BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WAYNE McCABE, Claimant, v. MAXWAY, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-001482** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** July 20, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Pocatello, Idaho on April 6, 2012. Claimant, Wayne McCabe, was present and represented himself. Defendant Employer, Maxway, Inc. (Maxway), and Defendant Surety, State Insurance Fund (Surety), were represented by Paul J. Augustine. The parties presented oral and documentary evidence. No post-hearing depositions were taken. Defendants later submitted a brief, but as of the deadlines for doing so, Claimant had not filed one. The matter came under advisement on June 28, 2012.

ISSUE

The sole issue to be decided by the Commission as a result of the hearing is whether Claimant sustained an injury from an accident arising out of and in the course of employment.

CONTENTIONS OF THE PARTIES

Claimant contends that he suffers continuing left upper quadrant abdominal pain due to being struck by a moving pallet of automotive parts being unloaded from the back of a delivery truck. Defendants counter that Claimant never suffered any workplace injury and that he is fabricating his claim because he is unhappy with Maxway for failing to comply with his request for a truck equipped with an air-ride seat.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Defendants' Exhibits 1-4 admitted at the hearing;
2. Transcript of prehearing deposition of Claimant taken March 10, 2011;
3. The oral testimony of Claimant, Keith Noyes, and Brandon Spiva taken at the hearing.

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

OBJECTIONS

All pending objections are overruled.

FINDINGS OF FACT

1. Claimant was 54 years of age at the time of the hearing and resided in Pocatello.

2. On December 8, 2009, Claimant began working for Maxway, delivering auto parts shrink-wrapped onto four-foot-square pallets. His daily route originated at a warehouse in Idaho, where he picked up a truck loaded with pallets of parts, then continued to Carquest locations in Idaho and Wyoming. The truck was equipped with a hydraulic lift, and Claimant

used a pallet jack to transport the pallets from the back of the truck, onto the hydraulic lift and into the various premises.

3. Claimant was a new hire, and the delivery route was also new. Claimant was having difficulty consistently driving the route within the time limitations assessed by the Department of Transportation, so Brandon Spiva, an experienced relief driver, was assigned to accompany Claimant to assess whether improvements could be made.

4. Claimant testified that he was injured in the box of the truck when he was struck by a pallet Mr. Spiva was maneuvering onto the hydraulic lift. As Mr. Spiva turned the load to fit onto the lift, it hit Claimant in his left abdomen under his ribs. Claimant recalled that Mr. Spiva asked if he was okay. "I said, "No," and we kept working. It wasn't like I was incapacitated totally. I mean, I was momentarily but - -." Cl. Dep., p. 52. "I had the pain a little bit, but it was kind of what I call - - I would call it incidental. Although I did answer that I wasn't all right, it was - - you know, I just - - kind of a quirk I have. I have somebody ask me that when I got hit and I was, like, "No." Cl. Dep., p. 53. Consistent with his deposition testimony, Claimant testified at the hearing that he thought he was banged pretty hard, but he continued to work, thinking the pain would subside on its own.

5. Over the next few weeks, however, the pain intensified, Claimant thinks, because the seat in one of the trucks he drove was too bouncy, aggravating the injury. Claimant complained to Maxway about the bouncy seat and requested a new one. He believed the seat problem was temporary and that the pain in his side would subside if he got a better seat (or another truck) and had a chance to heal.

6. Eventually, when the seat problem was not resolved to Claimant's satisfaction, he reported his December 2009 injury to Blake Maxfield, owner, by email. After sending the email, Claimant's pain worsened so he sought medical treatment:

> So, anyway, I sent him the e-mail. And I don't know how long it was after that - - if it was a day, two days, a week later - - but one night I went out and I did this route. I was by myself, obviously; and the pain got really sharp, sharper than it had ever been. It had been getting worse.
>
> And the thing was I'd go to work in the morning and there would be no pain or hardly any, if at all; and then, by the end of the route, it would be painful. This time it was really painful, sharp pains. And when I got back to Pocatello - - I believe it was on a Saturday morning - - I went to the first doctor visit I made.

Cl. Dep., p. 57. The medical records from that visit, and his subsequent one or two related medical appointments, are not in evidence. Claimant testified that he underwent x-rays and blood work, and that his x-ray results were normal. He was diagnosed with a bruised rib and/or a pulled muscle.

7. Mr. Spiva testified that he recalled one occasion on which he was in the box of the truck with Claimant, showing Claimant how to properly maneuver the pallet jack onto the hydraulic lift. He did not recall that Claimant was ever injured. Mr. Spiva testified, persuasively, that if he believed Claimant had been injured on the job, he would have reported it to Keith Noyes, general manager, as per company policy.

8. Claimant’s employment was terminated around the time he received treatment for his abdominal pain because he took too much time off, and Surety ultimately denied Claimant's workers' compensation claim because he failed to establish his injury was the result of a workplace accident.

9. Claimant's abdominal pain persisted so, after he obtained medical insurance coverage, he sought further evaluation and treatment for his abdominal pain. His related medical

records consist of a December 2011 chart note of an examination by a physician assistant and an abdominal ultrasound report, and a March 2012 chart note of an exam by a different physician assistant.

10. The 2011 chart note indicates Claimant reported his pain had been present for two years "following a car accident" so he was requesting an abdominal ultrasound. DE-1. His exam was unremarkable except for tenderness to palpation at the left upper quadrant of his abdomen. The abdominal ultrasound indicated a possible gall bladder condition. The 2012 chart note states Claimant believed his pain was due to the workplace injury he described in his deposition and at the hearing. This exam also revealed no problem other than tenderness in Claimant's left upper abdomen. A CT scan without contrast was recommended, but Claimant declined due to the cost.

11. Mr. Noyes testified that Claimant reported his injury on January 7, 2010, the date of his email to Mr. Maxfield. Claimant did not know at the time of the hearing the exact date on which he was injured. He stated in his Complaint that the injury occurred on December 15, 2009, and this injury date was not rebutted by Defendants' evidence which, interestingly, does not include the First Report of Injury.

12. Claimant, Brandon Spiva and Keith Noyes are all apparently truthful witnesses. Mr. Spiva's testimony, however, is given less weight because he had only a vague memory of the time he spent with Claimant:

> Q. Okay. Now, do you remember was there ever a - - how many times during the course of your time with Mr. McCabe in December of 2009 were you physically in the box with him where you were operating the pallet jack?
>
> A. Honestly, I couldn't tell you. It's been so long. It's - -
>
> Q. Now, do you recall, recall that circumstance where you were inside the box?

A. I remember one time, yes.

Q. Okay. Now, do you recall during that time were you maneuvering the pallet inside the box, or were you taking the pallet from the box to the gate?

A. Honestly couldn't remember. I just - - I mean if I have to go off of how I normally do things, […goes on to describe his general procedure].

Tr., p. 43.

13. Defendants' allegations that Claimant filed a fraudulent claim because he was a disgruntled employee over not getting a truck with an air-ride seat are unsupported by the evidence in the record.

14. The 2011 medical record indicating Claimant injured himself two years previously in a car accident raises the possibility that Claimant's current condition is related to a cause other than the industrial accident he alleges. This note is inadequate to establish as a fact that Claimant was ever involved in a car accident, or that he was untruthful with his caregiver, because there is no supporting evidence in the record of such an accident and it is understandable that Claimant's report to the medical care provider could have been erroneously transcribed as a car accident. Further, Defendants have not argued this point.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Idaho Worker's 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).

CAUSATION

The Idaho Worker's Compensation law defines accident to mean "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." An injury is "construed to include only an injury caused by an accident, which results in violence to the physical structure of the body." See I.C. § 72–102(18); *Perez v. J.R. Simplot Company*, 120 Idaho 435, 816 P.2d 992 (1991); *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (1995).

A claimant must prove not only that he or she suffered an injury, 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). 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). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995).

The employer is not responsible for medical treatment that is not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997). The fact that a claimant suffers a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006).

15. As discussed, above, Claimant and Mr. Spiva are both generally credible witnesses. However, their testimony differs as to whether Claimant was injured as he describes. Claimant testified that when he was hit with the pallet, Mr. Spiva asked if he was okay and he replied, "No," but did not complain about it again until he reported his continuing pain several weeks later. Mr. Spiva does not recall this or any other expressions of pain or discomfort by Claimant. Given Mr. Spiva's failure to remember all of the times he was in the truck box with Claimant, it is not surprising that he would not recall an apparently minor accident.

16. Mr. Spiva testified credibly that if he had hurt someone by running a 2,000 pound pallet into him, he would certainly remember it, and would have immediately reported it to Mr. Noyes. However, this characterization of the event differs from Claimant's, which describes a more low-key accident that Claimant brushed off as minor at the time even though he felt pain. Regardless of how heavy the pallet was, the degree of Claimant's injury would depend upon factors related to impact in addition to the weight of the pallet, including how fast the pallet was moving and how close Claimant was standing. Mr. Spiva's conclusion, that had any contact at all occurred then Claimant's pain and injury would have been obviously severe, is not consistent with Claimant's description of the accident.

17. Claimant was in a better position to perceive the events than Mr. Spiva. Further, it is understandable that Claimant would downplay his symptoms from what he thought was a relatively small accident in the presence of Mr. Spiva, who was present for the sole purpose of scrutinizing his behavior and abilities.

18. Although there is evidence from which one could conclude that the claimed accident did not occur as alleged, the Referee is persuaded that, on balance, the Claimant's credible testimony persuasively establishes that he did suffer a workplace accident when he was

impacted by a moving pallet on or about December 15, 2009. On the question of whether the accident caused "injury" to the physical structure of Claimant's body, the evidence is less clear, due at least in part to the fact that because of Surety's denial of responsibility, Claimant has not been able to undergo all of the diagnostic testing that has been recommended by his treating/evaluating physicians. However, based on Claimant's testimony of immediate and on-going abdominal pain since the subject accident, the Referee concludes that the evidence is sufficient to establish that Claimant suffered an injury of some type as a result of the accident. The nature of said injury, and whether the injury was temporary or permanent in nature is unknown, again, due to the fact that the diagnostic workup recommended by Claimant's physicians has not been completed.

19. Claimant has established the occurrence of an accident producing an injury, and is entitled to workers' compensation benefits under Idaho law. Claimant is entitled to recover medical expenses incurred to date in connection with the treatment/evaluation of his injury, and such further medical benefits as may be needed to diagnose or rehabilitate him as required by Idaho Code § 72-432. Claimant's entitlement, if any, to other benefits is not at issue in this proceeding.

CONCLUSIONS OF LAW

1. Claimant has proven he suffered a compensable accident and injury on or about December 15, 2009.

2. Defendants are liable for unpaid medical expenses incurred by Claimant through the date of hearing at 100% of the invoiced amount.

3. Claimant is entitled to such further diagnostic/rehabilitative care as may be required pursuant to the provisions of Idaho Code § 72-432.

RECOMMENDATION

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

DATED this 29th day of June, 2012.

INDUSTRIAL COMMISSION

/s/_____
LaDawn Marsters, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __20th___ day of July, 2012, 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:

WAYNE McCABE
1208 S 3RD AVE #1
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PAUL J AUGUSTINE
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sjw /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WAYNE McCABE, Claimant, v. MAXWAY, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-001482** **ORDER** July 20, 2012

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 recommendations of the Referee. The Commission concurs with these recommendations. 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 proven he suffered a compensable accident and injury on or about December 15, 2009.

2. Defendants are liable for unpaid medical expenses incurred by Claimant through the date of hearing at 100% of the invoiced amount.

3. Claimant is entitled to such further diagnostic/rehabilitative care as may be required pursuant to the provisions of Idaho Code § 72-432.

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

DATED this __20th____ day of _____July_____, 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 ___20th__ day of ____July_____, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

WAYNE McCABE
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sjw /s/_____