BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEROD NOBLE, Claimant, v. JH KELLY, LLC, Employer, and CHARTIS, Surety, Defendants.	**IC 2011-016162** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed August 30, 2013

Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee Michael Powers, who conducted a hearing on January 15, 2013, in Twin Falls, Idaho. Claimant was present in person and represented by Keith E. Hutchinson of Twin Falls. Employer ("JH Kelly") and Surety (collectively, "Defendants") were represented by David P. Gardner of Pocatello. Oral and documentary evidence was admitted. No post-hearing depositions were taken. The matter was briefed and came under advisement on July 19, 2013.

ISSUES

Pursuant to the parties' stipulation at the hearing, the issues to be decided as a result of the hearing are:

1. Whether Claimant's injury was the result of an accident causing injury within the course and scope of employment; and,

2. Whether Claimant gave proper notice of the accident.

CONTENTIONS OF THE PARTIES

Claimant contends he slipped on some river rock, fell, and injured his back while working for JH Kelly on November 10 or 11, 2010. Claimant asserts that a coworker witnessed this fall and that he told Clay Wilkie, general foreman, about the event on the day it occurred and repeatedly thereafter.

Defendants counter that Claimant did not fall at work on either proposed date. Further, even if he did, he did not provide notice of the fall within 60 days. Therefore, Claimant's claims should be dismissed pursuant to Idaho Code § 72-701.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits (JE) "1" through "9" and "12" through "14," admitted at the hearing; and

2. The testimony of Claimant, Clay Wilkie, and Camille Shaver, taken at the hearing.

OBJECTIONS

All pending objections are overruled.

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 37 years of age at the time of the hearing and residing in Rupert. Prior to his employment at JH Kelly, Claimant worked for another employer for approximately 15 years. He left that job after sustaining an industrial knee injury in 2009. Claimant's employer witnessed that accident, which occurred in April; however, that employer did not "do the paperwork" until October. Tr., p. 21. Claimant did not obtain medical treatment for his knee injury until July, and he did not miss any work until he underwent surgery on the knee in November. Claimant's expenses were ultimately paid by the workers' compensation surety. Before November 2010, Claimant also suffered an industrial finger injury requiring stitches. His then-employer witnessed that accident, too, and Claimant's medical expenses were paid by the workers' compensation surety. Claimant missed only a few hours of work due to his finger injury.

2. Claimant has no history of back problems.

3. Claimant was hired by JH Kelly as a pipefitter foreman on September 27, 2010. He supervised approximately 10 workers, and his own supervisor was Clay Wilkie, the general foreman. Claimant participated in orientation training before he went to work. He does not recall any training regarding injury-reporting policies; however, the first question on the safety quiz Claimant completed on his hire date asks, "What should you do if you are injured on the job?" JE-131. Claimant chose answer "C," "Immediately inform your Foreman and have him fill out an incident or accident form." *Id.* On that date, Claimant also executed an acknowledgement that he had read and understood the Job Rules and Regulations, which advised him that "Failure to report injuries immediately, regardless of severity" may result in "immediate termination and removal from the worksite," among

other things. JE-116. In addition, Camille Shaver, safety professional for JH Kelly who conducts new hire orientations, testified that she advises all new hires that all injuries must be reported through the safety department. "[R]egardless of how insignificant it can be, it still has to be reported through the safety department so that we can follow up with that employee to make sure that, you know, they're getting the proper medical attention, if necessary." Cl. Dep., p. 90.

INDUSTRIAL ACCIDENT

4. At the hearing, Claimant testified that he slipped while walking on some rocks on November 11, 2010. "My lower body went one way, my upper body went the other way. And I dropped down to one knee and hand, and it popped in my back." Tr., p. 30. Claimant recounted that Reed Praegitzer, also a foreman, was 10-12 feet away and Claimant believed he observed the fall. Claimant felt "Just numbness at first, just felt like a pulled muscle, but just numb in my leg on my left side, nothing real major, you know, noting - - it's like a strained muscle, like I stretched wrong." *Id.* Claimant explained he was certain of the date of his accident because he recorded it in his phone. At his deposition in April 2012, Claimant reported he fell on November 10, 2010. The First Report of Injury (FROI) states November 11, 2010.

5. Claimant did not immediately seek medical attention, and he continued to work. His symptoms worsened around Christmastime. "It felt like a strained muscle. But I did – like, it made my leg numb, like down my sciatic nerve. And then my sciatic nerve – it just started burning. And I couldn't hardly straighten my leg out, had a charlie horse behind – right in my calf. It was like it was trying to pull the bottom of my foot up through my back. Pretty painful." Tr., p. 32. Then, his symptoms improved a little while he was

off work on winter furlough. During this period he rested and did stretching exercises. Claimant still did not seek medical attention because, again, he was hoping his condition would resolve on its own.

6. Claimant felt pretty good on his return to work following the winter furlough. However, his symptoms soon returned. In March 2011, Claimant finally sought medical treatment. "I just kept hoping it was going to go away. I needed the money. I mean, I couldn't afford to be off. I had bills, too. Then I handed a hanger over a handrail to a guy, and that was all it took. I knew it was bad then." Tr., p. 34.

7. On March 15, 2011, Claimant was examined by Greg Boettcher, D.O., a family practitioner, for left groin pain. The corresponding chart note says nothing about a workplace accident. Instead, it references a TV-lifting incident. Claimant testified he never reported such an event to Dr. Boettcher because he never injured himself lifting a TV. Dr. Boettcher suspected a hernia.

8. On or around March 28, 2011, Daclynn S. Johnson, M.D., a laparoscopic surgeon, evaluated Claimant for hernia repair. Dr. Johnson noted in a letter that, on palpation, the lump suspicious for hernia caused pain in Claimant's lower left back "which subsequently causes pain and numbness in his leg and foot." JE-22. Dr. Johnson diagnosed not a hernia, but a lipoma. "I think this is nothing more than some swelling and irritation of a large lipoma." *Id.*

9. On April 25, 2011, Claimant underwent evaluation by Cody Liljenquist, D.C., who recorded, "…painful in all…positions started 3 mos. ago [*sic*] no single cause." JE-25. Claimant completed and executed an intake sheet on that same date in which he wrote that lower back and hip symptoms, starting three months previously, were the reason

for his visit. He does not mention a workplace accident on the form. A low back CT scan report bearing the same date identified low back pathology, but did not reference a workplace accident.

10. On May 5, 2011, Scott Honeycutt, M.D., an orthopedic spine surgeon, evaluated Claimant. "The patient reports intense low back pain with primarily left lower extremity radiation of weakness pain and numbness. He reports intense pain particularly with movement." JE-37. Claimant's employer, JH Kelly, is listed under the Social History section, but there is no mention of a workplace accident. Claimant underwent an MRI for "chronic lower back pain" on that same day. JE-29. Some low back pathology was identified. On May 10, 2011, Claimant reported to Dr. Honeycutt that his back pain had abated and that he was doing well, with minimal symptoms. "The patient reports that currently he is essentially asymptomatic. No intervention is indicated at this juncture." JE-40.

11. Claimant received no further treatment until he was laid off on May 26, 2011 for missing too much work. At this time, he reported that he had slipped and fallen on November 11, 2010, and JH Kelly amended the reason for letting him go to include his failure to previously report his workplace accident. For reasons that are not entirely clear, Claimant returned to his employment at JH Kelly on June 7, 2011. He filled out paperwork related to his industrial injury claim; however, his union representative told him he could not work because he could not provide a full medical release.

12. Claimant resumed treatment for his low back symptoms on June 3, 2011 with Dr. Liljenquist. On July 25, 2011, he completed a different intake form entitled Workers Compensation Patient Intake Form in which he wrote "Nov 11 2010…slipped on rocks at

work" as the time and circumstance under which his low back and left leg/foot pain began. Similarly, on July 20, 2011, Claimant reported to Henry West, D.C., that his symptoms began with the November 11, 2010 accident. Dr. West opined, "The nature of the patient's complaints are consistent with the nature of onset." JE-44. He placed Claimant into a lumbar trunk cast for six weeks and recommended follow-up with Dr. Liljenquist.

13. On November 29, 2012, Gary C. Walker, M.D., a physiatrist, performed an independent medical evaluation at Surety's request. After reviewing Claimant's medical records, performing an examination, and interviewing Claimant, Dr. Walker opined that his low back and left leg symptoms are consistent with the November 11, 2010 industrial accident Claimant describes. However, he did not rule out other causal mechanisms.

> Truly causation would simply come down to whether or not one were to trust the patient that he did indeed get hurt at the time that he relates that he did. Again, I have no way of stating whether he did or did not, other than to simply rely on his history.

JE-80.

CLAIMANT'S CREDIBILITY

14. Claimant testified at the hearing that he told the general foreman, Clay Wilkie, that he fell and hurt his back on the same day it happened, and that Mr. Praegitzer was within earshot at the time. According to Claimant, Claimant and Mr. Wilkie agreed that Claimant had probably just pulled a muscle and that it would likely resolve on its own.

15. At his deposition, Claimant similarly testified that the told Mr. Wilkie about his accident on the day it happened and asked him to fill out a First Report of Injury (FROI). In addition, Claimant said he reminded Mr. Wilkie about it "pretty much daily" because it needed to be "taken care of." Cl. Dep., p. 21. Claimant explained that, on advice from "the union guys," he only spoke with Mr. Wilkie. *Id.* "I was told not to – that

you had to go through your chain of command, not to be – you had to go through your – my general foreman, and then he would take care of it." *Id.* Claimant went on to state that Mr. Wilkie repeatedly assured him that he'd report the event to the safety department.

16. Mr. Praegitzer did not testify.

17. Mr. Wilkie did not recall Claimant ever reporting a slip-and-fall accident to him but, if he had, he would have reported it to the safety department. Likewise, he did not recall that Mr. Praegitzer ever told him about such an event. Claimant asserts that Mr. Wilkie's testimony on this point is not credible because Mr. Wilkie was aware of a subsequent accident that Claimant had (the hangar accident), but Mr. Wilkie did not report that accident, either.

18. Camille Shaver, in charge of safety and workers' compensation reporting, testified that Claimant first reported a November 2010 accident upon being laid off in late May 2011. Further, no one else had notified her of this event before then. Ms. Shaver also explained that every new employee is notified of JH Kelly's policy requiring the immediate reporting of accidents.

19. Claimant's testimony that he slipped and fell at work in November 2010 finds no contemporaneous corroboration in the record. Further, there is no need to make a finding as to the occurrence of an accident.

20. Claimant's own reports to his medical care providers prior to his layoff in May 2011 do not even hint that he believed a workplace slip-and-fall was a potential cause of his back pain. If Claimant had been concerned about the relationship between a workplace fall and his back pain and had notified Mr. Wilkie repeatedly to complete the paperwork, as he testified he did, it stands to reason that he would have been similarly

concerned when he sought medical treatment. Medical records are not infallible; however, the fact that none of the records of Drs. Boettcher, Johnson, Liljenquist or Honeycutt mention an industrial cause for Claimant's symptoms tends to establish that he did not report the event during this time period which, in turn, tends to prove that Claimant did not believe in a workplace etiology until after he was laid off. Also, it is unlikely that Dr. Liljenquist would not have provided Claimant with a specialized workers' compensation intake form on his initial visit, had Claimant reported an industrial injury at that time. Finally, it is unlikely that Claimant would have written on his initial intake form with Dr. Liljenquist that his symptoms began in approximately January 2011 if he believed at that time that a November 2010 injury was the source of his pain and numbness.

21. Claimant's reports that he was concerned that a November 2010 slip-and-fall at work was the source of back pathology within 60 days of that event are not credible. Therefore, in light of the competing evidence in the record, Claimant's testimony that he reported his slip-and-fall to Mr. Wilkie, or anyone at work, within 60 days of November 11, 2010, are not credible. Mr. Wilkie credibly testified that he did not remember Claimant making any such report. While this testimony, nor the absence of a report by Mr. Wilkie to the safety department do not, alone, prove that Claimant did not report the event, the weight of evidence simply does not support Claimant's version of the events, rendering his testimony on this point unpersuasive.

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).

Idaho Code § 72-701

22. Idaho Code § 72-701 provides, in pertinent part:

> No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident…

23. **Notice requirement.** Idaho Code § 72-702 requires that the notice must be in writing. However, notice required under Idaho Code § 72-701 is sufficient, even if the formal requirements are not met, so long as "…the employer, his agent or representative had knowledge of the injury or occupational disease or…the employer has not been prejudiced by such delay or want of notice." Idaho Code § 72-704. Notice is sufficient if it apprises the employer of the accident arising out of and in the course of employment causing the personal injury. *Murray-Donahue v. National Car Rental Licensee Association,* 127 Idaho 337, 339, 900 P.2d 1348, 1350 (1995).

24. *Written notice.* Claimant did not provide JH Kelly with written notice of his industrial accident. Therefore, he must establish either that JH Kelly had actual knowledge within the time limit, or that the delayed notice did not prejudice JH Kelly.

25. *Actual knowledge.* As detailed, above, Claimant was unable to persuade the Referee, over the weight of the evidence in the record, that he reported his injury to his supervisor within the prescribed 60 days. Similarly, the Referee finds it unlikely that *anyone* at JH Kelly had actual knowledge of a November 11, 2010 slip-and-fall within 60 days. Along those lines, the testimony of Ms. Shaver and Mr. Wilkie, that they did not

know of Claimant's claim until or about May 2011, is credible. Further, Claimant's testimony that Mr. Praegitzer witnessed the slip-and-fall finds no support in the record and is insufficient, standing alone, to establish that Mr. Praegitzer was aware of the accident.

26. As a result, the Referee finds JH Kelly did not have actual knowledge of Claimant's relevant industrial accidents.

27. *Prejudice to employer.* In order to demonstrate this prong, Claimant must affirmatively prove that JH Kelly was not prejudiced by the lack of timely notice. *Jackson v. JST Manufacturing,* 142 Idaho 836, 136 P.3d 307 (2006). Proof that the employer would not have done anything differently or that the medical treatment would have been the same, had timely notice been provided, is not dispositive. *Kennedy v. Evergreen Logging Co.,* 97 Idaho 270, 272, 543 P.2d 495, 497 (1975); *Dick v. Amalgamated Sugar Co.,* 100 Idaho 742, 744, 605 P.2d 506, 508 (1980).

28. The Commission has previously acknowledged, in a similar case, that the claimant bears a difficult burden to prove a negative when compelled to establish that an employer was not prejudiced. *Mora v. Pheasant Ridge Development, Inc.,* 2008 IIC 0548. In that case, the Commission held that the claimant failed to prove his employer was not prejudiced by a 5-month reporting delay because, although the Defendant may not have suffered actual prejudice, the Claimant nevertheless lost because he did not affirmatively establish that employer was not prejudiced. *Id.* The Commission based its holding on findings that 1) employer was unable to timely investigate the validity of the claim, 2) the delay "arguably hampered Defendant's ability to provide reasonable medical treatment", and 3) claimant's ability to work may have been compromised during the delay, by an intervening incident or otherwise, potentially exposing Defendant to greater liability. *Id.*

29. JH Kelly was on notice of Claimant's industrial injury as of late May 2011. Therefore, Claimant's report was at least 190 days late.

30. The Claimant in this case finds himself in a difficult position similar to the claimant in *Mora*. JH Kelly was unable to investigate the validity of the claim until over six months after the claimed workplace accident. Although JH Kelly arguably could have conducted a fuller investigation when Claimant finally disclosed his industrial accidents, there is inadequate evidence from which to determine that JH Kelly would not have obtained more accurate and complete material information, had it been able to investigate sooner.

31. In addition, Claimant's reporting delay may have hampered JH Kelly's ability to provide reasonable medical treatment. Evidence provided by Drs. Walker, Liljenquist and Honeycutt support the proposition that Claimant's symptoms are consistent with a workplace fall such as he describes. Although this is affirmative evidence that Claimant's pathology could be the result of a November 2010 slip-and-fall, it is insufficient to meet Claimant's burden of proving that his condition was not permanently worsened by his failure to report his accident or, ultimately, that JH Kelly was not prejudiced in this regard.

32. In addition, Claimant's ability to work may have been compromised by other intervening causes during the delay. The possibility that some non-occupational cause may have intervened to exacerbate or even create the condition for which Claimant seeks benefits during this six month-plus-long delay cannot be ruled out because JH Kelly did not have the opportunity to make a "baseline" assessment of Claimant's injuries during the statutory period.

33. The Referee finds that Claimant has failed to prove by a preponderance of evidence that JH Kelly was not prejudiced by his 190-day minimum delay in reporting his industrial accidents.

34. Claimant has failed to meet his burden of proving that he provided notice of his November 2010 workplace accident and injury as required by Idaho Code § 72-701. His Complaint should be dismissed.

35. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he provided notice of his November 2010 workplace accident and injury as required by Idaho Code § 72-701

2. Claimant's Complaint should be dismissed.

3. All other issues are moot.

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 _26th_ day of August, 2013.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __30th___ 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:

KEITH E HUTCHINSON
PO BOX 207
TWIN FALLS ID 83303-0207

DAVID P GARDNER
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ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEROD NOBLE, Claimant, v. JH KELLY, LLC, Employer, and CHARTIS, Surety, Defendants.	**IC 2011-016162** **ORDER** Filed August 30, 2013

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 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 failed to prove that he provided notice of his November 2010 workplace accident and injury as required by Idaho Code § 72-701

2. Claimant's Complaint is dismissed.

3. All other issues are moot.

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

DATED this __30th___ 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 __30th__ 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:

KEITH E HUTCHINSON
PO BOX 207
TWIN FALLS ID 83303-0207

DAVID P GARDNER
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ge Gina Espinosa