

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PATRICK DUNNE,

Claimant,

v.

INTELLIGENT EMPLOYMENT SOLUTIONS,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2009-017782

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

Filed August 9, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas Donohue, who conducted a hearing in Twin Falls on August 17, 2010. Dennis R. Petersen represented Claimant. Paul J. Augustine represented Defendants. The parties presented oral and documentary evidence. Subsequently, a post-hearing deposition was taken. The parties submitted post-hearing briefs. This matter came under advisement on January 31, 2011. It 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.

ISSUES

Having bifurcated the issues in this case, the sole issue to be decided is whether Claimant suffered an injury caused by an accident arising out of and in the course of his employment.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends that he developed ulcerated blisters on his feet within the first three days of working at the Jerome Cheese plant. Twelve-hour shifts, standing and walking on slippery concrete, together with required footwear caused the condition.

Defendants contend that no accident occurred. Claimant suffered from pre-existing foot problems as a result of diabetes and other conditions. If Claimant's condition were to be considered an occupational disease, the *Nelson* doctrine precludes compensability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition of Claimant;
2. The hearing testimony of Claimant, and of coworkers Tim Voss, and Glynn Duncan, and of Employer representatives Jessica Richmond, and Yeimi Magana;
3. Claimant's Exhibits 1-15 admitted at the hearing;
4. Defendant's Exhibits A-F admitted at the hearing; and
5. The post-hearing deposition of podiatrist Andrew Lee McCall, D.P.M.

After having considered all the above evidence and briefs of the parties, the Commission issues the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant began working at Jerome Cheese through Employer in May 2009. He completed a three-hour orientation on May 13. He was scheduled to work twelve-hour shifts, three days on, three off, then four days on, four off. He began actually working at the plant on May 18. Although Claimant had thought he was being hired as a hyster driver, he recalls that the first nights he worked a part of the line in the warehouse, continually standing and

walking. Only after he complained about his foot problems did the supervisor give him some hyster duties.

2. Claimant's supervisor, Glynn Duncan, recalls that Claimant complained about his feet on the first night's work. Although the usual practice is to rotate workers between the line and the hyster at three-hour intervals, he gave Claimant more hyster duties to relieve his feet.

3. Claimant recorded that after the third night's work, he had developed blisters on the ball of each foot. At his pre-hearing deposition, Claimant testified he had no pain or problems the first two nights of work and only noticed the beginning of a blister around midnight the third night. At hearing, Claimant testified that he had actually noticed blisters earlier and had changed his footwear from boots to sneakers before he began the third night's shift.

4. The boots and the sneakers were his own footwear which he was accustomed to wearing; they were not new. Because he had not yet established "at work only" footwear, he was required to wear protective "booties" over his shoes and boots for cleanliness in the plant.

5. Claimant discovered an additional blister on his right big toe which had disrupted the nail bed. On May 22, a physician at Physician's Immediate Care removed the toenail.

6. On May 24, Claimant returned to work as scheduled. He worked four more shifts and was scheduled off for four days.

7. On June 1, Claimant began a three-day schedule. He worked the first two, but called in sick for the third night's shift because his right foot hurt.

8. Claimant worked his regular four shifts on June 7, 8, 9, and 10, and his regular three shifts on June 15, 16, and 17. Claimant worked two more shifts on June 21 and 22. He

did not work again at Jerome Cheese.

9. The witnesses dispute when Claimant was observed limping, when he first complained about foot pain, and when or whether he claimed or denied his foot pain was related to his work. These disputes do not affect the outcome of the questions of accident and causation.

Medical Care

10. After starting work at Jerome Cheese, Claimant first sought medical care on May 22. The medical record notes that Claimant is diabetic, but does not mention work or any blisters. The doctor noted athlete's foot fungus "tinea" and that Claimant's toenail was "loose." Claimant's right big toenail was removed.

11. Claimant returned to Physician's Immediate Care on June 4. The doctor noted a blister and diagnosed an ulcer on the plantar aspect of Claimant right foot and referred him to a podiatrist. The note also states "Jerome Cheese>nites" without other context to indicate whether Claimant reported where he worked or whether the doctor was commenting on a potential cause.

12. Podiatrist Andrew McCall first saw Claimant on June 4. Claimant reported blisters on both feet with swelling of the right foot. The record notes he reported, "He has started a new job that keeps him on his feet a lot and this in combination with his foot deformity and neuropathy have led to ulceration." Family history includes diabetes and foot problems. Dr. McCall examined Claimant's feet. He noted the presence of a blister on the ball of the left foot and an ulceration and blister on the ball of the right foot. He diagnosed "Ulcer of right hallux and plantar foot secondary to diabetes, neuropathy, and foot deformity. Cellulitis."

13. Follow-up on June 10 revealed Claimant noted increased swelling after three 12-hour shifts in a row. Dr. McCall examined and continued to treat the ulcer. He noted improvement and the absence of swelling on June 15.

14. On June 23, Claimant visited the emergency room at St. Luke's Magic Valley Regional Medical Center ("MVRMC"). Claimant complained of redness in his right leg from foot to groin. He complained of an ulcer under a blister on his right foot. Claimant's history noted, "The patient is also a diabetic and has had very poor compliance with his diabetic medication. He also has been on significant alcohol and working significant hours with a lot of pressure on this right foot." Medication review revealed he had been taking his diabetes medication, Metformin, "sporadically." An examination by Dr. Pressman revealed "irritation" on the ball of the left foot without "infection, ulceration, or lymphangitis;" an ulcerated lesion on his right foot with "significant erythema of the whole lower leg with proximal lymphangitis up into the groin and some right lymphadenopathy." Dr. Pressman diagnosed: "1. Right lower extremity cellulitis with lymphangitis. 2. Diabetes mellitus with hyperglycemia. 3. Alcoholic hepatitis. 4. Dehydration." He admitted Claimant to the hospital under the care of Daniel Preucil, M.D.

15. Claimant remained hospitalized from June 23 through July 3. The infection was determined to be staph. Dr. Preucil's admitting diagnoses were: "1. Infected diabetic foot ulcer in a noncompliant diabetic. . . . 2. Diabetes. . . . 3. Essential hypertension. . . . 4. Alcohol abuse." Dr. Preucil's discharge diagnoses were: 1. "Methicillin resistant staph aureus [MRSA], streptococcus B diabetic foot ulcer status post incision and drainage x2. 2. Would Evac placement on progressively healing wound. 3. Diabetes mellitus, poorly controlled.

4. Hypertension. 5. Alcoholism. 6. Tobaccoism.” Claimant’s Metformin dosage was doubled, from 500 mg twice daily to 1000 mg twice daily.

16. During that hospitalization, despite the MRI report which noted no abscess, on June 24, Dr. McCall aspirated Claimant’s foot and drained the abscess which was present. On June 29, he debrided necrotic tissue in the surgical wound. He left the wound open because of infection and the potential for additional necrotic tissue. Although Dr. McCall did not make separate written notes, he did follow-up with Claimant’s wound care after hospitalization. Dr. McCall did not see Claimant again until September 10.

17. Claimant’s post-hospitalization wound therapy was performed by Elizabeth “Beth” Reinke, RN. She recorded visits on July 6, 8, 10, 13, 15, 17, 20, 22, 24, 27, 29, 31, August 3, 5, 7, 10, 12, 19, and 26, as the wound was slow to heal. Claimant was restricted from weight-bearing on the right foot during this time.

18. Claimant visited the emergency room again on July 11 with redness and swelling in his right foot. (Inconsistently, the record of this visit refers to the right and, inaccurately, to the left foot.) He was concerned about a recurrent infection. He was given medication and instructed in how to keep that wound clean. He was not admitted for inpatient treatment.

19. On September 10, Dr. McCall noted Claimant’s ulcer had completely healed. After the September 10 visit, Dr. McCall allowed gradual resumption of weight bearing. After visits on September 25 and October 28, Dr. McCall released Claimant to activities as tolerated. “Follow-up with the VA.”

20. Claimant has had continuing difficulties controlling his diabetes since.

Prior Medical Care

21. Claimant was diagnosed with diabetes in 2006. He has pre-existing neuropathy

in his feet and hammer toes.

22. Defendants' Exhibit A consists of two pages. The fax stamp indicates these were faxed together from South Idaho Foot & Ankle Clinic. Page one is dated May 4, 2009. It contains notes of a history and review of systems. Page 2 is undated. It refers to the May 22 removal of the right great toenail. Clearly, either the page one date is erroneous, or these pages represent visits at differing dates.

23. Page 2 describes an examination which found a blister on the ball of Claimant's left foot and ulcers on the ball of his right foot and right great toe and general swelling of the right foot. The record of that visit notes, "Pt has no feeling in feet due to neuropathy. States he started a new job & shoes caused him to get blisters forcing nail to pop up. Was badly fungal."

Additional Facts

24. Since high school graduation in 1969, Claimant has worked many jobs requiring him to be on his feet, including a more than five-year stint in the U.S. Army.

25. Claimant's calendar notes shows he worked May 4, 5, and 6, two hours each day, at YMCA.

26. More recently, Claimant has had four cysts removed from inside his foot. These are not claimed to be related to this workers' compensation claim.

27. Claimant does receive Social Security Disability benefits effective about January 2010.

28. Claimant began preparing his calendar notes, exhibit 15, about one week after he noticed the blisters. Some calendar notes were made by his wife.

29. In deposition, Dr. McCall testified that ulceration on the ball of the foot can be caused by pressure, particularly the pressure of standing and walking on hard surfaces, but can also be caused by the hammertoes which Claimant had, as well as by complications of diabetes.

30. If he had been asked in September 2009, Dr. McCall would have allowed Claimant to return to work on September 25, but would have recommended only four- or six-hour shifts at first, with gradual increase to full shifts as tolerated. Whether Claimant would have been released to full duty on October 28 would have depended upon how Claimant had tolerated the gradual increased work. Dr. McCall acknowledged these expectations are speculative.

31. In deposition, Dr. McCall opined that Claimant working 12-hour shifts on a concrete floor, walking and standing continually except for a half-hour lunch and two 15-minute breaks, wearing boots and booties, “is a scenario that would or very likely could lead to ulceration.” Dr. McCall also testified that an undefined amount of pressure for an undefined length of time could cause ulcers on the foot of a person with Claimant’s diabetic condition. He admitted:

Q. [by Mr. Augustine] Yeah. But, I mean, in other words, it’s simply guesswork how this was caused, when this came about?

A. [by Dr. McCall] Yeah, all I can testify to is that to create an ulcer, you have external force, you have internal force, and there needs to be a certain amount of time that each one exerts to develop the ulceration. As to telling you it takes 10 hours or 15 hours to do that, I can’t.

32. Dr. McCall opined that diabetes can cause neuropathy in the feet. There is a strong relationship between diabetes and the hammertoe foot deformity Claimant exhibits.

Neuropathy and hammertoes can both contribute to the likelihood of developing ulcers on the bottom of the foot. Claimant's poor compliance with his diabetic medication resulted in uncontrolled diabetes which increased his risk of neuropathy and ulceration. In such a diabetic condition, any pressure on the bottom of the foot could result in ulcers; ulcers could form with normal daily activity; ulcer formation would not require 12 hours of standing and walking. A sudden increase in the amount of time one spent on one's feet would increase the risk of ulceration.

DISCUSSION AND FURTHER FINDINGS

33. 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

34. "Accident" and "injury" are terms defined by statute. *Idaho Code*, § 72-102(18).

35. The claimant in a worker's compensation case has the burden of proving that an accident arising out of and in the course of employment occurred. *McGee v. J.D. Lumber*, 135 Idaho 328, 17 P.3d 272 (2000). The proof must establish a probable, not merely a possible, connection between cause and effect to support the contention that the claimant suffered a compensable accident. *Callantine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 653 P.2d 455 (1982); *Vernon v. Omark Industries*, 115 Idaho 486, 767 P.2d 1261 (1989).

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36. Where a worker's body is suddenly overcome by the forces of his work, an accident has occurred. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983) (operating machinery when back injury occurred). Where usual body motions, when required for work, are being performed and an injury occurs, an accident has occurred. *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005) (standing from seated position, felt immediate knee pain, meniscus had torn). An important point to glean from both *Page* and *Wynn* is that although the claimants in those cases were performing their usual jobs at the time of injury, both could pinpoint the precise moment when their physical ability to resist injury was overcome by the demands of their work. Therefore, the occurrence of an accident, and the time, place and circumstances of the accident, were easy to identify.

37. Compare the facts of *Wynn* and *Page* to those before the Court in *Perez v. J.R. Simplot Co.*, supra. In *Perez*, although there was some evidence that claimant's work related standing activities, occurring over a period of hours, were implicated in aggravating her underlying diabetes, the claim failed due to claimant's inability to satisfy the Commission that an accident, i.e., an untoward mishap or event, had occurred.

38. The major question in analyzing the facts of Claimant's claim is whether his situation is more like *Perez* or more like *Wynn* and *Page* and their progeny.

39. Here, Claimant testified that the blisters and ulcer came on gradually, without any identifiable event. Unlike the claimant in *Wynn*, who could identify the occurrence of his accident to the minute, Claimant could identify no mishap or event causing injury. Because Claimant, like the claimant in *Perez*, cannot identify an untoward mishap or event, his accident claim must fail.

40. In conclusion, the Commission finds that Claimant has failed to satisfy his burden of proof on the noticed issue of whether or not he suffered a compensable "accident." Therefore, the issue of medical causation is not reached.

CONCLUSION OF LAW

Claimant failed to show he suffered a compensable industrial accident.

ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant failed to show he suffered a compensable industrial accident;
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

IT IS SO ORDERED.

DATED this 9th day of August, 2011.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

Participated but did not sign
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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amw

/s/ _____