BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JORGE HERNANDEZ-PAZ, Claimant, v. TREASURE VALLEY PLASTERING, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2006-519834** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed March 30, 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 October 1, 2009. Claimant was present and represented by Daniel J. Luker of Boise. Gardener W. Skinner, Jr., also of Boise, represented Employer/Surety. Mauricio Jaramillo interpreted. Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on December 24, 2009.

ISSUES

As discussed and narrowed at hearing, the issues to be decided are:

1. Whether Claimant suffered an accident causing an injury, and, if so,

2. Whether Claimant gave timely notice of that accident pursuant to Idaho Code § 72-701.

CONTENTION OF THE PARTIES

Claimant contends that he injured his right hip on or about July 25, 2006, when he was coming off a scaffold that may have been collapsing, and stepped into a small hole or indentation in the ground. According to Claimant, his supervisor was present and had immediate knowledge of Claimant's accident. Surety accepted the claim and paid time-loss and medical benefits totaling approximately $78,000[1] over the next two-and-a-half years. It was not until Defendants filed their Answer that Claimant learned they were contesting the occurrence of the accident and lack of notice "as soon as practicable" after its alleged happening. Therefore, the doctrine of *laches* applies, and Defendants should be estopped from now arguing no accident occurred. Claimant has been prejudiced in that after a three-year lapse of time, memories have faded and he has been hindered in proving his case. In any event, while the testimony regarding the occurrence of the accident and the giving notice thereof is conflicting, he has nonetheless met his burden of proving the same.

Defendants contend that while they initially accepted and paid benefits on Claimant's claim, further investigation revealed inconsistencies in witnesses' version of the events surrounding Claimant's alleged accident, causing Defendants to now assert no accident happened and, if it did, it was not reported as soon as practicable following its occurrence. Further, *laches* is not available to Claimant for two reasons. One, it was not a noticed issue, and two; *laches* is only available to defendants. Even if such a defense is available to Claimant, he has failed to satisfy its elements. Finally, the parties were equally prejudiced by Surety's late assertion of its non-compensability defense and, in any event, Surety is not seeking reimbursement for benefits paid, so Claimant will not be prejudiced or injured by a decision favoring Defendants.

[1] Defendants' Exhibit 5(a) reveals that Surety has paid $81,430.43 in medical and indemnity benefits as of August 14, 2009.

Claimant responds by conceding that there are some "unanswered contradictions" in the testimony; however, when the documentary and medical evidence is viewed as a whole, compensability has been established. Further, Defendants' witnesses that dispute the happening of the accident or the giving notice thereof testified that they do not remember certain events testified to by Claimant and his wife, rather than testifying that those events did not happen. In any event, Defendants concede that they were given notice of Claimant's accident by at least 29 days after its occurrence, which is well within the 60-day requirement. Finally, this is exactly the type of case in which *laches* should apply and all of its elements have been met. Claimant was prejudiced in proving his case due to Defendants' delay in contesting the claim and they should not be rewarded for such delay.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, his wife Mege, co-workers Scott Dowalo and Fernando Rayo, company co-owner Roger Purcell, and his wife and co-owner Linda North, taken at the hearing.

2. Claimant's Exhibits A-X admitted at the hearing.

3. Defendants' Exhibits 1-22 and 24-27 admitted at the hearing.

4. Stipulation regarding the expected testimony of Colin Poole, M.D.

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 27 years of age and resided in Meridian at the time of the hearing. He has worked in construction and stucco preparation and application. He began working for Employer herein in mid-July 2006.

2. On or about July 24, 2006, Claimant alleges, and Defendants deny, that he was coming down off a scaffold he thought was collapsing and stepped into a depression in the ground and injured his right hip. He immediately felt a painful "cramp" in his right hip.

3. Claimant alleges, and Defendants deny, that Claimant's supervisor, Scott Dowalo ("Scott"), witnessed his accident. Claimant further alleges that a co-worker, Fernando Rayo ("Fernando"), told Scott that Claimant had injured himself and Scott was supposed to so inform Roger Purcell ("Roger"), a co-owner of Employer.

4. Claimant first sought medical treatment for his right hip injury on August 21, 2006, when he presented to St. Luke's Meridian Medical Center complaining of groin pain. He gave the following history: "Patient states he has had leg pain for the last 8 days. He reports he works construction, says it felt like he lost his balance, stepped in a hole, with initial pain in his right hip with the pain now going down anterior part of right leg." Claimant's Exhibit C, p. 16.

5. In a "Claimant Contact" form dated August 24, 2006, prepared by Surety while interviewing Claimant, it is noted: "moving scaffolding, took a step and stepped into a hole. Hurt his leg – hip." Defendants' Exhibit 19, p. 1.

6. Claimant eventually underwent two right hip surgeries. Surety accepted the claim and has paid over $81,000 in indemnity and medical benefits. There is nothing in the record to indicate that benefits were voluntarily paid or paid under any manner of reservation of rights.

After further investigation by Defendants' attorney, the claim was denied and so communicated to Claimant when Defendants filed their Answer to Claimant's Complaint on March 24, 2009.

DISCUSSION AND FURTHER FINDINGS

ACCIDENT

An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as having "more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903,906 (1974).

7. The record in this matter is fraught with phrases such as "I don't remember" and "I don't recall" when questioning witnesses from both sides regarding the circumstances surrounding Claimant's alleged accident. However, as pointed out by Claimant, this was an accepted claim for about two-and-a-half years after the accident and memories fade. Also, at

first Claimant did not think his injury was serious, so there would have been no reason for him (or for that matter, any of the other witnesses) to remember in detail a "non-event" over three years later by the time of the hearing.

8. The Referee does not find it necessary in this matter to attempt to reconcile the, at times, irreconcilable. Nor is it necessary to determine the applicability of the *laches* doctrine. Yes, Claimant's memory of the exact date of the accident is less than perfect; however, Claimant's memory of things not associated with his accident is also wanting. Yes, Claimant's supervisor and co-worker do not precisely corroborate Claimant's testimony regarding every detail of his accident. However, when the dust settles, the Referee places much weight on what Claimant told the physician at his first medical visit following the accident and what he told a Surety claims examiner four days later, and that is that he stepped into a hole and hurt his leg/hip. Defendants have offered nothing to suggest that Claimant's accident did not occur, or that Claimant was injured by some other event, and, in fact, admitted that it did happen and paid benefits thereon for over three years.

9. The parties entered into the following stipulation: "Were Colin Poole, M.D. to be called to testify he would testify on a more probable than not basis a hip injury, including labral tear, is consistent with the type of accident described by the Claimant." *See* Stipulation of Testimony filed October 2, 2009.

NOTICE

10. Claimant bears the burden of proving that timely notice. When notice is given within 60 days, there is a presumption the notice is timely. *Garren v. J.R. Simplot Company*, 93, Idaho 458, 460, 463 P.2d 558, 560 (1969). Thereafter the burden shifts to Employer to prove by a preponderance of the evidence that notice was not given "as soon as practicable." *Id*. Even if

the employer meets this burden, a claimant may still recover provided that the claimant shows by a preponderance of the evidence that the employer has not been prejudiced by such delay. *See*, Idaho Code § 72-704. Here, however, the only issue before the Referee is whether notice was given as soon as practicable.

11. The parties argued about when Surety received notice of Claimant's accident. The fact that there is conflicting evidence regarding exactly when Employer learned of Claimant's accident does not mean that Claimant's notice was untimely. Claimant contends, and Defendants deny, that Employer was aware of his accident from the date of its occurrence. However, the parties recall phone conversations while Claimant was at St. Luke's for his initial visit on August 21, 2006, wherein Claimant again contends he informed Employer of his accident. In any case, it is admitted that Employer learned of Claimant's accident and injury 29 days after its occurrence. Thus, Claimant gave notice to Employer within 60 days of the accident arising out of and in the course of employment causing the personal injury. As such, Claimant is entitled to the presumption that the notice was timely. Surety must show that notice was not given "as soon as practicable." In *Garren*, supra, the claimant did not initially believe that she had suffered a serious injury as a result of her work-related slip and fall. It was not until after surgery confirmed the existence of accident caused pathology that the claimant gave notice to her employer, some 49 days after her accident. The Court ruled that since the claimant did not understand that her injury was work related until after surgery, Employer had not met its burden of showing that notice was not given as soon as practicable. As in *Garren*, supra, the facts of the instant matter show that Claimant did not understand that his injury was serious until he finally sought treatment. Notice, though delayed, was given within 60 days and Employer has failed to show that it was not given as soon as practicable.

CONCLUSIONS OF LAW

1. Claimant suffered an accident causing an injury on or about July 25, 2006.

2. Claimant timely reported his accident pursuant to Idaho Code § 72-701.

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 __17th___ day of March, 2010.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___30th____ day of ___March___, 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:

DANIEL J LUKER
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GARDNER W SKINNER JR
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Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JORGE HERNANDEZ-PAZ, Claimant, v. TREASURE VALLEY PLASTERING, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-519834** **ORDER** Filed March 30, 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 suffered an accident causing an injury on or about July 25, 2006.

2. Claimant timely reported his accident pursuant to Idaho Code § 72-701.

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

DATED this __30th___ day of ___March___, 2010.

INDUSTRIAL COMMISSION

__/s/_____
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 __30th____ day of ___March_____ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DANIEL J LUKER
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