

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEROD NOBLE,

Claimant,

v.

JH KELLY, LLC,

Employer,

and

CHARTIS,

Surety,

Defendants.

IC 2011-016162

**ORDER GRANTING
RECONSIDERATION**

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

Filed October 8, 2014

This case went to hearing on January 15, 2013, was fully briefed, and taken under advisement. On August 30, 2013, the Commission issued an Order adopting the Referee's proposed findings of fact and conclusions of law, ruling that Claimant failed to give timely notice of his accident and injury as required by Idaho Code § 72-701.

On September 9, 2013, Claimant filed a timely Motion to Reconsider. Defendants JH Kelly, LLC and Chartis filed Defendants' Response to Motion for Reconsideration on September 19, 2013. Claimant filed a reply on September 27, 2013.

In his motion for reconsideration, Claimant asks the Commission to consider all the evidence of record including the deposition of Mr. Praegitzer, testimony which was inadvertently not considered by the Referee.

Mr. Praegitzer's deposition was admitted as evidence and must be considered by the Commission in making a determination. Accordingly, Claimant's Motion for Reconsideration is

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GRANTED. To effectuate the order granting reconsideration, the Commission withdraws the Recommendation and Order filed on August 30, 2013 and hereby issues the Amended Findings of Fact, Conclusions of Law, and Order.

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A hearing was held on January 15, 2013 in Twin Falls, Idaho. Claimant was present in person and represented by Keith E. Hutchinson of Twin Falls. Employer (“JH Kelly”) and Surety (collectively, “Defendants”) were represented by David P. Gardner of Pocatello. Oral and documentary evidence was admitted.

ISSUES

Pursuant to the parties’ stipulation at the hearing, the issues to be decided as a result of the hearing are:

1. Whether Claimant suffered an injury arising out of and in the course of his employment with JH Kelly; and, if so,
2. Whether Claimant gave proper notice of the accident.

CONTENTIONS OF THE PARTIES

Claimant contends he slipped on some river rock, fell, and injured his back while working for JH Kelly on November 10 or 11, 2010. Claimant asserts that a coworker witnessed this fall and that he told Clay Wilkie, general foreman, about the event on the day it occurred and repeatedly thereafter.

Defendants counter that Claimant did not fall at work on either proposed date. Further, even if he did, he did not provide notice of the fall within 60 days. Therefore, Claimant’s claims should be dismissed pursuant to Idaho Code § 72-701.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition of Claimant taken April 2, 2012;
2. Joint Exhibits (JE) "1" through "9" and "12 through "14," admitted at the hearing;
3. The testimony of Claimant, Clay Wilkie, and Camille Shaver, taken at the hearing; and
4. The post-hearing deposition of Reed Praegitzer, Jr., taken February 19, 2013.

OBJECTIONS

All pending objections posed in the depositions are overruled, except the following objections lodged during Reed Praegitzer's post-hearing deposition, which are sustained: Defendants' objection to the admission of Exhibit 1 to the deposition, as the document was not previously produced so admission would violate J.R.P. Rule 10.E.4; Claimant's objection at page 21; and Claimant's objections on pages 26 and 27 to the line of questioning regarding Exhibit 3 to the deposition and to the admission of that document due to lack of foundation, and for the reason that the document was not previously produced so admission would violate J.R.P. Rule 10.E.4.

FINDINGS OF FACT

After considering the above evidence and the arguments of the parties, the Commission submits the following findings of fact and conclusions of law.

BACKGROUND

1. Claimant was 37 years of age at the time of the hearing and resided in Rupert. Prior to his employment at JH Kelly, Claimant worked for another employer for

approximately 15 years. He left that job after sustaining an industrial knee injury in 2009. Claimant's employer witnessed that accident, which occurred in April; however, that employer did not "do the paperwork" until October of 2009. Tr., p. 21. Claimant did not obtain medical treatment for his knee injury until July of 2009, and he did not miss any work until he underwent surgery on the knee in November of 2009. Claimant's expenses were ultimately paid by the workers' compensation surety. Prior to November 2010, Claimant also suffered an industrial finger injury requiring stitches. His then-employer witnessed that accident, too, and Claimant's medical expenses were paid by the workers' compensation surety. Claimant missed only a few hours of work due to his finger injury.

2. Claimant has no history of back problems.

3. Claimant was hired by JH Kelly as a pipefitter foreman on September 27, 2010. He supervised approximately 10 workers, and his own supervisor was Clay Wilkie, the general foreman. Claimant participated in orientation training before he went to work. He does not recall any training regarding injury-reporting policies; however, the first question on the safety quiz Claimant completed on his hire date asks, "What should you do if you are injured on the job?" JE-131. Claimant chose answer "C," "Immediately inform your Foreman and have him fill out an incident or accident form." *Id.* On that date, Claimant also executed an acknowledgement that he had read and understood the Job Rules and Regulations, which specified that "Failure to report injuries immediately, regardless of severity" may result in "immediate termination and removal from the worksite," among other things. JE-116. In addition, Camille Shaver, safety professional for JH Kelly who conducts new hire orientations, testified that she advises all new hires that all injuries must be reported through the safety department. "[R]egardless of how insignificant it can be, it

still has to be reported through the safety department so that we can follow up with that employee to make sure that, you know, they're getting the proper medical attention, if necessary." Cl. Dep., p. 90.

4. In his deposition, Claimant acknowledged that 10-minute safety meetings were conducted every morning at JH Kelly in which safety concerns, such as weather conditions, were addressed.

5. Reed Praegitzer, Jr., was 26 years of age and a union welder/pipefitter when he went to work in August 2010 for JH Kelly at the ventilation gas circulation unit (VGR) at the Hoku plant in Pocatello. He recalled that Claimant arrived on that job in fall/winter of 2010; however, Claimant testified that he was hired in early September 2010. Mr. Praegitzer worked with Claimant daily. Mr. Praegitzer was a welder for four or five months before he was promoted to a foreman position, lateral to Claimant. Both Mr. Praegitzer and Claimant reported to Clay Wilkie, general foreman.

6. Mr. Praegitzer described the terrain around the VGR:

River rock, 4- to 10-inch-round river rock everywhere. They had a couple concrete pads there at the beginning. And there was like a 2-foot, maybe some of them was 1-foot, drop in elevation with no steps. And there was a lot of snow on the ground, like I said. It wasn't that way in the beginning. But it got pretty bad, you can imagine, with big round slick rocks.

Praegitzer Dep., p. 8. "Anybody's going to fall." *Id.* "...I fell five times...hundred times if not once." *Id.* at p. 9.

7. Mr. Praegitzer attended the daily safety meetings, was familiar with the injury-reporting requirement (report to a supervisor) and was also aware that he could report an injury directly to the safety department. "It was widely known you sign your name on the paper saying that at orientation that you understand all your ... [interrupted by question from

Claimant's counsel].” Praegitzer Dep., p. 14. “Personally, if there was nothing getting done about it, I'd go and tell safety myself, but that's just me.” *Id.* Mr. Praegitzer also explained that there was an emergency medical technician (EMT) present at the job site to assist with emergency situations.

INDUSTRIAL ACCIDENT

8. At the hearing, Claimant testified that he slipped while walking on some rocks on November 11, 2010. “My lower body went one way, my upper body went the other way. And I dropped down to one knee and hand, and it popped in my back.” Tr., p. 30. Claimant recounted that Reed Praegitzer, also a foreman, was 10-12 feet away and Claimant believed he observed the fall. Claimant felt “Just numbness at first, just felt like a pulled muscle, but just numb in my leg on my left side, nothing real major, you know, noting - - it's like a strained muscle, like I stretched wrong.” *Id.* Claimant explained he was certain of the date of his accident because he recorded it in his phone. At his deposition in April 2012, Claimant reported he fell on November 10, 2010. The First Report of Injury (FROI) states November 11, 2010.

9. Claimant did not immediately seek medical attention, and he continued to work. His symptoms worsened around Christmastime. “It felt like a strained muscle. But I did – like, it made my leg numb, like down my sciatic nerve. And then my sciatic nerve – it just started burning. And I couldn't hardly straighten my leg out, had a Charlie horse behind – right in my calf. It was like it was trying to pull the bottom of my foot up through my back. Pretty painful.” Tr., p. 32. Then, his symptoms improved a little while he was off work on winter furlough. During this period he rested and did stretching exercises.

Claimant still did not seek medical attention because, again, he was hoping his condition would resolve on its own.

10. Claimant felt pretty good on his return to work following the winter furlough. However, his symptoms soon returned. In March 2011, Claimant finally sought medical treatment. “I just kept hoping it was going to go away. I needed the money. I mean, I couldn’t afford to be off. I had bills, too. Then I handed a hanger over a handrail to a guy, and that was all it took. I knew it was bad then.” Tr., p. 34.

11. On March 15, 2011, Claimant was examined by Greg Boettcher, D.O., a family practitioner, for left groin pain. The corresponding chart note says nothing about a workplace accident. Instead, it references a TV-lifting incident. Claimant testified he never reported such an event to Dr. Boettcher because he never injured himself lifting a TV. Dr. Boettcher suspected a hernia.

12. On or around March 28, 2011, Daclynn S. Johnson, M.D., a laparoscopic surgeon, evaluated Claimant for hernia repair. Dr. Johnson noted in a letter that, on palpation, the lump suspicious for hernia caused pain in Claimant’s lower left back “which subsequently causes pain and numbness in his leg and foot.” JE-22. Dr. Johnson diagnosed not a hernia, but a lipoma. “I think this is nothing more than some swelling and irritation of a large lipoma.” *Id.*

13. On April 25, 2011, Claimant underwent evaluation by Cody Liljenquist, D.C., who recorded, “...painful in all...positions started 3 mos. ago [*sic*] no single cause.” JE-25. Claimant completed and executed an intake sheet on that same date in which he wrote that lower back and hip symptoms, starting three months previously, were the reason for his visit. He did not reference a workplace accident on the form. A low back CT scan

report bearing the same date identified low back pathology, but did not reference a workplace accident.

14. On May 5, 2011, Scott Honeycutt, M.D., an orthopedic spine surgeon, evaluated Claimant. “The patient reports intense low back pain with primarily left lower extremity radiation of weakness pain and numbness. He reports intense pain particularly with movement.” JE-37. Claimant’s employer, JH Kelly, is listed under the Social History section, but there is no mention of a workplace accident. Claimant underwent an MRI for “chronic lower back pain” on that same day. JE-29. Some low back pathology was identified. On May 10, 2010, Claimant reported to Dr. Honeycutt that his back pain had abated and that he was doing well, with minimal symptoms. “The patient reports that currently he is essentially asymptomatic. No intervention is indicated at this juncture.” JE-40.

15. Claimant received no further treatment until he was laid off on May 26, 2011 for missing too much work. At this time, he reported that he had slipped and fallen on November 11, 2010, and JH Kelly amended the reason for letting him go to include his failure to previously report his workplace accident. For reasons that are not entirely clear, Claimant returned to his employment at JH Kelly on June 7, 2011. He filled out paperwork related to his industrial injury claim; however, his union representative told him he could not work because he could not provide a full medical release.

16. Claimant resumed treatment for his low back symptoms on June 3, 2011 with Dr. Liljenquist. On July 25, 2011, he completed a different intake form entitled Workers Compensation Patient Intake Form in which he wrote “Nov 11 2010...slipped on rocks at work” as the time and circumstance under which his low back and left leg/foot pain began.

Similarly, on July 20, 2011, Claimant reported to Henry West, D.C., that his symptoms began with the November 11, 2011 accident. Dr. West opined, “The nature of the patient’s complaints are consistent with the nature of onset.” JE-44. He placed Claimant into a lumbar trunk cast for six weeks and recommended follow-up with Dr. Liljenquist.

17. On November 29, 2012, Gary C. Walker, M.D., an osteopathic physician, performed an independent medical evaluation at Surety’s request. After reviewing Claimant’s medical records, performing an examination, and interviewing Claimant, Dr. Walker opined that his low back and left leg symptoms are consistent with the November 11, 2010 industrial accident Claimant describes. However, he did not rule out other causal mechanisms.

Truly causation would simply come down to whether or not one were to trust the patient that he did indeed get hurt at the time that he relates that he did. Again, I have no way of stating whether he did or did not, other than to simply rely on his history.

JE-80.

CLAIMANT’S CREDIBILITY

18. The Referee hearing the case did not record any concerns about Claimant’s observational credibility. However, Claimant’s testimony does conflict with other testimony of record. We will address those differences within the relevant legal issues set forth below.

DISCUSSION AND FURTHER FINDINGS

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). 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).

19. **Notice requirement.** 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, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident...

20. Idaho Code § 72-702 requires that the notice 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." Idaho Code § 72-704. 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).

21. Written notice. Claimant did not provide JH Kelly with written notice of his industrial accident. Therefore, he must establish either that JH Kelly had actual knowledge within the time limit, or that the delayed notice did not prejudice JH Kelly.

22. Actual knowledge, in this case, could be demonstrated in two ways. The first is if Claimant gave Mr. Wilkie notice of the accident. The second is if Mr. Praegitzer is found to be an agent or representative of Employer and Mr. Praegitzer had actual knowledge of the accident.

23. Actual knowledge of Mr. Wilkie. A finding that Claimant gave Mr. Wilkie notice of the accident requires a discussion of the conflicting testimony of Claimant and Mr. Wilkie. Claimant testified at the hearing that he told the general foreman, Clay Wilkie,

that he fell and hurt his back on the same day it happened, and that Mr. Praegitzer was within earshot at the time. According to Claimant, Claimant and Mr. Wilkie agreed that Claimant had probably just pulled a muscle and that it would likely resolve on its own.

24. At his deposition, Claimant similarly testified that he told Mr. Wilkie about his accident on the day it happened and asked him to fill out a First Report of Injury (FROI). In addition, Claimant said he reminded Mr. Wilkie about it “pretty much daily” because it needed to be “taken care of.” Cl. Dep., p. 21. Claimant explained that, on advice from “the union guys,” he only spoke with Mr. Wilkie. *Id.* “I was told not to – that you had to go through your chain of command, not to be – you had to go through your – my general foreman, and then he would take care of it.” *Id.* Claimant went on to state that Mr. Wilkie repeatedly assured him that he’d report the event to the safety department.

25. Claimant’s testimony that he slipped and fell at work in November or December 2010 is supported by Mr. Praegitzer’s testimony. Mr. Praegitzer confirmed that he saw Claimant fall on the river rocks “before our furlough, so it was in November, December.” Praegitzer Dep., p. 9. “I seen him fall. I don’t know if that was the accident that actually hurt him.” *Id.* at p. 19. However, “...he never complained about it before, and then he fell, and complained about it pretty consistently.” *Id.* at p. 16. By “it,” Mr. Praegitzer meant back and knee pain. Mr. Praegitzer got tired of Claimant’s complaining.

26. Mr. Praegitzer worked on November 10, 2010, but he was off on November 11, 2010. He did not know what day he saw Claimant fall. “Couldn’t even tell you if it was the beginning of the week, the middle of the week, the end of the week, the weekend.” Praegitzer Dep., p. 17.

27. Mr. Praegitzer testified that he did not report Claimant's fall because he did not believe it was his job to do so. Praegitzer Dep., p. 20. Also, Mr. Praegitzer did not believe the matter warranted special consideration. "I didn't see a big – I didn't see me telling Clay as to be a big deal, you know." Praegitzer Dep., p. 20. He also testified that he did not remember whether or not he reported it to Mr. Wilkie. "[Claimant's fall] doesn't have any substance in my life, so why would I remember. [sic] You know what I mean?" *Id.*, p. 15.

28. Mr. Praegitzer did not witness Claimant report the event to Mr. Wilkie. "I didn't verbally, physically, see him or hear him say anything to Clay Wilkie about it." Praegitzer Dep., pp. 16-17. Further, neither Mr. Wilkie nor anyone from the safety department ever discussed the matter with Mr. Praegitzer. However, Mr. Praegitzer also testified that Claimant told him that he (Claimant) had reported his fall to Mr. Wilkie.

I wasn't present for him to verbally tell him. But when I seen Jerod, he was headed that way towards Clay Wilkie. And I asked him, "Hey, you going to tell Clay?"

And he says, "Yeah.

And then about ten minutes later, after I come down off the structure, I asked him, "Hey, did you tell Clay? What did he have to say?"

"Oh, he's just going to report it to Safety Ray," because he was the safety guy there.

Praegitzer Dep., pp. 11-12.

29. Mr. Wilkie did not recall Claimant ever reporting a slip-and-fall accident to him but, if he had, he would have reported it to the safety department. Likewise, he did not recall that Mr. Praegitzer ever told him about such an event. Claimant asserts that Mr. Wilkie's testimony on this point is not credible because Mr. Wilkie was aware of a

subsequent accident that Claimant had (the hangar accident), but Mr. Wilkie did not report that accident, either.

30. Camille Shaver, in charge of safety and workers' compensation reporting, testified that Claimant first reported a November 2010 accident upon being laid off in late May 2011. Further, no one else had notified her of this event before then. Ms. Shaver also explained that every new employee is notified of JH Kelly's policy requiring the immediate reporting of accidents.

31. Claimant's reports to his medical care providers prior to his layoff in May 2011 strongly suggest that he did not advise them that a workplace slip-and-fall was a potential cause of his back pain. Medical records are not infallible; however, the fact that none of the records of Drs. Boettcher, Johnson, Liljenquist or Honeycutt mention an industrial cause for Claimant's symptoms supports the argument that Claimant did not report the event during this time. Also, it is unlikely that Claimant would have written on his initial intake form with Dr. Liljenquist that his symptoms began in approximately January 2011 if he believed at that time that a November 2010 injury was the source of his pain and numbness.

32. Claimant insists that he immediately advised Mr. Wilkie of the occurrence of the accident, but this testimony is challenged by the fact that none of the records of Drs. Boettcher, Johnson, Liljenquist or Honeycutt mention an industrial origin. Mr. Wilkie cannot affirmatively say that Claimant did not notify him of the accident, but he can say that he has no recollection of being so advised, and he can say that if he had been so advised he would have taken certain steps to report the accident to the safety department, steps that were not taken. Mr. Praegitzer was aware of the accident, and was also aware

that Claimant maintained that he immediately notified Mr. Wilkie. However, Mr. Praegitzer has no first hand knowledge that Claimant actually did notify Mr. Wilkie. This is a close case, but these facts leave us unable to conclude that Claimant has met his burden of showing that Mr. Wilkie had knowledge of the accident within the meaning of Idaho Code § 72-704.

33. Knowledge of Mr. Praegitzer. Had it been found that Mr. Wilkie had knowledge of the occurrence of the subject accident, it would be a simple matter to conclude that want of timely notice would be excused under Idaho Code § 72-704; Mr. Wilkie was Claimant's immediate supervisor, and case law clearly establishes that under these facts, he would qualify as an "agent or representative" of employer. *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005), *Page v. State Ins. Fund*, 53 Idaho 177, 22 P.2d 681 (1993).

34. While we have concluded that the evidence does not support a conclusion that Wilkie had knowledge of the occurrence of the subject accident, the evidence clearly does establish that Mr. Praegitzer had knowledge of the occurrence of the subject accident at or around the time it occurred. Mr. Praegitzer held a position with employer lateral to Claimant's. Mr. Praegitzer testified as follows concerning his understanding of accident reporting procedures at the project:

Q (By Mr. Hutchinson). Did you understand the procedure how to file an injury claim at JH Kelly?

A (By Mr. Praegitzer). Sure. Tell your immediate supervisor, supervisor - - supervisor notifies his supervisor, and if that's not the general foreman, then he goes and tells safety.

Q. Do you know if there was anything else that you were supposed to do?

A. No. It was pretty plain and simple. You tell your foreman, your foreman tells your general foreman, and he goes and contacts safety.

Q. Okay.

A. Chain of command is what you got.

Q. Did the - -

A. Personally, if there was nothing getting done about it, I'd go and tell safety myself, but that's just me.

Q. Okay. Well, do you know, was it posted - - I don't know - - obviously, that there was a procedure for taking care of injury claims?

A. No. It was widely known you sign your name on the paper saying that at orientation that you understand all you . . .

Mr. Praegitzer was not Claimant's supervisor. Vis-à-vis Claimant, Praegitzer position was more akin to that of a co-worker:

Q. Okay. Now, at the time, at the time that he got hurt, were you his supervisor?

A. No. I wasn't even a foreman - - well, yes, I was a foreman. Yes, I was a foreman.

Q. But you wouldn't have been the foreman over - -

A. I wasn't, no. Clay was over us. See, we're just regular guys. Goes hands, foremans, general foremans, superintendents, and so forth. We were just foremans.

Q. You were a foreman, okay.

However, Mr. Praegitzer was also clearly a supervisor of other J.H. Kelly employees. Praegitzer Dep., p 22. His subordinates were responsible for reporting work-related accidents to him, and Praegitzer, in turn, had certain responsibilities when he was notified of the occurrence of an industrial accident. The question before us is whether, on these facts, Mr. Praegitzer qualifies as an "agent or representative" of employer sufficient to excuse written notice as anticipated by Idaho Code § 72-704.

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35. As developed above, Idaho Code § 72-701 requires notice of the occurrence of an accident within 60 days following the occurrence of the same. Idaho Code § 72-702 specifies that such a notice shall be in writing. Idaho Code § 72-703 specifies to whom such written notice may be given. If the employer is a corporation, as in this case, the written notice required may be given “to any agent of the corporation upon whom process may be served, or to any officer of the corporation, or any agent in charge of the business at the place where the injury occurred.” See Idaho Code § 72-703.

36. While Idaho Code § 72-703 speaks with some specificity to the identity of persons to whom written notice may be given, Idaho Code § 72-704, which treats the separate issue of when written notice may be forgiven, is much less specific concerning who it is that must possess the knowledge that excuses written notice. Idaho Code § 72-704 provides:

Sufficiency of notice – knowledge of employer. – A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice.

Therefore, in order to determine whether or not Mr. Praegitzer’s knowledge of the occurrence of the accident excuses written notice, we must determine whether he qualifies as an “agent or representative” of employer as those terms are used in the statute.

37. The Idaho Supreme Court has recently reiterated the statutory interpretation analysis in *Werneke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 282, 207 P.3d 1008, 1013 (2009):

...Statutory interpretation begins with the literal language of the statute. [Citation omitted.] That statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. [Citation omitted.] When the statutory language is unambiguous, the plain meaning of the statute must be given effect, and the court need not consider rules of statutory construction. [Citation omitted.] It should be noted that the court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. [Citation omitted.]

When interpreting the Act, we must liberally construe its provisions in favor of the employee in order to serve the humane purpose for which it was promulgated. [Citation omitted.] The Act is designed to provide sure and certain relief for injured workers and their families and dependents. [Citation omitted.] The primary objective of an award of permanent disability benefits is to compensate the claimant for his or her loss of earning capacity. [Citation omitted.]...

Id.

38. The language in question is in the disjunctive. The requirement of written notice will be excused where someone who is either an “agent” or “representative” of employer has knowledge of the occurrence of the accident within 60 days following the occurrence thereof. Very generally, an agent is defined as a person authorized by another to act for him; one entrusted with another’s business. *Black’s Law Dictionary* (9th Edition 2009).

39. There are three types of agencies: express authority, implied authority, and apparent authority. *Clark v. Gneiting*, 95 Idaho 10, 11-12, 501 P.2d 278, 279-80 (1972); *Bailey v. Ness*, 109 Idaho 495, 497-98, 708 P.2d 900, 902-03 (1985).

40. Both express and implied authority are forms of actual authority. Express authority refers to that authority which the principal has explicitly granted the agent to act in the principal's name. *Wiggins v. Barrett & Assoc., Inc.*, 295 Or. 679, 669 P.2d 1132, 1138 (1983). Implied authority refers to that authority “which is necessary, usual, and proper to accomplish or perform” the express authority delegated to the agent by the principal. *Clark, supra*, 95 Idaho at 12, 501 P.2d at 280.

41. Apparent authority differs from actual authority. It is created when the principal “voluntarily places an agent in such a position that a person of ordinary prudence, conversant with the business usages and the nature of a particular business, is justified in believing that the agent is acting pursuant to existing authority.” *Id.* (footnote omitted); *Clements v. Jungert*, 90 Idaho 143, 152, 408 P.2d 810, 814 (1965). Apparent authority cannot be created by the acts and statements of the agent alone. *Idaho Title Co. v. American States Insurance Co.*, 96 Idaho 465, 468, 531 P.2d 227, 230 (1975); *Clements, supra*, 90 Idaho at 152, 408 P.2d at 814.

42. In this case, Employer gave Mr. Praegitzer the title of foreman. Mr. Praegitzer was a foreman at Hoku, as was Claimant. Mr. Praegitzer attended the daily safety meetings, was familiar with the injury-reporting requirement (report to a supervisor) and was also aware that he could report an injury directly to the safety department. Importantly, Employer gave Mr. Praegitzer authority to supervise a group of 12 employees and Mr. Praegitzer was responsible for the work his group performed. Clearly, Mr. Praegitzer had express authority to receive notice of the injuries of the employees he was supervising. All the parties agree that Mr. Praegitzer, as a foreman, was in the chain of command to receive notice of an accident. Employer communicated that authority to him and he was aware of the requirements.

43. It seems clear, on the basis of the cases cited above, that had Claimant been one of Mr. Praegitzer’s subordinates, there would be no question that Mr. Praegitzer’s knowledge is sufficient to excuse lack of written notice due to his status as an express agent; Mr. Praegitzer was vested with specific authority to do certain things vis-à-vis those under his direction and control. However, Mr. Praegitzer had no responsibilities to take action concerning an accident suffered by Claimant, one of Mr. Praegitzer’s co-workers. Mr. Praegitzer took no action because he felt that he wasn’t required to. We do not believe that under these facts Mr. Praegitzer was

an “agent” of employer vis-à-vis Claimant, such that Mr. Praegitzer’s knowledge can be imputed to employer. Mr. Praegitzer and Claimant were no more than co-workers.

44. *Black’s Law Dictionary* (9th Edition 2009), defines the term “representative” as “one who stands for or acts on the behalf of another.” Several cases defining the term representative in this context were discussed by the Idaho Supreme Court in *Page v. State Ins. Fund*, 53 Idaho 177, 22 P.2d 681 (1933). “A representative is one who represents another, stands in his place or stead, or acts for him in the capacity of a foreman.” *Id.* at 683, *citing Franks v. Carpenter*, 192 Iowa 1398, 186 N.W. 647, 649 (1922).

45. Mr. Praegitzer was assuredly a representative of the company for certain purposes; he was in charge of the work assigned to him and the twelve employees he supervised. We have found that the evidence is insufficient to persuade us that Claimant notified Mr. Wilkie. Mr. Praegitzer had no responsibilities vis-à-vis Claimant and after learning that Claimant had (reportedly) notified Mr. Wilkie, let the matter drop. On these facts we cannot say that Mr. Praegitzer, who held a position lateral to Claimant, was a representative of the company whose knowledge of the accident can fairly be imputed to the company. That one of Claimant’s co-workers, a co-worker who had no responsibility to report Claimant’s accident, witnessed the fall, should not bind employer with knowledge of the accident. We do not believe it can be said that Mr. Praegitzer was standing for or acting on behalf of Employer when he learned that Claimant suffered an accident.

46. In accordance with the foregoing, the Commission finds that Mr. Praegitzer’s knowledge of Claimant’s accident is not imputed to J.H. Kelly. Claimant has failed to prove that lack of written notice is excused under Idaho Code § 72-704. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that timely written notice was provided or that lack of written notice should be excused under Idaho Code § 72-704.

ORDER

1. Claimant has failed to prove that timely written notice was provided or that lack of written notice should be excused under Idaho Code § 72-704.

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

DATED this 8th 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 8th day of October, 2014, a true and correct copy of the foregoing **ORDER GRANTING RECONSIDERATION - AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

KEITH HUTCHINSON
PO BOX 207
TWIN FALLS ID 83303

DAVID P GARDNER
PO BOX 817
POCATELLO ID 83204

/s/ _____