

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PAUL F. McCAWLEY,
Claimant,
v.
HOLMAN TRANSPORTATION
SERVICES, INC.,
Employer,
and
LIBERTY NORTHWEST
INSURANCE CORPORATION ,
Surety,
Defendants.

IC 2013-011563

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

Filed October 22, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Boise on May 13, 2014. Taylor Mossman-Fletcher represented Claimant. Joseph Wager represented Defendants. The parties presented oral and documentary evidence and later submitted briefs. The matter came under advisement on August 14, 2014 and 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.

ISSUE

The sole issue to be decided as the result of this bifurcated hearing is:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment on or about April 8, 2013.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends he was in the course and scope of his work as a truck driver during a forced layover caused by a log book violation after having driven excessive hours. As he exited the cab of his truck he felt sudden back pain. He notified Employer and sought medical treatment. The traveling employee doctrine applies.

Defendants contend Claimant had been off duty for about 80 hours before the alleged industrial accident. The layover was caused by Claimant receiving a “personal citation” for exceeding allowable hours of work. Inconsistencies in Claimant’s descriptions of the event calls into question Claimant’s credibility. Medical records indicate Claimant did not suffer an accident; rather, without any activity related to work, he had a flare-up of a longstanding back condition. Defendants acknowledge that the traveling employee doctrine applies, but assert that exceptions to it preclude compensability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony at hearing of Claimant; and
2. Exhibits A through G.

FINDINGS OF FACT

1. In January 2013, Claimant began working as a long-haul truck driver for Employer. Because of a forced layover to remediate a log book violation after having driven excessive hours, Claimant missed a scheduled delivery on April 5, 2013. The delivery was rescheduled for a specific time on April 10th. The customer prohibited drivers from arriving too early—more than 30 minutes or an hour before their scheduled delivery times. As a result, Claimant stopped to layover at a truck stop about 100 miles from the delivery point.

2. Claimant was compensated by Employer at a rate of 31 cents per mile. He received no pay for layover time.

3. On April 8, 2013, Claimant reported to Employer a work injury to his back. On Claimant's April 9 contact with Employer, Employer arranged a substitute driver. Despite Claimant's assertion that his back was now well enough to deliver the load, Employer fired Claimant. An April 18, 2013 exit interview record shows Employer fired Claimant for "company violations." (See, Ex. C, R 110, Ex. E, R 145, Ex. F, R 204.)

4. Claimant's supervisor, Thomas Bayne, reported the dispatcher said that Claimant said he had hurt his back when he walked into the truck stop for breakfast. Claimant disputes this assertion.

5. Claimant's supervisor reported that he was surprised on May 2, 2013 when he heard Claimant had filed a worker's compensation claim.

6. When Claimant sought unemployment insurance benefits after being fired, Employer denied to the Idaho Department of Labor that Claimant had been fired.¹

7. Claimant did not always complete his logbooks with sufficient timeliness to guarantee accuracy. For example, the logbook does not show Claimant's April 8, 2013 doctor visit although it shows a visit on April 9, 2013. The logbooks do not carry sufficient weight to question Claimant's testimony describing the accident.

2013 Medical Care

8. Claimant sought treatment on April 8, 2013. Chiropractor Larris Noble, D.C., provided a lumbar adjustment. He noted that Claimant reported back and buttock pain began three days prior. At hearing, Claimant disputed this report. Regardless, the history notes that

¹ Absent from the record is whether Holman, and who at Holman, indicated Claimant was not fired.

Claimant believed he had probably twisted his low back wrong getting into his rig. Dr. Noble diagnosed instability of the sacroiliac joint.

9. Claimant returned to Dr. Noble the next day, April 9, 2013. Claimant's pain had returned overnight.

10. After Claimant returned to Idaho, he sought treatment on May 6, 2013. He reported the pain began April 8, 2013 while exiting his rig. A lumbar MRI showed degeneration and a large L4-5 disk bulge impinging the left L5 nerve root.

11. On May 7, 2013, surgeon Shane Andrew, D.O. examined Claimant. After conservative treatment failed to help, Dr. Andrew recommended surgery on July 2. Surgery was cancelled when Surety denied the claim. On July 15, 2013, Claimant underwent a laminotomy and discectomy under his health insurance.

12. After surgery Claimant experienced immediate and substantial relief. By September 10, 2013, Claimant had only a little muscle weakness and residual hypesthesia in his left leg. Dr. Andrew was concerned about Claimant's unrelated shoulder condition and referred Claimant to Andrew Curran, D.O., who treated that condition.

13. Dr. Andrew provided follow-up care. He noted minor hypesthesia, weakness and foot drop was potentially permanent. He noted Claimant reported difficulty driving and did not feel safe. On that basis, Dr. Andrew recommended against Claimant driving truck or heavy equipment.

Prior Medical Care

14. In 1996, Claimant visited an ER for increasing back pain. Mark Henzler, M.D., diagnosed an acute back strain. He recorded a history of possible radiculopathy, but no new radiculopathy associated with that episode.

15. In 1999, Claimant visited Primary Health for back pain which was diagnosed as a lumbar strain. Some physical therapy was prescribed.

16. In 2003, Claimant visited an ER for neck pain after a motor vehicle accident. This was diagnosed as a cervical strain. One month later, he passed a driver's physical.

17. In April 2012, Claimant sought treatment for a dislocated shoulder.

DISCUSSION AND FURTHER FINDINGS

18. 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, however, 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).

Accident, Injury, Course and Scope

19. 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). An accident and injury arises out of employment when it is related to work. *Vawter v. UPS, Inc.*, 155 Idaho 903, 381 P.3d 893 (2014); *Spivey v. Novartis Seed, Inc.*, 137 Idaho 250, 16 P.3d 926 (2002). A minor deviation is insufficient to deny compensability. *Gage v. Express Personnel*, 135 Idaho 250, 16 P.3d 926 (2000) (stepping off a platform to retrieve a cigarette). A traveling employee is covered portal to portal, and acts within the course and scope of employment throughout a trip, including for necessary or incidental

personal activities. *Gerdon v. Rydalch*, 153 Idaho 237, 280 P.3d 740 (2012). An intermediate interruption does not sever compensability under the traveling employee doctrine. *Cheung v. Wasatch Electric*, 136 Idaho 895, 42 P.3d 688 (2002). A significant personal deviation from work is a basis upon which compensability may be denied. *Morgan v. Columbia Helicopters*, 118 Idaho 347, 706 P.2d 1020 (1990)(drunk driving).

20. Defendants attempt to denigrate Claimant's credibility based on minor variations in the details of Claimant's account of the accident. Defendants assert that there are at least four versions of Claimant's story within the record. Defendants contend that these inconsistent versions of the occurrence of Claimant's injury are found in the following documents/testimony: (1) Claimant's Medical Records, April 8-9, 2013; (2) Claimant's Supervisor's recorded statements; (3) Claimant's recorded statements on June 4, 2013; and (4) Claimant's May 13, 2013 hearing testimony. However, Claimant consistently testified that on April 8, 2013, sometime between late morning and early afternoon, he was exiting the truck to perform a required daily inspection on the truck, and when climbing down the truck, he suffered an acute back injury. (See, Claimant's Reply Brief, 5; Ex. A; Hrg Tr. 25; Exhibit D, p. 123.)

21. Defendants' first alleged inconsistency is found in the chiropractor's evaluation forms indicating the date of onset was April 5, not April 8, and that Claimant's pain began three days prior to the visit. On cross-examination Claimant not only disagreed with the inconsistencies between his account and the chiropractor's notes, but also indicated that when he first met with the chiropractor and was conveying the initial information, Claimant was in pain, the initial visit itself was very brief and hurried, and that he would not recommend this chiropractor in the future. (Hrg Tr. 40.) Claimant's assertion that the chiropractor's evaluation form contained incorrect information is not rebutted by any evidence in the record; thus,

Claimant's testimony and credibility supports minimizing the weight given to the chiropractor's evaluation forms. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

22. Defendants next assert that Mr. Bayne's recorded statement (Exh. C) provides a different account of events, notably that Claimant "was walking through the parking lot on his way into the Flying J to eat breakfast, Claimant's back went out causing him to fall to the ground. Claimant stated he fell down about 100 yards from the fuel desk, or entrance to the restaurant." (Defendants' Responsive Brief, 4.) Defendants did not cite, and the Commission could not find, any evidence where Claimant affirmatively asserted he was walking at the time of injury. Defendants presumably derived this assertion from Mr. Bayne's following statement:

[u]m, I called him because dispatch come [sic] in and told me what had happened, *something about* him hurting his back and Paul quote told me that he was on his way into the Flying J to, uh, eat breakfast and he, uh, his back went out on him and he fell to the ground.

(Ex. C, R 107) (Emphasis added.) Mr. Bayne's statement indicates that he was not entirely sure exactly what happened to Claimant from what the dispatcher had heard from Claimant and then conveyed to Mr. Bayne. Reviewing this statement in context does not provide support for Defendants' assertion. Moreover, Mr. Bayne's credibility, in regard to Claimant's injury, is suspect. Mr. Bayne made clear that he was most concerned about Holman's reputation and that he believed Claimant's account of events was "totally BS." (Ex., C, R. 110). Thus, Claimant's credibility and testimony weighs heavier as evidence than Mr. Bayne's testimony.

23. Defendants next assert that Claimant's "story versions are so inconsistent with each other [sections 3 and 4 in paragraph 20], as well as internally inconsistent, that Claimant cannot convince a reasonable person as to the certainty of when and where his alleged back

injury occurred.” (Defendants’ Responsive Brief, 14.)

24. Claimant reasonably testified to the place and time of the accident. Claimant’s testimony was consistent and the minor differences reconcilable. Claimant has testified credibly to an accident and injury within the parameters of Idaho Worker’s Compensation Law. Claimant’s testimony of the accident carries more weight than the hearsay report of Mr. Bayne. Neither Claimant’s comments to Surety nor Employer’s comments about Claimant are sufficient in this instance to render Claimant’s testimony inherently improbable. They do not otherwise impeach his testimony.

25. The medical records show an acute injury to the lumbar disk which physicians treated as consistent with the description of accident which Claimant provided. The records sufficiently show the treating physicians supported a causal link between the described accident and injury.

26. The fact that Claimant was not being paid while on layover is not dispositive. There are many activities a truck driver is required to perform when he is not actually traveling the miles by which his pay is calculated. Waiting to complete a scheduled delivery is one example of these.

27. Claimant’s activity during this forced layover was consistently within the bounds allowable for a traveling employee. The causes of the forced layover—logbook and hours violations and attendant rescheduling of delivery of a load—are difficulties which arise in the course and scope of truck driving; they do not constitute a personal deviation from work as in *Morgan*.

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CONCLUSION OF LAW AND ORDER

1. Claimant was in the course and scope of his employment as a traveling employee at all relevant times; he suffered a compensable accident and injury.

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

DATED this 22nd day of October , 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 22nd day of October, 2014, a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER was served by regular United States Mail upon each of the following:

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