BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAGNY CRAMBLIT, Claimant, v. BEARABLE DENTISTRY, PLLC, Employer, and GENERAL INSURANCE COMPANY OF AMERICA, Surety, Defendants.	**IC 2010-000204** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** **Filed May 22, 2012**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Lewiston, Idaho, on November 30, 2011. Claimant appeared *pro se.* Kent W. Day of Boise represented Defendants. The parties submitted oral and documentary evidence and filed post-hearing briefs. The matter came under advisement on February 23, 2012. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusion of law and order.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant has complied with the notice limitations 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 suffered an injury from an accident arising out of and in the course of employment on February 29, 2008;

3. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition; and

4. Whether and to what extent Claimant is entitled to the following benefits:

A. Medical care; and

B. Temporary partial and/or temporary total disability benefits (TPD/TTD).

CONTENTIONS OF THE PARTIES

Claimant asserts that as a result of an undisputed fall at work on February 29, 2008, she sustained a tear in the peroneus brevis tendon in her left ankle, which ultimately required surgical repair.

Defendants assert that Claimant failed to file a claim for compensation with Employer within one year of the date of the February 2008 accident as required by Idaho Code § 72-701. Defendants also contend that Claimant has failed to carry her burden of proving that her tendon tear, discovered in December 2009, was, more probably than not the result of her February 2008 accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimonies of Claimant, Suzanne Goodpaster, and Kristine Uravich, taken at hearing;

2. Claimant's exhibits A through L, admitted at hearing; and

3. Defendants' exhibits A through O, admitted at hearing.

The Commission's legal file is also a part of the record in this proceeding.

FINDINGS OF FACT

BACKGROUND

1. Claimant is a native of Iceland, and came to the United States in 1984. She has legal permanent resident alien status. Claimant has been married to her husband, Michael, for twenty-seven years. They have three children, the youngest of whom was nineteen at the time of hearing.

2. Before coming to the U.S., Claimant worked as a dental assistant on a U.S. military base in Iceland. She continued working in dental offices in various capacities after coming to the U.S.

EMPLOYER

3. Claimant first went to work for Employer in 2003 as a dental assistant for Dr. Schiavoni. She was unable to perform her duties and Employer demoted her to a position where she "floated," performing a variety of duties as needed. Employer discharged Claimant in April 2004 for poor performance. Employer rehired Claimant on May 1, 2004 as a sterilization technician. When Employer eliminated the sterilization technician position, Employer moved Claimant to a position as a dental hygienist assistant. Claimant continued in that position until Employer terminated her in October 2009 for insubordination.

ACCIDENT

4. It is undisputed that on February 29, 2008, Claimant slipped on a wet floor in

a patient treatment room. She fell, landing on her right hip, and her left foot and ankle jammed underneath one of the cabinets. Claimant reported the fall to the office manager, Kristine Uravich. Claimant told Ms. Uravich that her ankle hurt, but she declined Ms. Uravich's offer of immediate medical care. Claimant completed her shift. By the time Claimant returned to work on the following Monday, her ankle symptoms had resolved.

MEDICAL CARE

5. Claimant contacted her treating nurse practitioner on March 3 and March 18, 2008 concerning unrelated matters. At neither appointment did Claimant complain of ankle pain or request an appointment to address ankle pain. Claimant saw her nurse practitioner on March 24 for her blood pressure, and Claimant asserted that she inquired about her ankle at that visit, though there is nothing in the chart notes regarding an ankle complaint. Claimant did not inform Ms. Uravich of her medical inquiry concerning her ankle.

6. In December 2008, Claimant sustained a non-industrial injury to her left little toe. She sought treatment for the toe on January 22, 2009 with Yew Por Ng, M.D. The chart note indicates that the visit was for depression and on-going care for her hypertension. Claimant testified that she discussed her ankle complaints with Dr. Ng, but there is nothing in the chart notes regarding treatment of her ankle or foot. Claimant did not inform Ms. Uravich about her visit to Dr. Ng or her inquiry about her ankle.

7. In April 2009, Claimant saw Brad Capawana, M.D., concerning continuing pain in her left little toe resulting from her December 2008 non-industrial accident. An x-ray showed a non-union fracture of the mid- to proximal phalanx. Claimant testified that Dr. Capawana informed her that the x-ray showed nothing unusual in her left ankle.

Dr. Capawana surgically repaired Claimant's little toe in late April 2009.

8. In October 2009, Claimant sought treatment at a vein clinic for pain in her left leg from her calf up through her left knee. Venous ultrasound showed no abnormalities. Claimant then returned to Dr. Ng and requested an x-ray of her ankle. Dr. Ng ordered a left ankle x-ray, which was normal but for a small plantar calcaneal spur.

9. In early December 2009, Claimant saw Edwin Tingstad, M.D., an orthopedic surgeon, regarding her left ankle complaint. On exam he found Claimant had full range of motion, and walked with a normal gait, though she demonstrated some soreness in the left ankle. Dr. Tingstad ordered an MRI, which revealed a peroneus brevis tendon tear. Dr. Tingstad opined that the tear was minor and could be managed conservatively or surgically, depending upon the severity of Claimant's symptoms.

NOTICE

10. On January 4, 2010, Claimant signed a First Report of Injury (FROI), seeking benefits for her ankle injury which she attributed to the February 29, 2008 slip and fall. The Commission received and filed the FROI on January 5, 2010.

11. Dr. Tingstad performed a surgical repair of Claimant's left ankle tendon tear in March 2010. Claimant continued to experience ankle pain and numbness following her surgery. The etiology of her continuing complaints remains unresolved, but further discussion is not relevant to the determination of this matter.

12. While she continued to work for Employer, Claimant made general complaints about her left foot and ankle, but she never advised Employer that she believed her complaints related directly to her February 2008 slip and fall. During this period Claimant also suffered her non-industrial left little toe injury that caused her pain and took

her off work for a period of time.

CREDIBILITY

13. The Referee found Claimant to be a credible witness. A review of Claimant's testimony at hearing, and the record of hearing suggests that Claimant is intelligent and truthful. She presents as passive in the face of conflict, and in her interactions with her employer and her physicians she appears quite meek. At hearing, she relied heavily on her husband for guidance. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

14. 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).

15. Idaho Code § 72-701 sets out the requirements for making a timely claim for workers' compensation benefits. In pertinent part the statute provides:

> 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* . . . If payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be required. (Emphasis added).

16. Claimant complied with the first requirement of Idaho Code § 72-701 by reporting her *accident* to her Employer on the day that it happened. Although Claimant's ankle was painful immediately following the accident, she did not require medical care at that time, and continued to work the remainder of her shift. Claimant is of the opinion that Employer was more concerned about whether Claimant could continue to work than with Claimant and her condition. Employer offered medical care which Claimant declined; and presumably, had Claimant said that her ankle was too painful to continue working, she would have been released from work. By Monday, Claimant's ankle pain had resolved. So far as Employer was aware, Claimant had suffered an *accident,* but had not sustained any *injury.* Thereafter, Claimant never advised Employer that she suspected an ankle injury that she attributed to the work accident. Claimant's subsequent non-industrial injury to the same foot, and her passive manner likely contributed to Employer's lack of awareness of an industrial injury. Vague statements to supervisors regarding incidents or physical conditions that are ambiguous are insufficient to give notice to an employer of an injury. *Murray-Donahue v. National Car Rental Licensee Ass'n,* 127 Idaho 337, 900 P.2d 1254 (1995).

17. Although Claimant's report of her accident may have been sufficient to meet the first requirement of Idaho Code § 72-701, her claim is time barred because she did not comply with the additional requirement that she make a claim for benefits within one year of the date of injury. Claimant's accident occurred on February 29, 2008. The time for making a claim for benefits ended on February 29, 2009. Claimant did not make any claim for benefits until she filed a First Report of Injury or Illness on January 5, 2010, some eleven months after the statute of limitation for filing a claim had run. Claimant did not

require medical care immediately following the accident, and she suffered no time loss, so the exception contained in the last sentence of the statute is inapplicable on these facts.

IDAHO CODES §§ 72-602 and 72-604

18. Although Claimant has failed to demonstrate that she complied with the requirements of Idaho Code § 72-701, there exists a separate mechanism by which the one year limitation may be tolled. Idaho Code § 72-602 requires an employer to file an employer's first report no later than ten days following the occurrence of any accident which (a) requires treatment by a physicians, or (b) results in the absence from work for one day or more. Where an employer is aware of the occurrence of such an accident, yet "willfully fails" to file the required employer's first report, Idaho Code § 72-604 specifies that the limitation of Idaho Code § 72-701 shall not run against the claimant until such a report has been filed.

19. Here, before the question of whether or not Employer "willfully failed" to file an employer's first report is reached, it must be determined whether Employer was aware that the February 29, 2008 accident was one which obligated it to file the Idaho Code § 72-602 report. Again, the obligation to file this report does not arise until claimant suffers an accident which (a) results in the need for medical treatment, or (b) results in the loss of at least one day of work. It follows that Employer must have knowledge of that one of these two events has occurred before it has an obligation to take the action required by Idaho Code § 72-602. Here, it is clear that although Employer had immediate knowledge that an accident had occurred, it did not ever have knowledge that the February 29, 2008 accident caused Claimant to require medical treatment, or required Claimant to miss at least one day of work.

20. Because Employer never possessed knowledge arguably requiring it to file an Idaho Code § 72-602 report, the Commission does not reach the question of whether or not

Employer's failure to file such a report was "willful." In summary, the tolling provisions of Idaho Code § 72-604 do not apply to preserve the claim under the facts of this case.

REMAINING ISSUES

21. Because this matter is decided on the notice issue, the remaining issues are moot and are not addressed in these findings and conclusion.

CONCLUSION OF LAW AND ORDER

Based on the foregoing analysis, the Commission finds that:

1. Claimant failed to file a claim for benefits within one year after her industrial accident; her claim is barred by Idaho Code § 72-701;

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

IT IS SO ORDERED.

DATED this _22nd_____ day of May 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _22nd__ day of ___May_____, 2012, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

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_/s/_____