BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES T. PORTER, Claimant, v. QUALITY ELECTRICAL CONTRACTORS, Employer, and TRUCK INSURANCE EXCHANGE, Surety, Defendants.	)	**IC 2007-008250** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER.** Filed May 31, 2011

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 Boise on October 20, 2010. Claimant was present and represented by Clinton E. Miner. Jon M. Bauman represented Employer and Surety. The parties presented oral and documentary evidence. No post-hearing depositions were taken. Claimant and Defendants then each submitted post-hearing briefs. This matter came under advisement on March 21, 2011. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

By agreement of the parties, the issue to be decided is: Whether Claimant filed a claim for compensation with Employer within one year of the date of this[1] accident.

Specifically in question is whether Claimant satisfied the requirement in Idaho Code § 72-701, that a claim for compensation must be made within one year of the accident.

CONTENTIONS OF THE PARTIES

On June 25, 2006, Claimant sustained a broken back in a car accident. He was riding with a coworker to an out-of-state job when they were involved in a rollover crash.

Claimant contends that he made a written claim for compensation with Employer within one year after his accident. He cannot pinpoint the date his claim was delivered. However, he alleges that he completed a First Report of Injury (FROI) in early March 2007, which was subsequently timely filed with Surety's Denver office. He relies upon circumstantial evidence to establish that Surety must have had this document before the statutory period for making a claim for compensation expired.

Claimant also contends that Dale Iverson, an owner of Employer, knew of the accident within one day, so he does not need to do anything further to satisfy the one-year period in which to make a claim. In addition, Claimant argues that the one-year written claim requirement is not applicable because Employer voluntarily paid compensation within one year of the accident. Claimant seeks a ruling that will allow him to continue to pursue his claim for benefits.

Defendants counter that they had no notice of Claimant's worker's compensation claim until Surety was served with the Complaint on or about April 9, 2008. They rely upon Holly

[1] "This" accident refers to the June 25, 2006 rollover car accident. Nothing in this decision should be construed as an assumption or determination with respect to whether this constitutes an accident within the course and scope of employment.

Setzer, claims adjustor for Surety, and Mr. Iverson to establish that neither Surety nor Employer received a claim for compensation from Claimant prior to April 2008. They also refute that Claimant was paid any compensation that would exempt him from his duty under Idaho Code §§ 72-701 through 703 to file a written claim with Employer within one year of the accident. As a result, Defendants seek dismissal of the Complaint for lack of a timely claim for compensation.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition of Claimant dated September 8, 2009;
2. The testimony of Claimant, Holly Setzer and Dale Iverson taken at the hearing;
3. Claimant's Exhibits 1-2 admitted at the hearing;
4. Defendants' Exhibits A-I (including subparts 1-4 of Exhibit I) admitted at the hearing; and
5. The Industrial Commission's legal file in this matter.

FINDINGS OF FACT

1. Claimant resided in Nampa, both at the time of the accident and on the hearing date. He was a journeyman electrician for Employer, whose central office was located in Kaysville, Utah, near Salt Lake City ("SLC"), from February or April 2006 through November 2006. Claimant worked on jobs for Employer in both Idaho and Wyoming.

2. Claimant was at home in Idaho when Mr. Iverson called and told him to contact Tyler Purchase, Claimant's apprentice, and get to the Wyoming jobsite in time to start work at 6:00 a.m. on Monday, June 26, 2006. Claimant testified that he was instructed, as he always had

been before, to stop at the shop in SLC on the way to Wyoming to pick up the work truck and drive it to the jobsite. Mr. Iverson testified that Claimant was told to go straight to the jobsite.

3. Employer's policy was to pay $75-$95 per diem, but no wages, for the trip to an out-of-state jobsite. Upon arrival at SLC to pick up a vehicle, or on a jobsite to begin working, Claimant was paid hourly wages.

4. Claimant and Mr. Purchase left Nampa/Boise at 3:00 p.m. on June 25, 2006, in Mr. Purchase's vehicle, with Mr. Purchase driving south on I-84. Just beyond Mountain Home, they were involved in a rollover accident in which Claimant sustained a broken back. Mr. Iverson was notified on the same or the next day. Although the parties dispute whether the subject accident is one arising out of and in the course of employment, that issue is not before the Commission in this bifurcated proceeding.

5. Following medical treatment, including a back surgery, Claimant continued to work for Employer. He was paid his usual salary without interruption, based on a 40-hour work week, even though he could only do light-duty work part of the time. By November 2006, Mr. Iverson had to let Claimant go because he still was not well enough to work at his journeyman electrician position.[2] According to Claimant, during the conversation in which he was discharged, Mr. Iverson asked if he was planning to file a worker's compensation claim, and Claimant responded that he did not know.

6. At some point, Claimant contacted an attorney, who provided a FROI form for him to fill out in early March 2007. The attorney told Claimant he would take care of everything, and Claimant does not know what the attorney did with the completed form. Both

[2] Claimant had tried to return to work, at both the Wyoming and Idaho jobs, but he was ultimately unable to return to full duty at that time.

parties submitted, as separate exhibits, copies of that form, signed by Claimant on March 5, 2007, and filed at the Industrial Commission on March 8, 2007. The copies appear identical; neither has a "fax strip" anywhere on it, nor any Surety information. *See*, Claimant's Exh. 1; Defendants' Exh. A. Employer's address is indicated in the appropriate space. *Id.* However, a number of other blanks on the form are left empty, including the space provided for the name, address, and phone number of the carrier; the name, address, and phone number of the claims administrator; and the policy number. Although Claimant's prior attorney did file this FROI with the Industrial Commission on or about March 8, 2007, the record is devoid of any evidence which would support a finding that Claimant's former attorney contemporaneously served Employer, or its Surety, with a copy of this FROI.

7. In addition to the FROI contained at Defendants' Exhibit A, Defendants also submitted a slightly different version of the same document, found at Defendants' Exhibit E. In addition to the information contained on Defendants' Exhibit A, Defendants' Exhibit E contains the name of the carrier, the name of the claims administrator, and the policy number. As well, Defendants' Exhibit E bears four fax strips, one each dated April 9, 2008 and April 10, 2008 and two dated April 16, 2008 but no Industrial Commission filing stamp.

8. Holly Setzer, the designated adjuster for Surety, testified that she first became aware of the instant claim on April 10, 2008, through the Farmers' computer system. She initially testified that on that date she received not only a copy of a FROI, but also a copy of the subject complaint (See Defendants' Exh. D). What is unclear from Ms. Setzer's testimony is what version of the FROI she received on April 10, 2008:

Q Mrs. Setzer, I'm Clinton Miner, the attorney for Mr. Porter. I just have a couple of questions. You said that you received at the same time a complaint and the First Notice of Injury. Do you have that First Notice of Injury you received there?
A Yes.
Q Does it have an Industrial Commission stamp on it? It's kind of – the copy that it's kind of sideways about a third of the way down on the right side of the page.
A Yes. I think that's the one that I have.
Q And that –
A Or I have seen it.
Q Okay. And that came to you through you said the Denver office?
A Through the Denver office of Farmers, yes.
Q And do you have any idea how they received that?
A No. No, I don't.
Q Okay. And, then, you also have a workers compensation complaint that you said was received at the same time?
A A complaint?
Q Uh-huh. Yes.
A Yes.
Q And does it have the Industrial Commission stamp on it?
A I'm not sure about – that's – as far as my copies, that's the one that has the date stamp from the Industrial Commission that I cannot read. I'm afraid my copies don't have anything from the Industrial Commission – the two copies that I have.
Q That's fine.
A Three copies, I guess. They have a bunch of stamps on them, but I don't see the Industrial Commission stamp on there.
Q On my copy it sits sideways about halfway down through the page.
A No. I just have the one on the complaint that's –
Q Okay. And there is not one, then, on the Notice of Injury?
A No.
Q Okay.
A Not on my copy.

Hr. Tr. pp. 43/24-45/15.

9. From the foregoing, it seems clear that as of April 10, 2008, Surety's Denver office was possessed of a copy of one, or possibly both, versions of the FROI at issue. Quite possibly, at the time he prepared the FROI date stamped received by the Industrial Commission on March 8, 2007, Claimant's former counsel, also served a copy of that document on Employer,

or its Surety. Quite possibly, that service document is the document depicted as Defendants' Exhibit E. This would account for the fact that Defendants' Exhibit E does not contain an Industrial Commission file stamp. Also, this would account for the additional information contained on Defendants' Exhibit E relating to the name of the carrier, the claims administrator and the policy number, information that could have been inserted by Surety after receiving the document. However, there is no evidence to support such speculations, and there is no way to ascertain from either Ms. Setzer's testimony, or from a review of Defendants' Exhibits A and E, when it was that Employer or Surety actually received one or both versions of the FROI at issue. Specifically, from the evidence of record, it is impossible to ascertain whether Employer or Surety received one or both versions of the claim within one year following the occurrence of the subject accident. From the evidence of record, all that can be said is that as of April 10, 2008, Surety's Denver office was possessed of copies of one or both versions of the FROI.

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). However, the Commission is not required to construe facts 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).

Statutes of Limitation

Idaho Code § 72-701 provides mandatory and unequivocal time limits in which Claimant must file notice of his injury and a claim for compensation:

> *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…*

Idaho Code §§ 72-702 and 703 require that the notice and the claim must each be filed, in writing, with the employer. The notice and the claim are two separate and distinct requirements. *Tonahill v. LeGrand Johnson Construction Company,* 131 Idaho 737, 963 P.2d 1174 (1998).

10. **60-Day Written Notice to Employer.** Idaho Code §§ 72-701 through 703 require a claimant to give written notice to employer within 60 days of an accident. It is undisputed that Claimant did not provide such written notices. However, Employer had actual notice of the accident no later than the day after it occurred. Mr. Iverson knew medical care was required and that Claimant could not return to work. Defendants do not dispute this point. Claimant's Complaint should not be dismissed for failure to provide Employer with written notice of his injury within 60 days of his accident.

11. **One-Year Written Claim for Compensation.** Idaho Code §§ 72-701 through 72-703 also require a claimant to make a written claim for compensation upon an employer within one year following the date of accident. Claimant argues that he satisfied the written claim requirement because Surety must have received the FROI within one year following the occurrence of the accident.

12. Defendants possessed two copies of the FROI, at least one of which Claimant posits they must have received prior to the filing of the Complaint because Claimant did not file it with the Complaint, yet Ms. Setzer acknowledged receiving that copy with the Complaint. Claimant reasons that Surety's Denver office must have received it at some point prior to April 10, 2008, but only made it available to Ms. Setzer upon receipt of the Complaint.

13. Assuming, *arguendo,* that Claimant's reasoning and factual basis is sound, he has nevertheless failed to assert, let alone prove, when Defendants first received the FROI. Proof on this point would still be required because even if Surety was already in possession of the FROI when it received the Complaint in April 2008, this does not prove that it was received on or before June 25, 2007.

14. Claimant has also failed to present any affirmative evidence to establish just when, how and by whom the FROI was first delivered to Employer. If this threshold had been met, then Claimant's allegations in his briefs regarding Employer's lack of reliability in handling its mail may have become relevant. In this case, however, there isn't even a minimum showing that the FROI was actually subjected to Employer's mail handling practices.

15. Claimant has failed to prove that he made a written claim for compensation with Employer within one year of his accident.

16. Although not raised as an issue by Claimant, the provisions of Idaho Code §§ 72-602 and 72-604 arguably have some bearing on this case. In this regard, Idaho Code § 72-602 requires that employer file an Employer's First Report of Injury within 10 days following the occurrence of an injury which requires treatment by a physician or results in absence from work for 1 day or more. *See*, Idaho Code § 72-602. Certainly, Claimant's injury resulted in both medical treatment and loss of more than one day of work. Under Idaho Code § 72-604, where an employer "willfully fails or refuses" to file the Idaho Code § 72-602 report, the limitation prescribed in Idaho Code § 72-701 shall not run against the claim until the report has been filed. *See*, Idaho Code § 72-604. Per *Bainbridge v. Boise Cascade Plywood Mill,* 111 Idaho 79, 721 P.2d 179 (1986), the legislature's use of the term "willful," implies the necessity of proving a conscious wrong on the part of the employer. Here, Employer was clearly apprised of the

occurrence of the accident no later than day after it occurred. The accident was also one which resulted in time loss from work and the need for medical treatment. Clearly, Employer did not file an Idaho Code § 72-602 report with the Industrial Commission. However, the evidence of record leaves the Commission unable to conclude that Employer's failure in this regard was willful, i.e. consciously wrong.

17. The record establishes that even if Claimant is successful in avoiding the Idaho Code § 72-701 bar, it is nevertheless Employer's contention that the accident is not one arising out of and in the course of Claimant's employment. Evidently, Employer intends to argue that the accident was one occurring going to or coming from employment, and is therefore not an accident occurring in the "course" of employment. If Employer had a good faith belief that the accident did not occur under circumstances implicating an obligation under the Idaho Workers' Compensation law, it is hard to posit that Employer's failure to file an Idaho Code § 72-602 report is "willful" as that term has been construed by the *Bainbridge* court. Such a good faith, though potentially mistaken, belief would not be sufficient to prove a conscious wrong. Regardless, it is Claimant's burden to show that the Employer's failure was indeed "willful," and there is insufficient evidence of record to support such a conclusion. Accordingly, we find that the provisions of Idaho Code § 72-601, *et seq.*, do not relieve Claimant of his obligation to comply with the provision of Idaho Code § 72-701.

Exceptions to One-Year Written Claim Requirement

Idaho Code § 72-701 provides two exceptions to the one-year written claim limit: "If payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be

required." Per Idaho Code § 72-102(7), "compensation" refers to "any or all of the income benefits and the medical and related benefits and medical services."

18. Here, there is no dispute that Surety did not pay medical or time loss benefits within one year following the occurrence of the subject accident. However, it is undisputed that Employer continued to pay to Claimant his usual and customary wage following the occurrence of the accident, even though Claimant was hospitalized during part of the time that he continued to received his usual and ordinary wages, and was never able to return to his full pre-injury duties for Employer. Employer was evidently acquainted with other members of Claimant's family. Per Claimant, Employer agreed to keep Claimant on the payroll after the subject accident to help him out a little bit, on account of Claimant being laid up. (Tr. 17/14-18/9). According to Claimant, after he got out of the hospital, he did perform light duty work for Employer while receiving his time-of-injury salary.

19. Claimant alleges that his salary continuation was in lieu of the payment of Workers' Compensation benefits, therefore tolling the provisions of Idaho Code § 72-701. The Industrial Commission has previously addressed this issue in at least two decisions. In *Dubois v. Clements Farms, Inc.*, 1987 IIC 0784 (1987) following an industrial accident, employer continued claimant's wages, and also paid claimant's deductible on claimant's non-occupational health insurance. Claimant argued that these payments tolled the provisions of Idaho Code § 72-701. On the evidence before it, the Commission concluded that neither party reasonably believed the continuation of wages and the payment of medical deductible was in lieu of compensation under the Workers' Compensation laws. Rather, the evidence tended to establish that wages were continued out of a sense of loyalty to claimant.

20. In *Sjoren v. Idaho Conference of Seventh Day Adventist*, 1991 IIC 0928 (1991), claimant suffered a 1983 industrial injury as the result of a work-related automobile accident. At the time of injury, claimant received a $300 per month stipend from employer for her services as a Bible instructor. Although employer was aware that claimant was a covered employee for purposes of Workers' Compensation, employer (erroneously) did not associate claimant's injuries with coverage under the insurance policy. Therefore, claimant's medical expenses were paid under non-occupational coverage. However, employer continued to pay claimant's monthly stipend until her position was terminated in January of 1989. On the question of whether or not the employer's continuation of claimant's salary tolled the provisions of the statute of limitations, the Commission cited *Bottoms v. Pioneer Irrigation District*, 95 Idaho 487, 511 P.2d 304 (1973) for the proposition that under certain conditions, payment of wages may constitute a waiver and toll the Statute of Limitations where it is shown that claimant reasonably believed that payments were in lieu of compensation. The Commission ruled that the evidence before it did not establish that the continued payment of the $300 per month stipend was made in lieu of Workers' Compensation payments. There was no evidence that the employer made the payments with Workers' Compensation benefits in mind.

21. Similarly, there is no evidence before the Commission in the instant matter which affirmatively demonstrates that Employer made, or Employee received, the salary continuation payments in lieu of Workers' Compensation benefits. At most, the evidence establishes that Employer made the payments in question out of sympathy for Claimant. Therefore, in accordance with the cases cited above, the Commission finds that Claimant has failed to establish that salary continuation payments were made by Employer, or received by Claimant,

with the understanding that such payments were to be in lieu of Workers' Compensation benefits.

CONCLUSION OF LAW

1. Claimant has failed to prove that he made a claim to Employer within one year following the occurrence of accident, as contemplated by the provisions of Idaho Code §§ 72-701 and 72-703, as construed by *Tonahill v. LaGrand Johnson Construction Company*, 131 Idaho 737, 963 P.2d 1174 (1998).

ORDER

1. Claimant has failed to prove that he made a claim to Employer within one year following the occurrence of accident, as contemplated by the provisions of Idaho Code §§ 72-701 and 72-703, as construed by *Tonahill v. LaGrand Johnson Construction Company*, 131 Idaho 737, 963 P.2d 1174 (1998).

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

IT IS SO ORDERED.

DATED this __31st____ day of ____May_____, 2011.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_participated but did not sign_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __31st_____ day of ___May_____, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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JON BAUMAN
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__/s/_____