

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CATHY ANN PIPPIN,

Claimant,

v.

SEARS,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Surety,
Defendants.

IC 2010-025969

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

FILED AUG 16 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Pocatello on March 5, 2013. Claimant appeared *pro se*. Defendants were represented by Nathan T. Gamel. The parties presented oral and documentary evidence. No post-hearing depositions were taken. Claimant and Defendants each submitted an initial brief. Claimant did not submit a reply brief. The matter came under advisement on June 11, 2013 and is now ready for decision.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether Claimant has complied with the notice and limitations requirements of Idaho Code § 72-701 through § 72-706, and whether these limitations are tolled by application of Idaho Code § 72-604;
2. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;
3. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
4. Claimant's average weekly wage;

5. Whether and to what extent Claimant is entitled to benefits for:
 - a. Medical care;
 - b. Temporary disability;
 - c. Permanent partial impairment;
 - d. Permanent disability in excess of permanent impairment;
 - e. Retraining; and
 - f. Attorney fees pursuant to Idaho Code § 72-804; and
6. Whether apportionment for permanent disability as a result of a pre-existing condition under Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends that she is entitled to medical and compensatory benefits, in addition to attorney fees for unreasonable denial of her claim, related to her industrial shoulder injury she incurred while pushing display tables at work in August 2010.

Defendants deny that Claimant suffered a compensable accident and injury at work. As well, they argue that her claims are barred by Idaho Code § 72-701.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Industrial Commission legal file;
2. Defendants' Exhibits 1 through 17 including subparts; and
3. The testimony of Claimant taken at the hearing.

OBJECTIONS

All pending objections are overruled. Claimant lodged a continuing objection on the grounds of relevance to documentary evidence otherwise admitted. Having carefully reviewed all of the documentary evidence in the record, the Referee finds all of the admitted exhibits are generally relevant. Claimant also objected to the records of Dr. Joel Webb and The Sleep Institute because she did not recall being treated by these providers. These objections are overruled. Supporting evidence consistent with these records is sufficient show they likely are authentic.

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.

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 51 years of age and residing in Pocatello.

2. Claimant worked for Sears for approximately 18 months beginning in March 2009, merchandising and providing customer assistance in the men's and young men's clothing departments. In August or September of 2010, Claimant was pushing tables around, rearranging displays to meet a new store protocol, as she had been doing for about a week. By the end of the day, Claimant became so sore that she could not move.

3. Claimant does not know the exact date on which she hurt herself at work. In her Complaint, she claimed it was August 20, 2010, between 7 and 9 p.m. At the hearing, she admitted she did not remember the date and guessed, at different junctures, that the injury occurred anywhere between the beginning and the end of August 2010. It is unknown how August 30, 2010 came to be selected for the injury date on the First Report of Injury, Form 1, prepared on October 21, 2010. The evidence shows the table-pushing incident which Claimant associates with her shoulder and other symptoms likely occurred on August 20, 2010.

4. Claimant reported her pain to the store manager, Mike, and advised him that she could not move any more tables that night. He told her to get back to work. The next day, Claimant sought treatment at Physician's Immediate Care. Thereafter, she was subjectively unable to return to work. Claimant testified to arm paralysis. She also claims head pain when she bends at the waist, and memory loss that she attributes to her industrial accident.

5. Around September 15, 2010, Claimant tried, unsuccessfully, to return to her position at Sears. She also looked for other work, but was unable to find any. Claimant

suffered significant financial losses as a result of her inability to earn money.

6. Claimant filed her complaint in this matter on November 30, 2011.

7. At the hearing, Claimant described she wants a cast, but no surgery, for her shoulder injury

8. No physician has ever told Claimant her shoulder is dislocated, or that the treatment she seeks is either necessary or reasonable. She cannot afford to obtain an evaluation.

9. Defendants denied Claimant's claim outright. They have paid no benefits with respect to the August 20, 2010 injury.

DISCUSSION AND FURTHER FINDINGS

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).

Claimant's Credibility

10. Claimant's testimony at the hearing was prone to exaggeration. Where medical records bearing her name, birth date, address, workplace and other identifying information were perceived by her as unfavorable, she declared them "fictitious" or unrelated to her. The possible existence of another Cathy Davis (Claimant's former name) in the Pocatello area warrants careful inspection of medical records bearing that name to ensure they properly identify Claimant. However, Claimant's dismissal of many of them as unrelated to her own medical history was done off-handedly, without serious consideration and, apparently, in large part to express her frustration on cross-examination. Moreover, careful review of the disputed

records shows them consistent with Claimant's medical history and other medical records.

11. Claimant's employment with Sears left her with bitter memories of being "abused." Likewise, she felt abused during her deposition in this case, from which she ultimately got up and walked away before Defendants were finished. These proceedings and Claimant's time at Sears have taken their toll. Claimant's feelings about these matters were evident.

12. Claimant's testimony that she suffered a shoulder injury on August 20, 2010 and, on the same day, told the store manager, is credible. However, where contemporaneously made medical records are inconsistent with Claimant's memory or testimony, the records are assigned more weight.

Idaho Code § 72-701

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...

14. **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).

15. Claimant did not provide Sears with written notice of her industrial accident. Therefore, she must establish either that Employer had actual knowledge within the time limit, or that the delayed notice did not prejudice Employer. Claimant persuasively testified that she reported her injury to her store manager the same evening on which she incurred it.

16. The weight of evidence shows Sears had actual notice of Claimant's accident and injury on August 20, 2010. Even if it did not, Defendants admit they were notified on October 15, 2010, 46 days following Claimant's industrial accident. Therefore, Claimant's claim is not barred for failure to provide adequate notice.

17. **Statute of Limitations.** Claimant was required to file her Complaint within one year of her industrial accident on August 20, 2010. The Commission file establishes that Claimant's Complaint was filed on November 30, 2011, three months past her deadline. Without more, Claimant's Complaint must be dismissed. However, evidence in the record indicates that Idaho Code 72-604 is applicable.

18. **Tolling.** Idaho Code § 72-604 provides in relevant part:

When the employer has knowledge of an occupational disease, injury, or death and willfully fails or refuses to file the report as required by section 72-602(1), Idaho Code, ... the limitations prescribed in section 72-201 and section 72-706, Idaho Code, shall not run against the claim of any person seeking compensation until such report or notice shall have been filed.

Sears first became aware of Claimant's industrial injury on August 20, 2010. Further, Defendants filed their Form 1 on October 21, 2010, in violation of Idaho Code § 72-602(1), which required the Form 1 to be filed no later than August 30, 2010. Claimant's statute of limitations is tolled until October 21, 2011. Nevertheless, even allowing for tolling of the statute of limitations until that date, Claimant's Complaint was filed over one month late. Therefore, Idaho Code § 72-604, though applicable, will not operate to preserve the claims in Claimant's Complaint.

18. Claimant's claims are dismissed. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant's Complaint is dismissed for failure to comply with the statute of limitations provided in Idaho Code § 72-701.

2. All other issues are moot.

RECOMMENDATION

Based on 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 5TH day of August, 2013.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 16TH day of AUGUST, 2013, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

CATHY ANN PIPPIN
1730 WEST QUINN ROAD #624
POCATELLO, ID 83202

ERIC S. BAILEY
P.O. BOX 1007
BOISE, ID 83701

dkb

/S/ _____

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ORDER

FILED AUG 16 2013

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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's Complaint is dismissed for failure to comply with the statute of limitations provided in Idaho Code § 72-701.
2. All other issues are moot.

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

DATED this 16TH 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 16TH day of AUGUST, 2013, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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POCATELLO, ID 83202

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