

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

SHELBY MERRILL,

Claimant,

v.

CARIBOU MEMORIAL HOSPITAL,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

**IC 2011-021642**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

Filed August 16, 2013

Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee Michael Powers, who conducted a hearing on March 20, 2013 in Pocatello, Idaho. Claimant was present in person and represented by Dennis R. Petersen of Idaho Falls. Employer (“CMH”) and Surety (collectively, “Defendants”) were represented by Paul J. Augustine of Boise. Oral and documentary evidence was admitted. No post-hearing depositions were taken. The matter was briefed and came under advisement on July 11, 2013.

**ISSUE**

Pursuant to the parties’ stipulation at the hearing, the sole issue to be decided as a result of the hearing is whether or not Claimant suffered an industrial accident while working for CMH on August 25, 2011.

## **CONTENTIONS OF THE PARTIES**

Claimant contends she fell in the shower on August 25, 2011. Defendants counter that she is fabricating this event.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The prehearing deposition testimony of Claimant, Antonette Andreasen, Shannon Buckley, David Norris, and Michael D. Peck, taken February 14, 2013;
2. Claimant's Exhibits (CE) "A" through "T," admitted at the hearing;
3. Defendants' Exhibits (DE) "1" through "5," and
4. The testimony of Claimant, Antonette Andreasen, Shannon Buckley, Kristie Hill, and David Norris, taken at the hearing.

### **OBJECTIONS**

All pending objections are overruled. On March 22, 2013, an Order Sustaining Claimant's Objection was entered. The effect of that order was to strike all testimonial evidence by Betty Gorton (deceased) or others, concerning Ms. Gorton's recollection of relevant facts.

### **FINDINGS OF FACT**

After considering 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.

#### ***BACKGROUND***

1. Claimant was 21 years of age at the time of the hearing and residing in Soda

Springs. She graduated from high school in 2010. Following a six- to eight-week program, Claimant became a certified nursing assistant (CNA) and, on July 18, 2011, she went to work for CMH on the swing shift, from 2 a.m. until 2 p.m.

2. Claimant consistently reported that she fell while assisting Betty Gorton, a long-term care resident, in the large shower.

a. Claimant wrote on an incident report on August 25, 2011 that she was “doing a shower and went to grab the oxygen tubing and my foot slipt [*sic*] from under me and went under the shower chair [*sic*] when I went down I hit my lower back on the built in shower chair.” CE-130.

b. In her recorded statement to Surety on September 16, 2011, Claimant reported, “I told her I would get her oxygen, I dried her off and went to go grab it. I left her in the shower, came back and went to hand her the tubing when my foot slipped under me because of the water. My right leg went underneath the shower chair, and as I went down I slammed my back against the wall.” CE-3,4. “I collected myself for a second, got up and continued doing what I was supposed to do and getting her back to her room. On my way to the room I went and talked to Annie and said that I fell and could somebody help me.” CE-4.

c. In her deposition on February 14, 2013, Claimant explained, “And I had just got done kind of like drying her hair, I guess

you could say. So I went to go grab - - I went and grabbed the oxygen. I left it outside of the room because you don't really want an oxygen tank in the shower and get it all wet. So I grabbed it, put it on the back of the [chair] and as I was walking, like, I was behind it, positioned it just right so it, like, wouldn't fall off. And when I walked around, go to walk around, I slipped....I was - okay. So, like, I was behind her which would have been...The back of the chair. So when I went to go step, just my foot slipped from underneath me because of the water and I went down." Cl. Dep., pp. 46-47. Claimant went on to explain that she was stepping with her right foot when she slipped. "The right one. So it did - - my foot went underneath the chair....The right. And then as I went down I, like, basically, tried to put my hands behind me and catch myself, but that didn't work and I hit my lower back on the corner tile triangle chair thing." Cl. Dep., pp. 47-48. Claimant went on to explain that she took Betty back to her room and left her in the shower chair while Claimant sought help from Annie.

- d. At the hearing (March 20, 2013), Claimant testified that after she dried Betty off, "I went to grab her oxygen and - - which was outside the door where, where we put it so it doesn't get wet. And so I put it on the back of the chair; and as I'm

walking - - going to walk around, I slipped. My foot went underneath the chair and – The right. And I fell and hit my lower back and landed on my butt.” Cl. Dep., pp. 30-31. “...I came in, closed the door behind me, put the oxygen on the back, and then went to go hand her the tubing by walk - - like going to walk around and hand it to her, and that’s when I slipped.” Cl. Dep., p. 33. After giving Betty the oxygen tubing, Claimant testified, Claimant left the shower room and sought help from Annie.

3. A number of individuals at CMH interacted with Claimant on and after August 25, 2011 with respect to her instant claim. Some of them testified to facts which are inconsistent with those reported by Claimant:

- a. **Betty Gorton.** Betty died before her deposition could be taken. She was a long-term care patient at CMH because she was blind.
- b. **Annie Andreassen.** Annie was a CNA at CMH. She trained Claimant. Annie was on shift with Claimant on August 25, 2011, but was not present when Claimant was assisting Betty in the shower. That day, Claimant reported to her that “she slipped in the shower and hurt her back.” Andreason Dep., p. 9. Annie told Claimant to report the matter to Shannon Buckley (see below.) At the hearing, Annie confirmed that Claimant’s pants were wet, as was usual for a CNA after

assisting a resident in the shower.

- c. **Shannon Buckley, R.N.** Shannon was the daytime charge nurse at CMH on August 25, 2011. She was on shift, supervising Claimant, on that date. Either Annie or Claimant told Shannon that Claimant slipped in the shower, so she met with Claimant and they filled out an incident report. Shannon did not recall what Claimant was wearing, but she testified that Claimant was not wet. Then, as per policy, Shannon sent Claimant to be evaluated at the emergency department. Shannon recalled at her deposition that Claimant was in no obvious pain or distress, and she had no apparent trouble walking. Consistent with Claimant's testimony, however, Shannon recalled that Claimant may have been a little bent over (leaning forward).
- d. **David Norris.** David was the night charge nurse at CMH on August 25, 2011. He supervised Shannon Buckley who, in turn, supervised Claimant. David was not on shift when Claimant reported her fall, but he spoke to Claimant on his next working day. "She said she slipped, her one leg went underneath the shower chair and she hit her back on the solid ridge where the chair is inside the shower room." Norris Dep., pp. 10-11.
- e. **Mike Peck.** Mike was the assistant administrator at CMH,

charged with human resources duties, on August 25, 2011. He handles all insurance benefits for CMH, conducts safety committee meetings, and completes First Reports of Injury (FROIs) and forwards them to Surety, among other things. David completed an FROI with respect to Claimant's August 25 claim. He did not speak with her before doing so; instead, he relied on information from the incident report prepared by Shannon Buckley and others.

- f. **Kristie Hill.** Kristie was a CNA on the swing shift with Claimant. They both started in July 2011, and Kristie left CMH in the fall of 2011. Kristie was not deposed prior to the hearing. At the hearing, Kristie testified, for the first time, that she responded to Claimant's request for assistance by retrieving Betty from the small shower (as opposed to the large shower), taking her to her room, and getting her into bed.

#### ***CLAIMANT'S CREDIBILITY***

4. Defendants argue that Claimant's testimony concerning where she fell, how she fell, the location of her injuries, and what she was doing at the time of her alleged fall are all so inconsistent with the balance of evidence in the record that she cannot establish that she suffered an industrial accident on August 25, 2011.

5. Notwithstanding Defendants' assertions, Claimant's reports about how her accident occurred are consistent. She dried Betty off, retrieved the oxygen tank and tubing from outside the shower, and was resituating them when she slipped with her right leg, fell

against the shower chair built into the wall, and landed with her right leg under Betty's shower chair. However, Claimant's reports about details following her fall are sometimes inconsistent. For example, she reported in her interview with Surety that she "kind of collected herself for a second" before getting up after her fall; in her deposition that she "kind of got myself together then got back up," and that this took three to four minutes; and, at the hearing, that she may have been down for 30-45 seconds and, later that it was three to four minutes before she got up. DE-3-4; Cl. Dep., p. 34. In addition, Claimant sometimes reported that, while in the shower, she told Betty she had fallen, but sometimes (later) Claimant reported that she did not mention it to Betty at the time. Further, Claimant reported to Surety that Betty probably couldn't make out what she said or did because the shower water was running, while her other statements regarding the matter indicate Claimant had dried Betty off. As well, Claimant testified at the hearing that she left Betty in the shower, but previously she maintained that she wheeled Betty to her room before seeking assistance from Annie (in her deposition and during her statement to Surety), and that she spoke to Annie on the way to Betty's room (in her statement to Surety.)

6. Defendants posit that Claimant's reports changed from time to time because she fabricated the entire event. However, the record lacks any direct evidence that Claimant intentionally misreported any facts pertaining to whether or not she fell. Further, her description of how she fell is consistent. Also, Claimant immediately reported the event to Annie, and then to Shannon, and she obtained medical treatment consistent with her claim. The most damaging evidence regarding Claimant's credibility is Kristie's testimony that Claimant actually showered Betty in the small shower (because that is the location from where she retrieved Betty), combined with Claimant's testimony at the



hearing, that she left Betty in the shower. Defendants posit that Claimant, at about six feet tall and 275 pounds, could not possibly have fallen in the small shower; hence, she had incentive to lie about the location. Two problems with Defendants' argument are that it requires findings that: 1) Claimant could not have fallen in the small shower as she described, and 2) Kristie's recollection a year and a half after the fact is more credible than Claimant's report that she fell in the large shower. The Referee is not prepared to make either finding on the evidence in this record.

7. It is possible that Claimant's memory of the relevant details pertaining to her fall shifted over time. It is also possible that Claimant has intentionally misled this tribunal about whether or not she actually fell in the shower on August 25, 2011. However, after observing Claimant and reviewing her testimony, the Referee is persuaded that the former explanation is more likely. Human memory is sometimes inconstant and unreliable, particularly over time. The record establishes that Claimant is an unreliable historian with respect to many details about events that transpired after her alleged fall. Claimant's inconsistent testimony in this regard may be relevant to the injuries, if any, that she suffered. However, the nature and extent of Claimant's injuries is not at issue. Claimant's inconsistent testimony is insufficient to establish that she was untruthful or inaccurate about whether or not she actually fell in the shower on August 25, 2011.

#### **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). 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).

### ***ACCIDENT***

The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jansson*, 91 Idaho 904, 435 P.2d 244 (1967). The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982).

8. In this case, the only question is whether or not Claimant fell in the shower. Whether she incurred any injury is a matter specifically reserved by the parties. As determined above, Claimant's testimony alone, regarding her (for all intents and purposes) un-witnessed fall, is not so internally inconsistent as to defeat her case. As well, the record lacks any other evidence sufficient to establish that she did not fall.

9. Claimant has proven that she fell in the shower on August 25, 2011.

### **CONCLUSIONS OF LAW**

1. Claimant has proven that she fell in the shower at CMH on August 25, 2011.

All other issues are reserved.

## 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 1<sup>st</sup> day of August, 2013.

INDUSTRIAL COMMISSION

/s/  
Michael E. Powers, Referee

## CERTIFICATE OF SERVICE

I hereby certify that on the 16<sup>th</sup> day of August, 2013, 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:

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Claimant,

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**ORDER**

Filed August 16, 2013

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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 these recommendations. 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 she fell in the shower at CMH on August 25, 2011.

All other issues are reserved.

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

DATED this \_\_16<sup>th</sup>\_\_ day of \_\_August\_\_, 2013.

INDUSTRIAL COMMISSION

/s/  
Thomas P. Baskin, Chairman

/s/  
R. D. Maynard, Commissioner

/s/  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_16<sup>th</sup>\_\_ day of \_\_August\_\_ 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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