

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL T. MISSICK,)
)
 Claimant,)
)
 v.)
)
 RIVERSIDE ROOFING,)
)
 Employer,)
)
 and)
)
 TRAVELERS INDEMNITY COMPANY,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2009-015215

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

Filed: August 15, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on March 10, 2011. Claimant, Michael T. Missick, was present in person and represented by Bradford S. Eidam, of Boise. Defendant Employer, Riverside Roofing, and Defendant Surety, Travelers Indemnity Company, were represented by Eric S. Bailey, of Boise. The parties presented oral and documentary evidence. No post-hearing depositions were taken, but briefs were later submitted by all parties. The matter came under advisement on May 3, 2011.

ISSUE

The sole issue to be decided is whether Claimant suffered an injury from an accident arising out of and in the course of employment. All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant alleges that he suffered an injury to his back while lifting shingles at work on March 14, 2009. Defendants observe that Claimant did not report his supposed work injury until April 6, 2009, and contend that he suffered a spontaneous re-herniation and not an injury at work.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant taken August 20, 2009, admitted as Defendants' Exhibit B;
3. The pre-hearing deposition testimony of Claimant taken September 13, 2010, admitted as Defendants' Exhibit E;
4. The testimony of Claimant, Juanita Walton, Howard Kibe, and Christian Bakke, taken at the March 10, 2011 hearing;
5. The pre-hearing deposition testimony of Robert Lynch taken January 7, 2011, admitted at the hearing as a joint exhibit;
6. The pre-hearing deposition testimony of Howard Kibe taken January 7, 2011, admitted at the hearing as a joint exhibit;
7. Claimant's Exhibits 1 through 13 admitted at hearing; and
8. Defendants' Exhibits A (pages 26 through 162, and pages 169 through 237 only), B (pages 1 and 10 through 16 only), C, D, E, F, G, and H admitted at hearing.¹

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

¹ At hearing, the parties argued about the admissibility of Defendants' proposed Exhibits A and E. Counsel identified Exhibit E as the deposition of Claimant taken in a Washington state proceeding. Upon closer examination, counsels' references and arguments at hearing pertain to Defendants' Exhibit B, not E. Those portions of Defendants' Exhibits A and B admitted herein were agreed to by all parties during a telephone conference conducted by the Referee on May 2, 2011.

FINDINGS OF FACT

1. Claimant was 45 years old and resided in Blaine, Washington, at the time of the hearing. He is a carpenter and professional fisherman by trade.

2. In 2006, Claimant suffered an industrial accident in Washington. He noted severe back pain and stabbing left leg pain. On May 8, 2007, he underwent left L4-5 microdiscectomy by Barry Landau, M.D. Claimant's symptoms improved; however, several months later, Claimant awoke one morning with renewed back pain. On August 2, 2007, Dr. Landau surgically removed reherniated disc material at L4-5 on the left. Claimant's symptoms again improved. On October 15, 2007, Dr. Landau released Claimant from his care and cleared him to return to activities as tolerated. He placed no permanent physical restrictions upon Claimant.

3. In the fall of 2008 Claimant moved to Mountain Home, where he resided with his grandmother while looking for work. Claimant performed maintenance around his grandmother's home by gardening, mowing the lawn, trimming trees, and repairing fences. Claimant experienced no back or leg pain.

4. Riverside Roofing (Riverside) is a roofing business owned and operated by Howard Kibe in the Mountain Home area.

5. In February 2009, Claimant observed roofers working at the Open Door Fellowship Church in Mountain Home. He asked if they needed help. Kibe hired Claimant on the spot to help tear off and reroof the church. Thereafter, Claimant worked for Riverside Roofing, tearing off the old roof, installing new roofing, and performing carpentry work. He was paid \$12.00 per hour for carpentry and other general work and \$10.00 to \$12.00 per square for installing new roofing. He worked with Riverside employees Christian Bakke and Robbie Lynch. Kibe visited the work sites periodically, but usually stayed only briefly to inspect the progress of the work.

6. Claimant testified that on March 14, 2009, he was loading asphalt shingles onto the church roof. He lifted bundles of shingles from a raised platform and set them on his shoulder, then

turned and pitched the bundles up onto the church roof. Another Riverside employee then moved the shingles farther up the roof. While lifting and turning with a bundle of shingles, Claimant felt a pop in his back and noted mild back pain. He continued working that day and did not mention his back discomfort to anyone. His back pain persisted and gradually worsened.

7. Claimant's grandmother testified that she noticed Claimant limping one day and when he was still limping after three days, she asked him what was wrong. He replied that he hurt his back carrying shingles. She noted that his pain appeared to worsen over approximately the next week. She gave him ibuprofen and encouraged him to tell his employer and consult a doctor.

8. Approximately three days after March 14, 2009, Claimant's supervisor, Kibe, picked Claimant up at his grandmother's house. Claimant testified that he then told Kibe that he had hurt his back, to which Kibe replied: "Aw, you're just getting old." Transcript, p. 44, l. 3. Kibe confirmed that he had a conversation with Claimant on approximately March 17 or 18, 2009, in which Claimant told Kibe that his back was stiff and sore or something to that effect. Claimant continued working. His back pain became progressively worse and he developed stabbing right leg pain, which progressed until it extended into his right foot.

9. Kibe testified that the church reroofing project lasted from March 14 – 23, 2009. He further testified that from March 15 – 23, 2009, Claimant repeatedly climbed ladders and helped lifting and installing lengths of siding weighing from 15-20 pounds. Kibe testified that he first understood that Claimant alleged he had a back injury on March 31, 2009. Kibe affirmed that from April 1 – 5, 2009, Riverside had no active project and its employees did not work.

10. On April 4, 2009, Claimant presented to the Elmore Medical Center emergency room with severe back pain and right leg symptoms. He described injuring his back three weeks earlier, lifting heavy loads of shingles up onto a roof. His symptoms had progressed over the prior three weeks. Matthew Conklin, M.D., diagnosed Claimant with low back injury and radiculopathy and ordered an MRI.

11. On April 5, 2009, Claimant underwent a lumbar MRI that showed recurrent right-sided disc herniation at L4-5 with disc extrusion involving two separate fragments, one dorsally along the right disc space and one on the left side.

12. On April 6, 2009, Claimant returned to work for approximately three hours, after which he could not continue due to increasing back pain. Claimant then left the job site and sought medical treatment. He did not return to work at Riverside. Claimant went to the emergency room, where Peter Angleton, M.D., examined him and diagnosed acute lumbar radiculopathy. Claimant subsequently called Kibe, who initiated the report of injury. Claimant subsequently underwent two additional lumbar surgeries.

13. Having reviewed the evidence and observed Claimant at hearing, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

14. The provisions of the Idaho 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).

15. **Occurrence of an accident.** 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). 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). Idaho Code § 72-102(18)(b) defines accident 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.” An injury is defined as “a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law.” I.C. § 72-102(18)(a).

16. In the present case, Claimant asserts that he suffered an industrial accident on March 14, 2009. Defendants maintain that Claimant has failed to prove an industrial accident and that his injury was a spontaneous reherniation or arose from some non-industrial cause between approximately April 1 and April 3, 2009.

17. The record contains three medical opinions that Claimant sustained a reherniation while lifting shingles at work in March 2009. By letter dated May 19, 2009, James Morland, M.D., opined that Claimant’s industrial injury caused, at the very least, an aggravation of his pre-existing injury and, at the worst, a new injury. After further research, Dr. Morland opined that Claimant had suffered a new injury. By letter dated January 14, 2011, Dr. Landau opined that Claimant’s reherniation developed acutely from his work injury. Orthopedic surgeon John Burns, M.D., also opined that Claimant’s L4-5 reherniation was caused by his March 2009 work as a roofer. While Defendants bear no burden of proof herein, the record contains no medical opinion supporting Defendants’ spontaneous reherniation or non-industrial accident theories.

18. Defendants also assert that Claimant did not sustain an industrial accident on March 14, 2009, because he continued to perform heavy labor without complaint until April 6, 2009. They reason that he could not have worked for nearly three weeks with a substantial disk herniation. However, the record establishes that none of Riverside’s employees worked from April 1 through April 5, 2010, and Claimant performed relatively light work installing siding weighing 15-20 pounds for most of the last half of March. Furthermore, Claimant’s stoicism and pain tolerance is documented by the fact that even after his April 5, 2009 MRI, which revealed a substantial disk herniation with extruded fragment, Claimant still returned to work for three hours the very next day, performing his usual duties until he left the work site to seek further medical care.

19. At first blush, some documentary evidence appears to suggest that Claimant may not have been involved in roofing activities on March 14, 2009. However, Riverside's lead man, Christian Bakke, testified that the church reroofing project and other carpentry and siding work progressed during the same period.

20. Defendants contend that the only evidence of the occurrence of an accident is the "after the fact" notice by Claimant of the occurrence of an event. Obviously, prior notice of an industrial accident is not possible. Furthermore, in the present case Defendants' own witnesses, Kibe and Bakke, confirm that Claimant performed the very activity Claimant alleges caused the onset of his back pain—lifting bundles of shingles at work.

21. Bakke testified that Claimant worked hard, did not complain, and was one of the best workers that Bakke has ever worked with. He expressly testified that Claimant worked hard right up to the time he left. Bakke testified that the only reason he questioned whether Claimant got hurt on the job was because Claimant did not tell him earlier. However, Claimant testified that he told Kibe that he hurt his back at work, but could not recall precisely when or the exact words he used to communicate this to Kibe. Kibe acknowledged that Claimant said something about his back on March 17 or 18, 2009, but denied that Claimant told him he hurt his back at work prior to April 6, 2009.

22. As previously noted, Claimant is a credible witness. His testimony is substantially consistent with, and reasonably reconcilable with, the weight of the evidence herein.

23. Claimant has proven that he suffered an industrial accident causing injury to his back while working for Riverside Roofing on March 14, 2009.

CONCLUSION OF LAW

Claimant has proven that he suffered an industrial accident while working for Riverside Roofing on March 14, 2009.

RECOMMENDATION

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

DATED this 9 day of August, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of August, 2011, 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:

BRADFORD S EIDAM
PO BOX 1677
BOISE ID 83701-1677

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

sc

/s/ _____

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IC 2009-015215

ORDER

Filed: August 15, 2011

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 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 that he suffered an industrial accident while working for Riverside Roofing on March 14, 2009.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 15 day of August, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

Unavailable for signature
Thomas P. Baskin, Commissioner

/s/ _____
R.D. Maynard, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of August, 2011, a true and correct copy of the foregoing **ORDER** 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
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sc

/s/ _____