BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN M. GOODMAN, Claimant, v. IDAHO TANK & CULVERT, INC., Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2009-015311** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 13, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on March 25, 2010. Claimant was present and represented by Bradford S. Eidam of Boise. Eric S. Bailey of Boise represented Employer and Surety. The parties presented oral and documentary evidence. No post-hearing depositions were taken. Claimant and Defendants then each submitted post-hearing briefs, after which Claimant submitted a reply brief. This matter came under advisement on May 17, 2010.

ISSUES

By agreement of the parties, the issue to be decided is: Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-704.

At the hearing, the parties agreed that Claimant injured his shoulder in an industrial accident at Employer's premises. In addition, they stipulated that the medical bills in the record were reasonably and necessarily incurred in treating Claimant's shoulder injury and that, if Claimant prevails on the notice issue, he is entitled to temporary total disability benefits from June 9, 2009 through October 26, 2009. The parties reserved the issues of permanent partial impairment and permanent partial disability.

CONTENTIONS OF THE PARTIES

Claimant contends that he injured his left shoulder on March 6, 2009, when he fell twice while welding in an 80-ton silo. He concedes that he did not provide Employer with written notice of his industrial accident until after the 60 days allowed under Idaho Workers' Compensation Law. Nevertheless, Claimant argues that his claim should not be dismissed because he told Brian Nance, his supervisor, about his falls on the day they happened. In the alternative, Claimant asserts that he should prevail because he notified John Kipper, Employer's shop superintendent, on June 1, 2009, and Employer was not prejudiced by a 29-day delay in giving notice.

Employer contends that Claimant failed to provide proper notice, under any theory. It argues that Brian Nance's knowledge of the industrial accident, through an off-hand, joking discussion with Claimant, is irrelevant because Brian Nance was not a supervisor or otherwise positioned as Employer's agent or representative. Further, Claimant's failure to report the accident within 60 days prejudiced its ability to investigate the accidents and direct treatment for Claimant's injury. As a result, Employer seeks dismissal of Claimant's Complaint.

OBJECTIONS

Claimant's objection, upon which ruling was reserved, recorded on page 61 of the hearing transcript, and Employer's objection, recorded on page 14 of Larry Byers' deposition transcript, are both overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition of Claimant;
2. The pre-hearing deposition of Brian Nance, layout welder for Employer;
3. The pre-hearing deposition of John Kipper, shop superintendent of Employer;
4. The pre-hearing deposition of Larry Byers, laborer for Employer;
5. The pre-hearing deposition of Janis Smith, claims examiner for Surety;
6. The testimony of Claimant taken at the hearing;
7. Claimant's Exhibits 1A-15 admitted at the hearing; and
8. Defendants' Exhibits 1-12 admitted at the hearing.

After having considered all the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 44 years of age and resided in Nampa at the time of the hearing. He was a welder prior to being hired in January 2005 by John Kipper, shop superintendent of Employer, as a welder fabricator. Claimant built asphalt drums, silos and tanks for Employer. During his tenure there, Claimant progressed from a "beginning" welder to a "welder layout person."

2. On January 17, 2005, Claimant acknowledged, by his signature, reading and understanding the Idaho Tank & Culvert, Incorporated General Safety Rules. The first enumerated item, on the first page, states: "Report all accidents to your supervisor – whether you seek medical treatment or not." Ex. 8, p. 133. It does not mention anything about where an injured employee should obtain medical treatment or whether Employer has a designated health care provider.

3. Employer's company is a small shop, with the administrative office located on the same premises as the production facility.

4. Mr. Kipper, as shop superintendent, possesses greater authority than any other worker on the site. He is generally available to answer questions, but maintains a "pecking order" so that things get done when he is away. Kipper Dep., pp. 15-16.

5. When Claimant first started working for Employer, Earl Murphy was the "lead man." He had supervisory authority over Claimant and other workers on the production floor. According to Mr. Kipper, "Everyone pretty much knew what to do, but Murphy had authority to assign them as he saw fit." Kipper Dep., pp. 14-15. A few weeks prior to Claimant's industrial accidents, however, Mr. Murphy took a leave of absence and Brian Nance, formerly a welder layout person like Claimant, was promoted to lead man and "layout welder." Mr. Kipper promoted Mr. Nance over Claimant because . . . [p]ure and simple, Brian is a little better at the prints." Kipper Dep., p. 12.

6. Claimant testified that he believed Mr. Nance was a supervisor because he had been promoted. But, according to Mr. Kipper, even though Mr. Nance was the new lead man, he did not inherit Mr. Murphy's level of authority. He admitted that floor workers would be obliged to take directions from Mr. Nance in his absence because "somebody has to have the last say-so

if I'm not around so something gets done." Kipper Dep., p. 16. However, Mr. Kipper also explained that Mr. Nance did not have authority to move workers from one job to another, to discipline employees, to hire or fire, to approve time off work, or to set work schedules. According to Mr. Nance, he wasn't even officially given the title of "lead man." He referred to Mr. Kipper as the "big boss" who gave job assignments, while describing himself as a person who would answer questions about how to build or weld things, and sometimes about what jobs to work on.

7. Mr. Kipper's testimony concerning Mr. Nance's authority is credible. Mr. Nance's testimony was guarded, but also credible. Claimant did not offer evidence of Mr. Nance's specific duties or matters over which he exercised authority and his testimony is, therefore, less credible than that of Mr. Kipper in that regard.

8. With respect to silo fabrication in general, Claimant testified that the giant metal cylinder forming the primary segment of a silo is sometimes situated on "fit-up rolls" while it is under construction. On fit-up rolls, a cylinder can be turned, or rolled, to access the full surface of the structure.

9. In March 2009, Claimant was building an 80-ton silo for asphalt. Claimant was fabricating the body of the silo from a giant half-cylinder, cut length-wise, resting on fit-up rolls. The fit-up rolls reached approximately Claimant's knee-height, and he needed to step over them and up onto the half-cylinder in order to work on its inner surface.

10. On March 6, 2009[1], Claimant testified that he was loaded down with tools and heading for the half-cylinder when he tripped over the fit-up rolls and landed on the front of his left shoulder, on the floor. There are no known witnesses to this accident. His shoulder aching,

[1] Claimant originally alleged that his accidents occurred on April 16, 2009; however, after reviewing his and Larry Byers' time cards, he determined that they occurred on March 6, 2009. Although Employer raised issues surrounding Claimant's inability to pinpoint the correct date when he reported the accidents, it does not dispute that they occurred on March 6, 2009.

Claimant brushed himself off, placed his tools inside the half-cylinder, and fetched Larry Byers, laborer, to assist him in installing a wear ring onto the inside surface.

11. Inside the half-cylinder with Larry Byers 10-15 minutes later, Claimant testified that he again lost his balance and fell, this time landing on the back of his left shoulder. Claimant's shoulder pain increased, and he quit working on the silo for the day. Claimant testified that it was 3:30 or 4:00 in the afternoon and, after falling twice, he was "just done." Tr. p. 34.

12. Larry Byers' deposition testimony corroborated Claimant's testimony about falling inside the cylinder. Mr. Byers also testified that Claimant told him on March 6, 2009 that he had fallen previously that same day.

13. Later that afternoon, Claimant testified he was laughing and joking with Brian Nance, layout welder for Employer, about his falls. Claimant's testimony in this regard is undisputed by Mr. Nance.

14. Claimant testified that he knew he was supposed to advise Mr. Kipper when an accident occurred at work but elected not to do so, at first, because he thought he was not hurt. "You work with steel all day long, you know, you're always sore, you're always hurting." Tr., p. 39.

15. Over the months that followed, however, Claimant testified that his shoulder became more painful and he modified how he worked. For instance, he "babied it," got help from others and used an overhead crane or a forklift to assist in lifting objects he would normally just pick up. Tr., p. 35. Larry Byers corroborated this testimony.

16. By June 1, 2009, Claimant testified that he thought his left shoulder pain had persisted too long, so he made an appointment with his health care provider for June 2, 2009.

17. After making the appointment, Claimant met with Mr. Kipper in his office to let him know he needed time off. Mr. Kipper disputes that Claimant said anything about any workplace accident at that time. He maintains Claimant only sought time off for an appointment with his physician. Claimant, however, testified that he told Mr. Kipper the details of his relevant industrial accidents during this meeting.

18. According to Mr. Kipper, he directs every employee who reports a workplace accident to see John Barth, Employer's person in charge of filling out workers' compensation claim forms, and to obtain care from Employer's designated provider. He further testified that, if Claimant had advised him of an industrial accident, he would have sent Claimant to see Mr. Barth and to go to Employer's designated health care provider, though not necessarily in that order.

19. Mr. Kipper explained that he did not direct Claimant to do either of these things because Claimant did not tell him he hurt himself at work. Mr. Kipper testified that he first learned of Claimant's relevant workplace accidents a few days after their June 1 meeting, when Claimant and he discussed whether Claimant could return to work with lifting restrictions.

20. Claimant also testified that on June 1, after making his physician appointment but before speaking with Mr. Kipper, he told Mr. Barth about his industrial accidents.

21. Mr. Barth did not testify, nor was he deposed during the course of these proceedings. However, Janis Smith, claims examiner for Surety, spoke to Mr. Barth on June 9, 2009 in connection with her investigation of the claim. She testified that, according to Mr. Barth, Claimant advised Mr. Kipper on June 2 or 3 that he had a physician appointment to see about his left shoulder pain and that he believed the pain was caused by the industrial accidents (later determined to have occurred on March 6, 2009):

[Ms. Smith] First one I contacted was Jeff Barth. And that was on June 9th.

Q. And what did you learn in speaking with him?

A. That on June 2nd or June 3rd, Mr. Goodman advised the shop foreman, John Kipper, that he was going to a doctor about his shoulder. This was the first time he had heard that the injured worker had injured his shoulder, and that the employee states he recalls working on a silo 4-16-09 when he tripped getting in and fell on his left shoulder.

Q. Did you learn anything else from Mr. Barth during that conversation?

A. It says he lost his balance and fell again, hitting the same shoulder.

Q. So there would be two falls?

A. Uh-huh.

Q. Is that yes?

A. Yes, the same day.

Smith Dep., pp. 8-9.

22. A June 2, 2009 chart note by Charlie Frost, P.A., tends to indicate that Claimant told both Mr. Barth and Mr. Kipper about the industrial accidents on or before June 2, 2009:

> *The patient comes in with complaints of left shoulder pain…claims in 03/2009 he fell and injured his left shoulder…was working on a silo…stated that he had tools in both hands, he went to step over the rollers in an attempt to get into this silo and lost his balance and fell to the ground. He was unable to break the fall and he fell directly onto his left shoulder. He admitted to quite a bit of pain. He did notify one of the supervisors of the injury. He said he was able to gather himself up, grabbed his tools, got back up and got into the tunnel. When he got in the silo 10 minutes later, he lost his balance and fell directly on his shoulder once again. The patient felt with time the left shoulder should have healed. However, he is starting to get more pain now and a lot of nighttime pain. He admits to some popping and clicking in his left shoulder. The patient did report the injury to his foreman and safety director but has not filled out a Work Comp claim yet. He still admits to pain, popping and decreased range of motion. He denies history of left shoulder trauma.*

Ex. 2, p. 40.

23. The Referee finds Ms. Smith's testimony less compelling than Mr. Frost's chart note, because her testimony reports third-hand information about what Mr. Kipper knew and when he knew it (*See,* finding number 21 above), knowledge that Mr. Kipper denied possessing

under oath. Further, Ms. Smith's testimony does not address on what date Mr. Barth first became aware of Claimant's industrial accidents.

24. Mr. Frost's chart note contains only second-hand information on this subject, all reported by Claimant. While it appears to corroborate Claimant's testimony, however, there is some question as to whether "safety director" refers to Mr. Barth. Further, although "foreman" can be assumed to refer to Mr. Kipper, it must again be noted that Mr. Kipper denied Claimant told him about his accidents on June 1.

25. In light of the conflicting evidence concerning the date on which Claimant first notified Mr. Kipper or Mr. Barth of his industrial accidents, the Referee finds that Claimant has failed to establish he provided notice to Employer prior to June 3, 2009, the date on which the Surety recorded that Claimant first provided notice.

26. Concerning Claimant's injury, Mr. Frost diagnosed a left acromioclavicular sprain and a possible left rotator cuff tear at Claimant's June 2, 2009 medical appointment. Claimant continued to treat with Mr. Frost while his workers' compensation claim was pending. He kept in contact with Employer about his condition, but ultimately did not return to work there.

27. In a letter dated June 17, 2009, Surety denied Claimant's workers' compensation claim for failure to report the accidents to employer within the statutory 60-day window. As a result, Ms. Smith closed her investigation without ever speaking to Larry Byers, obtaining Claimant's prior medical records or taking further action on the file. Ms. Smith went as far as to speculate that the claim would not have been denied, had it been timely reported.

28. Even though his claim was denied, Claimant continued to obtain treatment for his left shoulder injury, at his own expense.

29. At some point, Mr. Frost referred Claimant to Thomas E. Goodwin, M.D., an orthopedic shoulder surgeon. On July 13, 2009, Dr. Goodwin performed left shoulder arthroscopy with subacromial decompression acromioplasty, acromioclavicular joint excision, and open subscapularis tendon repair. Dr. Goodwin's pre- and post-operative diagnoses were the same: left shoulder subscapularis tendon tear and rotator cuff impingement syndrome.

30. In a letter to Claimant's attorney dated August 7, 2009, Dr. Goodwin opined that Claimant's delay in reporting his industrial accidents to Employer did not "ultimately" affect Claimant's treatment. Ex. 1, p. 13. "Specifically, I feel that surgical intervention would have been required whether this had been evaluated early versus late and ultimately I do not think that the late reporting or diagnosis of his problem will be a detriment to his recovery in regards to this rotator cuff injury." *Id.* The letter indicates that Dr. Goodwin was unaware of the specific length of the delay, being under the impression that Claimant's industrial accidents occurred "possibly in April." Ex. 1, p. 12.

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). 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).

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…*

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." I.C. § 72-704.

Claimant concedes that he did not provide Employer with written notice of his industrial accidents. Therefore, he must establish either that Employer had actual knowledge within the time limit, or that the delayed notice did not prejudice Employer.

Actual knowledge.

If Employer had actual knowledge of Claimant's March 6, 2009 industrial accidents within 60 days of their occurrences, then his claim remains viable under Idaho Code § 72-704. That statute provides "actual knowledge" is imputed to the employer if the employer or its "agent or representative" had knowledge of the injury.

In the case of a corporation, such as Employer, *formal* notice under Idaho Code § 72-701 may be served upon "…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." In addition, informal notice to an employee's "supervisor" of an industrial accident constitutes notice to a corporate employer. Page v. McCain Foods, Inc., 141 Idaho 342, 109 P.3d 1084 (2005).

Knowledge of an industrial accident by an "agent or representative" of employer is established under Idaho Code § 72-704 whenever it is proven that either a person statutorily

designated to receive formal notice of an industrial accident pursuant to Idaho Code § 72-701, or an employee's supervisor, possessed such knowledge. As a result, if an agent of Employer upon whom process may be served, an officer of Employer, an agent in charge of business where Claimant was injured, or Claimant's supervisor had timely knowledge of Claimant's industrial accidents, then Claimant's Complaint should not be dismissed.

31. The Referee finds sufficient evidence in the record to establish that Claimant fell on his left shoulder, twice, while working on the silo on March 6, 2009. The Referee further finds that Larry Byers, and perhaps Mr. Nance, had some knowledge of these accidents on March 6, 2009 and, further, that nobody else (other than Claimant) had such knowledge within the 60-day statutory window. As a result, Claimant must prove that either Mr. Byers or Mr. Nance was an "agent, representative, or supervisor" of Employer at the time Claimant allegedly provided them with knowledge of his accidents in order to prevail on the notice issue.

32. As a laborer, Mr. Byers did not possess sufficient authority for his knowledge to be imputed to Employer. Therefore, his knowledge is irrelevant. However, Mr. Nance was a "layout welder" at the time, and had been promoted after Mr. Murphy, Claimant's prior intermediate supervisor, ceased working for Employer. As a result, a deeper analysis must be conducted to determine whether Mr. Nance's "knowledge" is equivalent to Employer's.

33. Mr. Kipper testified that Mr. Nance would make decisions in his absence to keep the production floor running. Mr. Kipper also testified, however, that he (himself) was in charge at the location, that he was the one who answered questions on a day-to-day basis, and that he was usually available. Mr. Kipper further testified, and Mr. Nance's testimony did not dispute,

that Mr. Nance did not possess authority to hire or fire, to approve vacation time or work schedules, to make job assignments or to discipline employees.[2]

34. According to Mr. Nance, after his promotion, he would answer questions about how to build things and would occasionally give directions about what job to work on. He did not admit to possessing any specific decision-making authority.

35. Claimant testified that if Mr. Nance told him to do something, he would be obliged to comply; however, he also testified that he knew Mr. Kipper and Mr. Barth were the individuals to speak to about workplace accidents, never alleging that he believed Mr. Nance had supervisory authority in that area. Claimant further testified that, because Mr. Nance was given a promotion and a raise when Mr. Murphy left, he must be a supervisor. However, Claimant never described what he believed was the extent of Mr. Nance's supervisory authority, or whether Mr. Kipper or someone else in charge had ever confirmed the level of authority to which Claimant assumed Mr. Nance had risen. Mr. Nance's "authority," if such he had, was more concerned with the production side of the business rather than the administrative side.

36. At the hearing, Claimant only described one job (the 80-ton silo job) on which he interacted with Mr. Nance after his promotion. Claimant was explaining that it was not customary to work on a half-cylinder on fit-up rolls to install a wear-ring, as he was doing when he fell. When asked whose decision it was to proceed this way, Claimant responded, "Well, kind of me and Brian [Nance] together. We were just like why not . . . You never know, it might be a better way to do it." Tr., p. 30.

[2] For some reason, neither Mr. Kipper nor Mr. Nance were asked directly what Mr. Nance's responsibility was, if any, regarding handling industrial injuries.

37. After a careful review of the record, the Referee finds no evidence that might establish Mr. Nance was either an agent of Employer upon whom process may be served or an officer of Employer. Further, although he answered questions in Mr. Kipper's absence to keep production moving, there is only weak inferential evidence that Mr. Nance may have ever been in a position to make any business decisions on Employer's behalf. As a result, Claimant has also failed to prove that Mr. Nance was ever "in charge" of anything at Employer's. Thus, the Referee finds Mr. Nance was not an "agent in charge of business" where Claimant was injured.

38. Finally, the Referee finds that Mr. Nance was not Claimant's supervisor. The evidence fails to establish that Mr. Nance had any particular authority with respect to workplace accidents, or that he in any way specifically directed Claimant in any aspect of his job. Mr. Nance was promoted, given a raise and had somewhat different production responsibilities than Claimant. Based on these facts, Claimant's testimony that he believed Mr. Nance was his supervisor is credible. However, Claimant's belief is only relevant to the extent that it tends to establish actual authority bestowed upon Mr. Nance by Employer. Claimant's impression, that Mr. Nance inherited Mr. Murphy's authority, is not without merit. However, given that Claimant offered no substantial evidence to support this belief, and further given Mr. Kipper's and Mr. Nance's credible testimony tending to prove that Mr. Nance was not a supervisor, Claimant's impression is insufficient to carry his burden of proof.

39. As a result, the Referee finds Employer did not have actual knowledge of Claimant's relevant industrial accidents.

40. In the alternative, even if it be assumed that Mr. Nance did have supervisory authority over Claimant such as to qualify as his "supervisor" under the rule discussed in the

Page v. McCain Foods, Inc., supra, it is clear that the information imparted to Mr. Nance was insufficient to put the employer on notice of the occurrence of the accident.

41. Under Idaho Code § 72-704, as construed in the case of *Murray-Donahue v. National Car Rental Licensee Association,* 127 Idaho 337, 900 P.2d 1-48 (1995), oral notice to the Employer may provide the employer with actual knowledge of an injury, thus obviating the necessity of a written notice. As set forth in *Murray-Donahue, supra,* the inquiry is whether the Employee's verbal statements imparted "considerable knowledge" of the accident or injury to Employer. *See also, Page v. McCain Foods, supra.* This standard requires an examination of the conversation between Claimant and Mr. Nance, a conversation which Mr. Nance no longer remembers. However, Claimant's testimony, standing alone, is insufficient to demonstrate that his discussions with Mr. Nance would be likely to impart to Mr. Nance "considerable knowledge" of the accident or injury. As described by Claimant, his reference to the subject accident to Mr. Nance was in Passing, and in a joking manner.

> *Q. Did you have occasion to talk to anyone else about you falling?*
>
> *A. yeah, me and Brian were talking about it.*
>
> *Q. How did that happen that you were talking to him about it?*
>
> *A. Because I was just done and I just went over there and we were kind of bs'in, you know, Friday.*
>
> *Q. And it came up?*
>
> *A. It came up. Yeah, we were laughing about it and joking about it.*
>
> *Q. It came up more in a humorous sense rather than for the purpose of you letting him know I got hurt on the job?*
>
> *A. Yeah, basically.*

Tr., p. 34, ll. 15-18.

42. Nowhere in Claimant's testimony does it appear that he advised Mr. Nance that he had suffered an injury as a consequence of an accident, much less that he had suffered an

injury of the type that required further attention. In short, nothing in the very brief and jocular discussion Claimant may have had with Mr. Nance was sufficient to impart to Mr. Nance the "considerable knowledge" of the accident/injury anticipated under *Murray-Donahue v. National Car Rental Licensee Association, supra.* Indeed, that Mr. Nance has no recollection of the conversation may be explained by the fact that nothing that was said alerted Mr. Nance to the fact that Claimant had suffered an accident related injury. for this reason as well, Idaho Code § 72-704 fails to excuse the written notice required under Idaho Code § 72-701.

Prejudice to employer.

43. In order to demonstrate that Employer was not prejudiced, 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).

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 because, 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.*

44. The Referee found, above, that Employer was on notice of Claimant's industrial injury as of June 3, 2009. Therefore, Claimant's report was 29 days beyond the 60-day requirement imposed by Idaho Code § 72-701.

45. The Claimant in this case finds himself in a difficult position similar to the claimant in *Mora*. Employer was unable to investigate the validity of the claim until nearly three months after Claimant's workplace accidents. Although Employer could 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.

46. In addition, Claimant's reporting delay may have hampered Employer's ability to fulfill its statutory duty to provide reasonable medical treatment, and direct the same. Although Dr. Goodwin opined that Claimant would have required left shoulder surgery regardless of the delay, he himself did not examine Claimant until approximately 4 months after the industrial injury. As a result, Dr. Goodwin's opinion is necessarily based upon some degree of speculation, which he did not quantify or explain. Thus, Dr. Goodwin's opinion suffers from a lack of specificity, if not an inherent credibility deficiency, rendering it of marginal usefulness to the determination at hand. Although this is affirmative evidence, it is insufficient on its own to meet Claimant's burden of proving that Employer was not prejudiced.

47. In addition, Claimant's ability to work may have been compromised by other intervening causes during the delay or even continuing to work without restrictions until he was

unable to do so. Even though not argued by Employer, the possibility that some non-occupational cause may have intervened to exacerbate or even create the condition for which Claimant seeks benefits during this nearly month-long 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.

48. The Referee finds that Claimant has failed to meet his burden of proving Employer was not prejudiced by his 29-day delay in reporting his industrial accidents.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-704.

2. Claimant's Complaint should be dismissed.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __23rd__ day of June, 2010.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:
___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __13th___ day of ___July____, 2010, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRADFORD S EIDAM
PO BOX 1677
BOISE ID 83701-1677

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

ge *Gina Espinosa*

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN M. GOODMAN, Claimant, v. IDAHO TANK & CULVERT, INC., Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	)	**IC 2009-015311** **ORDER** Filed July 13, 2010

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove he complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706.

2. Claimant's Complaint is dismissed.

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

DATED this __13th___ day of __July__, 2010.

INDUSTRIAL COMMISSION

___Unavailable for signature_____
R.D. Maynard, Chairman

__/s/_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:
_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __13th___ day of __July___ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

BRADFORD S EIDAM
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ge Gina Espinoza