BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL JONES, Claimant, v. TAYLOR MADE FENCE, LLC, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, and DEL MILAM & SONS, INC., Employer, and STATE INSURANCE FUND, Defendants.	)	**IC 2007-026454** **2007-026074** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed May 3, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled consolidated matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on September 22, 2009. Claimant was present and represented by Dennis R. Petersen of Idaho Falls. Employer Taylor Made Fence ("Employer") and its surety, Liberty Northwest Insurance Corporation, were represented by Scott Harmon of Boise. Neil D. McFeeley of Boise represented Employer Del Milam & Sons and its surety, State Insurance Fund[1]. The parties presented oral and documentary evidence. Claimant and Employer then each submitted post-

[1] Del Milam & Sons employed Claimant subsequent to Employer and Claimant's workers' compensation cases against these Defendants are consolidated herein; however, the only questions pertinent to the instant decision are those arising from the time in which Claimant worked for Employer.

hearing briefs, after which Claimant submitted a reply brief. This matter came under advisement on February 5, 2010.

ISSUES

The sole issue to be decided is whether Mr. Jones suffered an "event"[2] on or about July 5, 2007. All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends that, on or about July 5, 2007 while working with Dave at a residential site for Employer, he dropped to his left knee and held onto a tipping wheelbarrow full of concrete to prevent it from dumping out. Claimant explained that he held onto the wheelbarrow, containing approximately 240 pounds of concrete, for 2-5 minutes.

Defendants argue that Claimant is fabricating a story because, on July 5, 2007, Claimant was working with Sam at a commercial site, where no concrete was being mixed. Defendants also assert that Claimant was not physically able to hold up a 240-pound wheelbarrow, that the wheelbarrow in question could not be filled with three bags of concrete and be simultaneously moved without spilling and, further, that Claimant was not fired the day after the alleged event, as Claimant testified.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing;

2. The testimony of Lane G. Taylor taken at the hearing;

3. Joint Exhibits A-D admitted at the hearing; and

[2] The parties expressly agreed that whether the "event" caused an injury is not an issue to be decided in this decision.

4. Claimant's Exhibit 1 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 conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 31 years of age at the time of the hearing and resided in Twin Falls. He did not graduate from high school, but obtained a G.E.D. in 1996. In addition, Claimant holds a commercial driver's license.

2. Claimant has a criminal record and has been diagnosed with bipolar personality disorder, paranoia, schizophrenia, anxiety disorder and ADD/ADHD. There is insufficient evidence in the record to establish that any of these facts are relevant to the instant decision.

3. On July 13, 2007, Claimant was examined by Jennifer Preucil, M.D., a family practitioner. Claimant presented with subjective pain in his mid and low back and explained that it began when he was helping lift a 240-pound wheelbarrow "1 week ago". Exhibit 1. Dr. Preucil recorded Claimant's height as 76 inches and his weight as 230 pounds. She went on to treat Claimant based on the findings from her examination and the information Claimant reported.

4. On July 25, 2007, Claimant's attorney prepared a Workers' Compensation – First Report of Injury or Illness on behalf of Claimant. He stated therein that Claimant was injured on July 5, 2007. "Claimant was hauling 240 pounds of cement in a wheelbarrow when the wheelbarrow started to tip over. Claimant caught it and set it upright injuring his back."

5. On October 5, 2007, Claimant underwent a defense independent medical examination by David Jensen, D.O., a physical medicine and rehabilitation physician. Claimant

reported he was injured "when he was carrying cement in a wheel barrel [sic], it started to tip over, and he had to pull back against it to keep it from tipping over…around 7/05/07." Dr. Jensen issued his opinion based upon his examination of Claimant and Claimant's report.

6. Employer did not retain any records corresponding to the time Claimant was an employee.

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).

Employer's objection.

7. In its responsive brief, Employer objected and moved to strike those portions of Claimant's brief asserting that the event in question could have occurred on a day other than July 5, 2007. Employer asserts that, in addressing other potential dates on which the event could have occurred, Claimant is inappropriately expanding his argument to include notice issues. The Referee agrees that questions of notice are beyond the scope of the issue to be decided herein. However, the Referee disagrees that Claimant must necessarily fail to prevail if he does not prove by a preponderance that the relevant industrial event occurred on July 5, 2007.

8. By agreement of the parties at the hearing, after a great deal of discussion on the record, the issue to be decided herein is whether Claimant suffered an "event" on or about July 5,

2007. Their intention in using the term "event" instead of "accident" was to exclude any questions concerning the alleged resulting injury. Nevertheless, the definition of "accident" provided in Idaho Code § 72-102(18)(b) still governs, to the extent that it does not solely address the concept of injury. Under that statute, the "event" herein must be "reasonably located as to time". The Industrial Commission has held, in *Adam'e v. Lacy Mechanical, Inc.*, 2009 IIC 0142 (2009), that an accident was reasonably located as to time even though the evidence tended to show that it occurred 2 days prior to the date on which Claimant testified it occurred.

9. In this case, the evidence indicates that on July 13, 2007, Claimant reported to his physician that he had been injured at work a week previously and also that, on July 25, 2007, his attorney filed a workers' compensation claim indicating Claimant had been injured on July 5, 2007. Employer has no records to refute Claimant's evidence, and Employer's owner, Lane G. Taylor, testified to facts consistent with Claimant's injury occurring on July 6, 2007. The Referee finds Claimant has reasonably located the time when he was allegedly injured and, thus, Employer's objection is overruled and its motion to strike is denied.

Whether an "event" occurred.

10. Defendants seek a finding that Claimant is fabricating a story. They reject Claimant's allegations that he was injured, on or about July 5, 2007, when he caught and held the wheelbarrow he was pushing, for 2-5 minutes, after it began to turn over.

11. Defendants allege that Claimant must be falsifying his workers' compensation claim because: (1) on July 5, 2007, Claimant worked on a commercial job moving temporary fence panels, where no concrete was mixed, (2) the wheelbarrow could not be pushed, without spilling over, while containing three bags of concrete, (3) Claimant was not strong enough to

prevent the wheelbarrow from tipping over for 2-5 minutes, and (4) Claimant could not have been fired on the day after the alleged event because he was fired on July 9, 10 or 11. They rely upon the testimony of Lane G. Taylor, owner of Employer, to make their case. For the following reasons, the Referee does not accept any of these allegations as facts.

12. Concerning the first allegation, Mr. Taylor testified that Dave called in sick on July 5, 2007. Consequently, Mr. Taylor testified, Claimant was sent to a commercial job to work with Sam setting up temporary panels that did not require concrete. Mr. Taylor did not take the sick call from Dave and the record does not indicate that Mr. Taylor was personally present on any job with Claimant on July 5. Mr. Taylor explained that he remembered being told Dave had called in sick that day because it was the day following a holiday, and also because it was a couple of days following an Employer-sponsored celebration. On the other hand, Claimant testified he worked with Dave on a residential job on July 5.

13. Though their testimony is conflicting, the Referee finds both witnesses credible. Elsewhere in the record, the Referee finds substantial credible evidence from which to find that Claimant reported, within approximately one week, that the event occurred on or about July 5. Conversely, the record lacks any supplementary support for Mr. Taylor's first allegation. Memories are fallible and they typically decay as time passes. The evidence of Claimant's earlier report, therefore, carries more weight than Mr. Taylor's undocumented testimony. In addition, Mr. Taylor testified that Claimant may have worked at a residential job with Dave on July 6. The Referee finds both July 5, 2007 and July 6, 2007 to be "on or about July 5, 2007". While Mr. Taylor offered some evidence that the alleged event may not have occurred on July 5,

his testimony is insufficient to rebut the evidence in the record tending to show that Claimant worked with Dave on a residential job on or about July 5.

14. With respect to Defendants' second allegation, Mr. Taylor testified that he believed the wheelbarrow in question would spill over if it contained three bags of concrete. He surmised, "you'd have to control it pretty good" to keep from spilling it while moving it with three bags. Transcript, p. 73. However, Mr. Taylor further testified that he had never before mixed more than two bags in a wheelbarrow. Although Mr. Taylor has experience related to the industry, he had never attempted to mix three bags in a wheelbarrow before, and did not provide any other relevant foundation for his opinion, such as knowledge of relevant volumes and capacities. Therefore, the Referee finds Mr. Taylor's opinion on this question speculative and unpersuasive and, further, that he has failed to rebut Claimant's assertion that he mixed and moved a wheelbarrow containing three bags of concrete.

15. As to Defendants' third allegation, Mr. Taylor testified that he did not believe Claimant could hold in place, for 2-5 minutes, a 240-pound wheelbarrow that was poised to tip over. This assumption on Mr. Taylor's part also suffers from a lack of foundation. The record is void of any evidence that Mr. Taylor possessed any expertise, through experience or otherwise, that would qualify him to render an opinion as to Claimant's relevant capabilities. There is evidence in the record indicating that Claimant weighed at least 230 pounds and stood 6' 4" around the time of the alleged event, and, further, that Claimant believed himself to be quite strong. The Referee agrees with Defendants, that Claimant's assertion at the hearing that he thinks he weighed approximately 280 pounds on July 5, 2007, appears inaccurate based upon the totality of evidence in the record. However, this appearance, without more, is insufficient

evidence to establish that Claimant was being disingenuous or that he was physically incapable of holding the wheelbarrow as he testified he did. Further, Claimant's "estimate" of "2-5 minutes" of holding the wheelbarrow is probably not entirely accurate under the circumstances.

16. Defendants' fourth allegation is based upon Mr. Taylor's testimony that Claimant was fired on July 9, 10 or 11, 2007, and Claimant's testimony confirming that it is possible he could have been fired on July 10 or 11. Defendants argue that this evidence contradicts Claimant's prior testimony, that he was fired the day after the alleged event, and establishes that Claimant's testimony is not credible. The Referee disagrees for three reasons. First, Mr. Taylor was not a first-hand witness to the details involved in Claimant's termination and he did not retain any business records related to Claimant's employment, so his testimony as to the specific date on which Claimant was terminated is afforded little weight; second, both witnesses' memories are foggy as to specific dates, so Claimant's concession, on cross-examination, that he may have been terminated on the 10th or 11th is not dispositive of the issue; and, third, given that the 9th was the Monday following the 6th, Claimant could have been terminated on the day following the alleged event, so long as it occurred on or about July 5, 2007. Therefore, Mr. Taylor's fourth allegation, even if accepted as fact, does not necessarily conflict with Claimant's testimony in that regard.

17. The Referee finds Claimant's testimony credible and that he has established, by a preponderance of evidence, that he suffered an industrial event on or about July 5, 2007. Dr. Preucil's July 13, 2007 record indicates that Claimant reported the event to her within approximately one week of its occurrence. Claimant's initial Workers' Compensation claim shows that he reported the event to his attorney on or before July 25, 2007. Dr. Preucil and Dr.

Jensen both treated Claimant based, in part, on Claimant's reports, indicating that they did not question his credibility at the time. Finally, Mr. Taylor's testimony, though generally credible, did not persuade this Referee that Claimant's workers' compensation claim was contrived.

CONCLUSION OF LAW

1. Claimant has proven that he suffered an industrial event on or about July 5, 2007.

RECOMMENDATION

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

DATED this _20th__ day of April, 2010.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __3rd___ day of __May___, 2010, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DENNIS R. PETERSEN
PETERSEN, PARKINSON & ARNOLD, PLLC
P.O. BOX 1645
IDAHO FALLS, ID 83403-1645

SCOTT HARMON
HARMON, WHITTIER & DAY
P.O. BOX 6358
BOISE, ID 83707-6358

NEIL D. McFEELEY
EBERLE, BERLIN, KADING, TURNBOW & McKLVEEN
P.O. BOX 1368
BOISE, ID 83701-1368

ge _Gina Espinosa_

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL JONES, Claimant, v. TAYLOR MADE FENCE, LLC, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, and DEL MILAM & SONS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2007-026454** **2007-026074** **ORDER** Filed May 3, 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 conclusion 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 conclusion of law as its own.

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

1. Claimant has proven that he suffered an industrial event on or about July 5, 2007.

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

DATED this __3rd___ day of ___May__, 2010.

INDUSTRIAL COMMISSION

_____
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 __3rd___ day of __May___ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

E SCOTT HARMON
PO BOX 6358
BOISE ID 83707

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

ge Gina Espinosa