BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SCOTT CHADWICK, Claimant, v. MULTI-STATE ELECTRIC, L.L.C., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2012-021676** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed May 20, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Boise on January 31, 2014. Claimant was present at the hearing and represented himself, *pro se.* Neil D. McFeeley of Boise represented Employer and Surety (referred to collectively as Defendants). The parties presented oral and documentary evidence. No post-hearing depositions were taken. Post-hearing briefs were filed, and the matter came under advisement on April 9, 2014.

ISSUES

Per the December 24, 2013 amended notice of hearing, the following matters are at issue:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of employment;

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; and

4. Whether proper notice was provided.

5. All other issues are reserved. *See* transcript 7/18-15/3.

CONTENTIONS OF THE PARTIES

Claimant contends that his low back condition is the result of work activities in general and, specifically, jumping out of a truck on May 29, 2012 and lifting a trencher on July 26, 2012. Defendants counter that Claimant has failed to prove by a preponderance of evidence that he had an industrial accident in either May or July 2012 and, even if he did, his claims should be dismissed because he did not provide timely notice of those events to Multi-State Electric.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition of Claimant taken October 25, 2013;

2. The testimony taken at hearing of Claimant, Carolyn Chadwick, and Brad Baker;

3. Claimant's Exhibits A through J (with the exception of H, which was withdrawn by Claimant); and

4. Defendants' Exhibits 1 through 15.

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

BACKGROUND AND MEDICAL HISTORY

1. Claimant was 47 years of age at the time of the hearing and resided in Nampa, Idaho. He worked for Multi-State Electric from 2005 until August 3, 2012, as an apprentice

electrician. He and Brad Baker, owner, had a good relationship.

2. Claimant fractured his right hip in a car accident when he was 17 or 18 years of age. He was involved in another car accident in December 2009 that resulted in cervical and thoracic spine symptoms. His symptoms improved after he received chiropractic care for several months.

3. Claimant's job, at times, required bending, twisting, and heavy lifting. Claimant has obtained chiropractic treatment for back aches and pains "on and off for 20" years. DE-10; *see also* DE-9. He has experienced sciatica on and off, from "ass to knee," since approximately August 2012. *Id.* at 12.

4. The record contains evidence of three potential causes of Claimant's back condition. Pivotal facts especially relevant to each potential basis for liability follow.[1]

MAY 29, 2012 JUMPING OUT OF TRUCK ACCIDENT

5. On or about May 29, 2012, Claimant presented for treatment/evaluation at Kuna Chiropractic. There, he was seen by Kevin Rosenlund, D.C. Chiropractor Rosenlund recorded the following history on the occasion of that visit:

> On May 29, 2012, Mr. Scott Chadwick presented himself for treatment of his complaints stemming from a work related injury that he was involved in on or about May 26, 2012.
>
> The patient was treated for low back pain that began on or about 5-26-12. The mechanism of the injury was jumping out of a truck. The quality of the pain is sharp and aching.
>
> **INITIAL COMPLAINTS:**

[1] This case is an anomaly because it addresses two potential industrial accidents within a single case. Normally, Claimants are required to file separate complaints for each alleged industrial accident; however, Claimant's complaint was inadvertently filed under a single case without any objection from either party. Claimant's claims are treated herein no differently than if two separate cases had been consolidated.

> After jumping out of the truck at work the patient reported that he had low back pain that radiated through the right side.

6. Kuna Chiropractic records demonstrate that Claimant regularly sought treatment following the May 2012 injury: he obtained five treatments in June, one treatment in July (July 30), three treatments in August on or before the day he called in to report he could not return to work (August 6), and several more treatments through October 12, 2012. All of these chart notes attribute Claimant's low back pain to the May 2012 injury. It appears that the same information was copied from note to note, indicating that Claimant did not provide new information regarding his May 2012 injury. On August 6, 2012, Claimant was advised by his chiropractor to seek a physician's opinion, which he did (see Dr. Weiss, below).

7. Although the Kuna Chiropractic records appear to reflect that Claimant gave Chiropractor Rosenlund a history of a specific mechanism of injury, i.e. jumping out of a truck, this history was not endorsed by Claimant in subsequent conversations he had with agents of the State Insurance Fund. Indeed, when interviewed by Surety's investigator, Claimant explained that he actually believed that his low-back problems were the result of cumulative insults to his low back incurred during his work as an electrician. At the time of his October 25, 2013 deposition, Claimant testified that he did not recall describing a particular incident to Chiropractor Rosenlund. Claimant testified that in the spring of 2012, as work picked up, he began to note the onset of low-back pain which he associated with the general demands of his work. (Claimant deposition 58/11-63/2). Only after reviewing his medical records in September of 2012 was Claimant reminded of a May 26, 2012 event, and he questioned this because he typically did not work on Saturdays. It is noted that in his complaint Claimant actually identified a May 29, 2012 date of injury.

8. Mr. Baker testified that he became aware that Claimant believed his back condition was due to work activities, and perhaps an industrial accident in May 2012, in September 2012. He did not remember how he learned this information. He received an August 23, 2012 chart note from Primary Health, indicating a potential May 29, 2012 industrial injury, on August 26, 2012.

9. Richard E. Manos, M.D., an orthopedist who evaluated Claimant on July 30, 2013, noted that, on the information available to him, he considered Claimant's low back condition to be work related. However, he did not relate it to jumping out of a truck in May 2012.

> Right L4-L5 HNP without L5 radiculopathy causation. From the limited records that I have been able to review and the patient's history, it certainly appears that this is a work-related injury. He is an electrician. He has to wear a tool belt. He does have to climb [*sic*] small spaces. It is not unreasonable to suggest that he did have a back injury in May. Certainly, lifting a trencher could have created the extruded disk fragment which is seen on his MRI from October. Therefore in my opinion, based upon the limited records that I have reviewed and the patient's history, my physical exam and my review of his MRI, this would be considered a work-related injury.

CE-243. No other physician has opined that Claimant's low back condition is related to an injury incurred while jumping out of a truck in May 2012.

10. In summer 2012, Mr. Baker was aware that Claimant was having trouble with his back. He offered to send Claimant to see his son, a chiropractor, for treatment. He also sent Claimant for a massage at one point.

11. On July 31, 2012, Claimant texted Mr. Baker that he was slow that day due to back pain. He went to work anyway. He did not say that he thought his back pain was work-related. Claimant believed Mr. Baker should just know this by virtue of the fact that Claimant was telling him he had pain.

12. On August 6, 2012, Claimant called Mr. Baker and advised he could not work due to back pain. That same day, Claimant was evaluated by Ann Weiss, M.D., an emergency medicine physician at Primary Health. Claimant did not report a workplace cause for his symptoms. Instead, he reported that he had experienced chronic back pain for years, and that low right-sided back pain had started "last thur.". He also reported he had been seeing a chiropractor since June. According to the chart note:

> 46 year old male presents with c/o Low Back Pin Acute low back pain for several days. Has had chronic back pain for many years, manages it with ibuprofen and chiropractor. Having severe pain in lower right back today, does not recall recent injury or strain. No numbness or weakness in legs. No incontinence. No urinary problems. Pain worse with movement. Took wife's flexeril and norco today with some improvement, but it has not lasted..

CE-192 (reproduced as in original).

13. Dr. Weiss diagnosed back sprain/strain, prescribed pain medication, and recommended icing/heating and light stretching.

14. On August 13, 2012, Claimant indicated on a patient questionnaire for McKim Chiropractic that his sciatica (recurring) had restarted "4 weeks ago" and had come on "gradually" (as opposed to "suddenly"). DE-12.

15. Mr. Baker advised Surety's investigator that he first became aware Claimant was reporting his back pain was work-related on August 16, 2012, following a conversation with Claimant. Claimant had advised that he "needed to go the next step," which Mr. Baker understood to mean he wished to pursue workers' compensation benefits. DE-9.

16. Claimant returned to Primary Health on August 17, 2012. Claimant reported a work-related injury. Colin Soares, physician assistant, noted: "[C]/o injury related to work exacerbated by, onset was at work, repetitive motion, labor." CE-194. Mr. Soares ordered

x-rays which were negative for acute injury. He prescribed medications and recommended icing. Claimant continued to receive chiropractic treatments.

17. On August 23, 2012, Claimant returned to Primary Health. This time, he was evaluated by Stephen Martinez, M.D., a family and occupational medicine practitioner. Claimant reported he injured himself at work on May 29, 2012, but also that he thought his pain was due to repetitive lifting and bending.

> No falls or trauma, but feels that repetitive lifting and bending activities while on the job is the cause of his back pain. He states that he was seen recently in urgent care and claimed that it was not a work related condition, but now feels that it is indeed a work related condition.

CE-197. Without elaboration, Dr. Martinez concluded Claimant's condition was "reasonably medically work related," advised Claimant to cease his chiropractic treatments, and prescribed medications and icing. CE-198. Dr. Martinez continued to treat Claimant and, as discussed, above, Claimant continued to see his chiropractor, who continued to recommend medical treatment.

18. Sometime in August 2012, Carolyn Chadwick, Claimant's wife, telephoned Mr. Baker and told him how bad Claimant's back was hurting and that Mr. Baker needed to help with medical treatment costs. She did not report any specific injurious event at work.

19. On August 27, 2012, Mr. Baker filed a First Report of Injury indicating that Claimant injured himself over the weekend of August 4, 2012, when he was not working. He also wrote a letter to Surety on that day stating he knew Claimant was then asserting his back condition was work-related.

20. On September 26, 2012, Claimant advised Surety, during its investigational interview, that he could recall no specific injurious event leading to his low back pain. Instead,

he believed it was the result of a cumulative injury over time, during his employment with both Multi-State Electric and prior employers. He denied any specific accident, asserting that his pain began around the end of July 2012 or the beginning of August. He thought he may have hurt himself on a scissors lift, but he claimed to recall nothing else. As discussed, above, Claimant was most likely intentionally withholding information regarding his May 2012 injury. Also, Claimant reported that he did not advise Multi-State Electric that he thought his back condition was due to his work activities before August 17, 2012.

21. On October 8, 2012, Claimant underwent an MRI of his low back. The reading radiologist diagnosed pathology, including vertebral spurs or disc bulges at each level from L2 through S1, and annular fissures or tears at each of those levels except L3-4. He specifically noted "L4-L5 right paracentral disc protrusion with mild reduction of spinal canal caliber and localized mass effect in the region of the right L5 nerve root." CE-188. On October 18, Dr. Martinez diagnosed a back sprain and referred Claimant to an orthopedist.

22. On October 16, 2012, Surety denied Claimant's claim.

JULY 26, 2012 TRENCHER ACCIDENT

23. On November 6, 2012, in response to the denial of his claim, Claimant first notified Surety that he must have injured his back lifting and pulling a trencher on July 26, 2012. *See* CE-128. Through the time of the hearing, he did not recall any specific new pain or discomfort associated with that event. He did recall that it was heavy and should have been equipped differently to ease its attachment to a trailer hitch, and that he did not work as hard as he usually did the rest of that day.

24. Claimant's chiropractic and medical treatment records do not reflect any new injury at any point since the end of July. On August 13, 2012, he reported to McKim

Chiropractic that he had been experiencing sciatica which came on gradually for four weeks, placing the onset of his symptoms well before July 26.

25. Mr. Baker testified that he first learned of the possibility of a July 2012 trencher accident on the day of the hearing.

26. On December 27, 2012, Surety confirmed its denial. "[W]e are still unable to determine that you sustained a specific accident arising out of and in the course of your employment or that your condition constitutes an occupational disease as that term is defined under the Idaho Code." CE-133.

27. On March 15, 2013, Claimant filed his Complaint alleging accidents on May 29, 2012 and July 26, 2012.

28. As noted, above, Dr. Manos opined on July 30, 2013 that, on the information available to him, Claimant's low back condition could be due to lifting a trencher.

DISCUSSION AND FURTHER FINDINGS

29. The provisions of the 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, the Commission is not required to construe facts 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).

ACCIDENT

30. The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was

caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967). To be compensable, the accident-produced injury must result in violence to the physical structure of the body. *See* Idaho Code § 72-102(18)(c).

31. 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).

32. In his complaint, Claimant contends that he suffered two accidents, the first occurring on or about May 29, 2012, when he jumped out of his work truck, and the second occurring on or about July 26, 2012, when he was unloading a trencher at Tates Rents and/or a job site. However, at the time of his recorded statement, his prehearing deposition, and at other times, Claimant has clearly expressed the view that he does not, in fact, attribute his low-back condition to either or both of the alleged accidents. Rather, Claimant believes that his low-back condition is the result of cumulative insults to his low back, i.e. long term wear and tear related to his work as an electrician. Claimant has testified that it was only on the basis of retrospective review of his medical records that he identified the alleged accidents. He reviewed his medical records and attempted to ascertain what he was doing at or about the time the care was rendered,

not because he attaches any significance to the incidents, but because he perceived a need to identify a particular incident.

33. As respects the alleged accident of May 29, 2012, it is true that Dr. Rosenlund's notes reflect that Claimant did describe a particular incident of jumping out of his truck on May 26, 2012. It is not entirely clear why Claimant chose to claim that the accident occurred on May 29th, although he noted that he typically did not work on Saturdays, and May 26, 2012, fell on a Saturday. However, we believe that Dr. Rosenlund's records, coupled with Claimant's testimony, do tend to establish that an event did occur, whether on May 26th, May 29th or some other date in late May, we cannot determine. We cannot say the same with respect to the alleged incident of July 26, 2012, involving the loading/unloading of a trencher. Contemporaneous medical records fail to reflect that Claimant gave a history concerning this incident, and the incident itself does not figure in the September 26, 2012 recorded statement taken by Surety's investigator. We find that the evidence fails to establish that such an event occurred. More so than with the alleged accident of May 26, 2012, Claimant's assertion that such an accident occurred is not the product of his memory of an inciting event, but is rather the result of his subsequent reconstruction of his activities at or around the time his low-back condition progressed to the point that he was no longer able to work.

INJURY

34. In addition to proving the occurrence of an untoward mishap/event, Claimant must also demonstrate that the incident produced an "injury", i.e. violence to the physical structure of his body. Although we have found that a May 2012 event did occur as described by Claimant, we do not believe that Claimant has met his burden of demonstrating that this incident caused damage to the physical structure of his body. Importantly, Claimant himself has no

conviction whatsoever that this incident produced an injury. He did not describe a sudden worsening of symptomatology following this incident, and although Dr. Rosenlund appears to attribute some part of Claimant's symptomatology to the event described, we do not believe that this chart note, to the extent that it might be viewed as the expression of an opinion on the issue of causation, rests upon an adequate foundation. We conclude that Claimant has failed to meet his burden of proving that the accident of May 26, 2012 caused damage to the physical structure of his body.

35. Even if it be assumed that the July 2012 incident occurred as alleged by Claimant, we find, as well, that the evidence fails to establish that this incident caused damage to the physical structure of Claimant's body.

36. Dr. Manos opined in a chart note on July 30, 2013 that lifting a trencher could have caused Claimant's L4-5 disc herniation. His opinion states a possibility, but it is insufficient to establish, to a reasonable medical probability, that lifting a trencher to attach it to a truck hitch on July 26, 2012 caused this injury. Claimant has failed to prove by a preponderance of evidence that he suffered workplace accidents resulting in injury.

NOTICE

37. Claimant's claim also fails for lack of proper 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...*

38. Notice of an industrial accident or occupational disease must be in writing. However, notice required under Idaho Code §§ 72-701 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." I.C. § 72-704.

39. Written notice. Claimant provided Surety with written notice of his alleged July 26, 2012 industrial accident 103 days later, in an email dated November 6, 2012. He did not previously notify Mr. Baker of this potential accident.

40. Actual notice. Neither Surety nor Multi-State Electric was aware that Claimant thought he injured himself in July 2012 until Claimant provided written notice to Surety (see above).

41. The earliest likely date on which Claimant first advised Mr. Baker that he injured himself stepping out of a truck on May 29, 2012 is September 27, 2012.[2] This amounts to a delay of 121 days. In his statement to the claims adjustor's investigator, Mr. Baker acknowledged receiving the August 23, 2012 chart note from Primary Health, which states Claimant hurt himself on May 29, 2012, on August 26, 2012. This is the earliest date in the record on which Multi-State Electric could have become aware that Claimant was alleging a May 29, 2012 industrial accident, representing an 89-day delay. Even if Claimant told Mr. Baker about the May 29, 2012 accident at the time of the August 6, 2012 telephone call, Mr. Baker still did not learn of the work accident within 60 days of May 29, 2012.

42. Notice is sufficient if it apprises the employer of the accident arising out of and in the course of employment causing the personal injury. *Murray-Donahue v. National Car Rental Licensee Association,* 127 Idaho 337, 339, 900 P.2d 1348, 1350 (1995). All Claimant had to do

[2] According to Mr. Baker, Claimant first provided notice of a potential May 29, 2012 industrial accident in September 2012. Claimant advised Surety on September 26, 2012 that he had neither experienced an accident at work nor reported one to Multi-State Electric. It is unlikely that Claimant would have so advised Surety if he had already reported the details of an industrial accident to Mr. Baker.

within the statutory period was report, for instance, that he hurt his back jumping out of a truck on a job, or that he felt pain when lifting a trencher at work. Unfortunately, however, Claimant did not communicate facts that would timely apprise Multi-State Electric that he thought his back condition was work-related. Mr. Baker's knowledge that Claimant's back hurt or that he received treatment for back pain is insufficient to meet the notice requirement.

43. Defendants did not have actual knowledge of either the May 29, 2012 accident allegation or the July 26, 2012 accident allegation within the statutory 60-day period following each respective date. Therefore, Claimant must establish that the delayed notice did not prejudice Employer.

44. Lack of prejudice. Claimant must affirmatively prove that Employer was not prejudiced by the lack of timely notice. *Jackson v. JST Manufacturing,* 142 Idaho 836, 136 P.3d 307 (2006). Proof that the employer would not have done anything differently or that the medical treatment would have been the same, had timely notice been provided, is not dispositive. *Kennedy v. Evergreen Logging Co.,* 97 Idaho 270, 272, 543 P.2d 495, 497 (1975); *Dick v. Amalgamated Sugar Co.,* 100 Idaho 742, 744, 605 P.2d 506, 508 (1980).

45. The Commission has previously acknowledged, in a similar case, that the claimant bears a difficult burden to prove a negative when compelled to establish that an employer was not prejudiced. *Mora v. Pheasant Ridge Development, Inc.,* 2008 IIC 0548. In that case, the Commission held that the claimant failed to prove his employer was not prejudiced by a 5-month reporting delay. Although the Defendant may not have suffered actual prejudice, the Claimant nevertheless lost because he did not affirmatively establish that employer was not prejudiced. *Id.* The Commission based its holding on findings that 1) employer was unable to timely investigate the validity of the claim, 2) the delay "arguably

hampered Defendant's ability to provide reasonable medical treatment", and 3) claimant's ability to work may have been compromised during the delay, by an intervening incident or otherwise, potentially exposing Defendant to greater liability. *Id.*

46. The Claimant in this case finds himself in a difficult position similar to the claimant in *Mora*. Claimant has set forth no affirmative proof establishing that Multi-State Electric was not prejudiced by either reporting delay. Employer was unable to investigate the validity of each claim until several months after Claimant's workplace accidents. Although Employer could possibly have conducted a fuller investigation when Claimant finally disclosed his industrial accidents, there is inadequate evidence from which to determine that Employer would not have obtained more accurate and complete material information, had it been able to investigate sooner.

47. In addition, Claimant's reporting delay may have hampered Employer's ability to provide reasonable medical treatment. Earlier treatment may have resulted in quicker, more complete healing of Claimant's back condition.

48. Also, Claimant's ability to work may have been compromised by other intervening causes during the delay. The possibility that some non-occupational cause may have intervened to exacerbate or even create the condition for which Claimant seeks benefits during the long reporting delay cannot be ruled out because Employer did not have the opportunity to make a "baseline" assessment of Claimant's injuries during the statutory period.

49. The Commission finds that Claimant has failed to meet his burden of proving Employer was not prejudiced by his respective delays in reporting his industrial accidents.

50. All other issues are moot.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to prove that he suffered an injury from a workplace accident on May 29, 2012 or July 26, 2012;

2. Claimant failed to prove that he satisfied the notice requirements of Idaho Code §§ 72-701 with respect to his alleged industrial accidents on May 29, 2012 and July 26, 2012;

3. Claimant's Complaint should be dismissed with prejudice.

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

DATED this _20th___ day of __May_____, 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 __20th_____ day of ____May_____, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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