes, and only put tennis shoes on for his last trip from Arkansas to California which ended in a New Mexico hospital.

[1] During his hospitalization, Claimant told physicians he reported the Chock Block Event to his dispatcher *the day after* it occurred.

57. At hearing Claimant testified his left foot ulcers healed when working for Employer. January 2013 medical records, the first since he began with Employer, showed two left foot ulcers. In November 2013 when his left leg was amputated he reported to one physician an "over two-year history of nonhealing wound" in his left foot and to another that "he has left foot chronic ulcers since last 40 years." Whether "40" was an exaggeration by Claimant at the time or a typographical error in place of "4" or perhaps a "for two" spoken in dictation by a physician remains ambiguous.

58. Additionally, Claimant's testimony about his general health condition is occasionally vague or inconsistent at varying accounts. He testified that the right foot callus fissure on the outer edge of his big toe healed for a time before one appeared on the inner edge nearer the second toe. He also testified that the initial callus fissure progressively moved around the bottom of his toe from location to location. Claimant testified vaguely that his diabetes was fine or at least under control at every point in time about which he was questioned. Medical records contradict his generalized opinion. The January 2013 A1c reveals that the three- to four-month period before he sought medical care was a time of unprecedented uncontrolled diabetes for him.

59. The record shows Claimant is a poor historian. His memory is fallible. When pressed for material details, his account is often vague, ambiguous, inconsistent, or some combination of all three.

Notice

60. Notice of an accident shall be given "as soon as practicable but not later than sixty (60) days after the happening." Idaho Code § 72-701.

61. The date of Claimant's first report to Employer about the Chock Block Event is

disputed by the parties. Claimant's uncertainty about the date of the Chock Block Event adds uncertainty to the question of timely notice. Claimant's suggested September 1 date, not the August 9 date, will be, *arguendo*, deemed accurate for purposes of analysis in considering whether timely notice was given. Thus, if notice was given during the October break, it would be considered timely. By either date, any notice given between Thanksgiving 2012 and February 19, 2013 was untimely.

62. One person's inability to recall an event is not, by itself, positive proof that it did not occur. However, all four of the people who are alleged to have received, directly or indirectly, Claimant's report of an accident and/or injury have denied any such recollection. The two who were in position to have the most timely and direct contact with Claimant no longer work for Employer.

63. The record allows three possibilities: (1) Claimant reported to his supervisors as completely and as often as he testified, and they simply don't remember; (2) Claimant reported to his supervisors as completely and as often as he testified, and one or all are falsely claiming a lack of memory; or (3) Claimant's testimony is exaggerated or recently fabricated.

64. By Claimant's testimony, he reported the Chock Block Event to Mr. Domek on the date it occurred; one week later, Mr. Domek asked, and they again discussed the condition of Claimant's foot. This testimony implies that the Chock Block Event was sufficiently significant to Mr. Domek that he brought it up again in a telephone conversation one week later. It requires that (1) despite Mr. Domek thinking it so significant, he neglected or refused to pass on this information to Ms. Sanchez and then forgot about it, or (2) Mr. Domek and/or Ms. Sanchez are lying about having received the report and have continued to lie about material details of Ms. Sanchez's February 19, 2013 investigation. Claimant's own testimony that Mr. Domek

initiated the subject in conversation one week later makes it less likely that Mr. Domek has simply forgotten.

65. Claimant did not testify that he reported the Chock Block Event to any supervisor during his October Break. Rather, he vaguely expressed uncertainty about when Ms. Brosseau became his driver manager, whether before or after his October Break, and when he first talked to her about his need for medical care. The record does not show it likely that Ms. Brosseau was assigned to be Claimant's driver manager before Mr. Domek left Employer on October 28, 2012. Claimant had begun his October Break on or before that date. The record does not show it likely that he had contact with Ms. Brosseau before his October Break.

66. Evidence concerning later contacts—Thanksgiving to the date of hospitalization—is relevant mostly to support or undermine the likelihood of Claimant's allegation that he reported the Chock Block Event to Mr. Domek on the date it occurred. Similarly, evidence of Ms. Sanchez's February 19 investigation supports her testimony that she was unaware of any report of work-related accident or injury before that date.

67. Claimant's testimony about his repeated contacts with Ms. Brosseau makes it less likely that she neglected or refused to pass the information to Ms. Sanchez and then forgot about it in time for Ms. Sanchez's February 19 investigation.

68. Mr. Pitman did recall the January 6, 2013 call from Claimant. Per Employer's standard practice, Mr. Pitman immediately reported it to Kelly Sanchez. Still, none of the four recall any indication that Claimant's need for hospitalization was alleged to be work related before the February 19, 2013 contact which Ms. Sanchez recalled and testified to.

69. These four witnesses' testimony showed consistent understanding of Employer's expectations about receiving and reporting an injury. Mr. Pitman's and Ms. Sanchez's

actions show they acted according to that understanding. The testimony of each of the four is materially consistent with the others'. There is an absence of written evidence to suggest any inconsistency.

70. Claimant's report to physicians in February that he reported to Employer that he had an accident or injury "nearly every day" from the date of the Chock Block Event is not credible. Claimant's testimony that he reported it when it happened to Mr. Domek, that he reported it repeatedly to Ms. Brosseau beginning shortly after Thanksgiving or at any time, *and* that he indicated his hospitalization should be considered work related to Mr. Pitman on January 6, 2013, is not credible.

71. The preponderance of the evidence shows it likely that supervisors do not recall Claimant communicating the Chock Block Event or claiming a work-related injury before February 19, 2013 because he did not do so. Even when he called on January 6, 2013, Claimant did not communicate to Mr. Pitman that he believed his condition was work related.

72. Not until after hospitalization began, after Claimant's right leg was amputated, after physicians indicated an amputation of Claimant's left foot was imminent, *and* after Employer's health insurer denied further coverage without payment of COBRA benefits, did Claimant first notify Employer to allege an accident or work-related injury. Such notice was statutorily untimely.

Accident

73. To the extent an issue arose about whether the Chock Block Event would constitute an accident *if it caused an injury*, that issue is moot as a result of Claimant's failure to provide timely notice. The question of whether it likely occurred need not be addressed.

CONCLUSIONS

1. Claimant failed to provide timely notice of an accident and injury as required by Idaho Code § 72-701;

2. The question of whether the Chock Block Event occurred and would constitute an accident if it caused an injury is moot.

RECOMMENDATION

Based on 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 31st day of August, 2015.

INDUSTRIAL COMMISSION

__/s/_____
Douglas A. Donohue, Referee

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2015, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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dkb

__/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENNETH WINN, Claimant, v. GORDON TRUCKING, INC., Employer, and XL SPECIALTIES INSURANCE COMPANY, Surety, Defendants.	**IC 2013-005604** **ORDER** Filed September 11, 2015

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended 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 recommendations of the Referee. The Commission concurs with these recommendations. 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 provide timely notice of an accident and injury as required by Idaho Code § 72-701.

2. The question of whether the Chock Block Event occurred and would constitute an accident if it caused an injury is moot.

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

DATED this 11th day of September, 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 11th day of September, 2015, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R. PETERSEN
P.O. BOX 1645
IDAHO FALLS, ID 83403-1645

ERIC S. BAILEY
NATHAN T. GAMEL
P.O. BOX 1007
BOISE, ID 83701

dkb __/s/_____