

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ADAM L. SAPIEN,)
)
 Claimant,)
)
 v.)
)
 APPLEBEES,)
)
 Employer,)
)
 and)
)
 HARTFORD INSURANCE COMPANY)
 OF THE MIDWEST,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2009-005591

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

Filed: December 22, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on October 22, 2010. Daniel J. Luker of Boise represented Claimant. Lora Rainey Breen of Boise represented Defendants. Richard Hammond of Caldwell represented witness Adrian Acevedo. The parties submitted oral and documentary evidence. The parties took post-hearing depositions and submitted post-hearing briefs. The matter came under advisement on April 25, 2011, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant suffered an injury from an accident arising out of and in the

- course of employment;
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident; and
 3. Whether, and to what extent, Claimant is entitled to the following benefits:
 - a. Medical care; and
 - b. Temporary Partial and/or Temporary Total Disability benefits.¹

CONTENTIONS OF THE PARTIES

Claimant asserts he fell and suffered a cervical injury while working for Applebees in January 2009. He seeks medical and temporary disability benefits.²

Defendants assert that Claimant's account of a work accident is not credible and that he has not proven that his cervical injuries are related to any industrial accident at Applebees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Ryan Hahn, taken on October 14, 2010, on behalf of Claimant;
3. The testimonies of Claimant, Adrian Acevedo, Stephen Youngerman, Debi Blair, Ryan Hahn, Tod Berg, Michael Moiza, and Jill Yordy, taken at the hearing;
4. Claimant's Exhibits A through Q, admitted at the hearing;
5. Defendants' Exhibits 1 through 13, and 16, admitted at the hearing;

¹ At hearing, Claimant also alleged entitlement to attorney fees. However, Claimant's briefing makes no request for, or argument in support of, attorney fees. The Referee considers the issue abandoned.

² Claimant initially asserted that his alleged industrial accident also caused lumbar injury. However, he has not so argued in his briefing and the record contains no expert medical evidence of such a causal relationship.

6. The post-hearing deposition of Samuel Jorgenson, M.D., taken on December 3, 2010, on behalf of Claimant;
7. The post-hearing deposition of Paul Montalbano, M.D., taken on January 19, 2011, on behalf of Defendants.

All objections posed during the pre-hearing and post-hearing depositions are overruled.

Defendants request that the Commission strike the post-hearing deposition of Dr. Jorgenson, asserting it entirely lacks foundation. The Referee denies Defendants' request, for although Dr. Jorgenson did not base his opinion upon review of all of Claimant's medical records, it is based upon Dr. Jorgenson's examination of Claimant and Claimant's recitation of his medical history.

After having considered all of the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

CLAIMANT'S BACKGROUND

1. Claimant was born in 1966 and was 43 years old at the time of the hearing. He had resided in or near Boise for more than the last five years.

2. Claimant was born in Rupert. He dropped out of school in the tenth grade and later obtained a GED. He worked for potato processing plants, auto body repair shops, and a drywall business in the Burley area. He later worked in auto body repair in Twin Falls.

3. In approximately 1991, Claimant injured his right arm playing football. Thereafter, he noted numbness and an occasional electric shock sensation in his right upper extremity. In 1995, Claimant slipped and fell on his back in the shower while incarcerated at the

Ada County Jail. Thereafter, he developed neck and back pain. He also noted numbness and loss of strength in his hands, arms, and legs.

4. Commencing in approximately 1996, Claimant was incarcerated for a felony DUI conviction, following multiple prior DUI convictions. On February 9, 1998, Claimant reported to Dale Hoekema, M.D., a health care provider at the Idaho Department of Corrections (IDOC), that he developed chronic neck pain, radiating right arm pain, and loss of right triceps muscle bulk since his 1995 fall at the Ada County Jail. On March 12, 1998, Douglas Smith, M.D., performed anterior C5-6 discectomy and fusion. Thereafter, Claimant's cervical condition improved, however, Dr. Hoekema documented persistent triceps muscle wasting, which he indicated "probably will not return." Defendants' Exhibit 2, p. 413.

5. On March 21, 1999, while incarcerated, Claimant reported he slipped and fell on a wet kitchen floor and landed on his lower back. On August 3, 1999, Claimant reported neck and back pain, indicating his neck pain was worse than prior to his cervical fusion. IDOC medical services notes of that date record that Claimant demonstrated atrophy of one muscle group in his right arm. The examiner directed Claimant to restrict his lifting to twenty pounds. *Id.*, at p. 404. On April 25, 2000, Claimant expressly requested Robaxin and Ibuprofen from IDOC health care providers for his lower back and neck pain.

6. In November 2001, Claimant obtained his release from prison and promptly began working in an auto body repair shop near Caldwell.

7. In February 2004, Claimant returned to prison after another DUI conviction. On February 19, 2004, Claimant completed a medical history questionnaire at prison and in response to questions regarding the present condition of past illnesses, wrote: "1998 pinched nerves in neck & back[,] same & at times worse." Defendants' Exhibit 1, p. 28. On November 29, 2004,

Claimant requested medical attention for “excruciating pain” in his lower back and neck. *Id.*, at p. 314. He received Naproxen and his condition improved.

8. On September 8, 2006, Claimant began working for Best Bath Systems (Best Bath) as a shipping and receiving laborer through a community work center (CWC) program, a work release program of the IDOC. On February 12, 2007, Claimant was paroled. He continued to work at Best Bath.

9. On or about February 25, 2007, Claimant injured his lower back and neck at Best Bath while maneuvering a shower unit, which he estimated weighed up to five hundred pounds. On March 8, 2007, Robert Gatchel, PAC, examined Claimant, who reported low back pain and intermittent paresthesias into the upper extremities. Mr. Gatchel diagnosed lumbar strain, prescribed medications and physical therapy, and restricted Claimant to lifting no more than twenty-five pounds. On March 14, 2007, Mr. Gatchel recorded Claimant’s complaints of low back and neck pain. On March 21, 2007, Michael Weiss, M.D., examined Claimant and recorded: “He has pain in his neck and low back primarily on the right side. It radiates to his arm and then into his thigh.” Defendants’ Exhibit 7, p. 940. On March 28, 2007, Dr. Weiss examined Claimant again and recorded, “I would like to consider an MRI of his back, since he is now a month out. May also consider MRI of this [*sic*] neck.” *Id.*, at p. 943. In March 2007, Best Bath terminated Claimant’s employment when he admitted to controlled substance abuse the prior week when confronted with a mandatory drug test. Claimant returned to prison without receiving the lumbar and cervical MRIs contemplated by Dr. Weiss.

10. On June 1, 2007, Claimant completed a medical history questionnaire at prison and wrote, “back/neck injury workman’s [*sic*] comp. ... need MRI’s [*sic*], syatic [*sic*] nerve pain; neck.” Defendants’ Exhibit 1, p. 19. Claimant received medications, but no MRIs.

11. On April 20, 2008, Claimant began working as a prep cook for Applebees, a restaurant in Boise. He was still in custody and his employment was through the CWC work program. Claimant was scheduled to complete his sentence and be released in February 2009. On April 25, 2008, while driving without privileges, a police officer stopped Claimant and asked him to identify himself. Claimant gave the officer his brother's name, birthdate, and social security number. Another police officer arrived and recognized Claimant from the CWC program. Claimant went back to prison, terminating his employment at Applebees after only five days.

12. On June 21, 2008, Claimant wrote to IDOC health care providers: "My scyatic [*sic*] nerve has set in my lower back & neck more painful than ever before & getting worse. Will you please provide me medical ATTN:/medication to treat extremely painful situation? ASAP!" Defendants' Exhibit 2, p. 594. The IDOC health care providers' records from June 24, 2008, note that Claimant had a history of back and neck injury and he specifically requested Flexeril.

13. On June 26, 2008, Claimant wrote in response to an IDOC questionnaire regarding recent injuries that he needed immediate care for "unbearable lower back pain getting worse & worse." *Id.*, at p. 551. He continued to receive Naproxen. In July 2008, IDOC medical services records indicate Claimant was seen for complaints of low back pain and requested generic Darvocet. IDOC records establish that Claimant regularly received Naproxen and Flexeril, and often Robaxin and ibuprofen, during his incarceration.

14. In approximately November 2008, Claimant became eligible again to participate in the CWC program.

RE-EMPLOYMENT AT APPLEBEES

15. On December 9, 2008, Claimant again began to work as a prep cook for Applebees through the CWC program. His duties included cutting produce, weighing and labeling food items, and preparing everything required for use by the cooks. Subsequently, his assignment changed to dishwashing, general cleaning, and sanitizing the kitchen. IDOC provided Claimant transportation to and from Applebees for a fee.

16. In December 2008 and January 2009, at least two Applebees employees, one a manager, slipped and fell on ice by the dumpster behind the restaurant. Neither sustained any injury. The manager's fall was well known and joked about among the Applebees employees. After these falls, Applebees was more vigilant in applying chemical ice-melt to the area.

17. At hearing, Claimant testified that on January 21, 2009, he gave his two weeks' notice to Ryan Hahn. Mr. Hahn was a co-worker; Debi Blair, general manager, placed Mr. Hahn in charge of the kitchen that evening. Hahn testified that he did not remember Claimant giving two weeks' notice to him, and that he would have directed Claimant to speak to a manager had he done so. Blair testified, and Claimant's employment file indicates, that Claimant gave only five days' notice prior to quitting and would not, therefore, be considered for rehire. Claimant's Exhibit L, p. 5.

18. On January 28, 2009, Correctional Medical Services physicians prescribed a two-week supply of Naproxen and Amitriptyline for Claimant as his "release meds." Defendants' Exhibit 2, p. 520. Claimant anticipated release on February 9, 2009.

ALLEGED INDUSTRIAL ACCIDENT

19. Claimant testified that on January 28, 2009, he was taking the trash out to the dumpster behind Applebees when he slipped on the ice and fell on his "backside." Transcript,

p. 32. He testified that he kept his body stiff as he fell, to protect his head, and the fall hurt his “backside ... and whole body.” Transcript, p. 33. Claimant testified that a co-worker, Adrian Acevedo, knew he had fallen. He testified that he did not notify any supervisor of his fall that day.

20. Claimant testified that he later called Aetna Insurance, reported his fall at work, and was given names of doctors to contact to arrange for medical care. Aetna was his private insurance carrier. Based upon Claimant’s representations, this conversation allegedly occurred January 29 or 30, 2009. Claimant testified he could not recall if Aetna directed him to file a workers’ compensation claim for his alleged work injury. Claimant testified that he then called the doctors recommended by Aetna and made appointments after his release date. Claimant testified that Aetna later denied coverage for treatment of his cervical condition.

21. Claimant next worked for Applebees on February 3, 2009. It was also his last day of work for Applebees. He testified that he attempted to report his accident to supervisors, but they ignored him.

22. On February 9, 2009, Claimant completed his sentence and was released from prison.

MEDICAL CARE

23. On February 12, 2009, Claimant presented to Sean Hassinger, M.D., reporting that he fell at work approximately two weeks earlier and twisted his neck when he was falling. Claimant reported shooting right arm pain. Dr. Hassinger suspected cervical disc herniation and recommended an MRI.

24. On February 13, 2009, Claimant underwent a cervical MRI which revealed cervical degenerative disc disease with right posterolateral osteophytic ridges/protrusions of

moderate size at C6-7 and small to moderate size at C5-6 with anterior extradural defects and mild to moderate C5-7 cord atrophy probably secondary to chronic myelomalacia from cervical spondylosis. Claimant's Exhibit B-2, p. 39.

25. On February 23, 2009, Claimant presented to orthopedic surgeon Samuel Jorgenson, M.D., reporting an injury on January 20, 2009, when he was at work and fell, striking his thoracic spine. He reported immediate pain into his neck with extension into his right upper extremity. Dr. Jorgenson then recorded: "PAST MEDICAL HISTORY: Medical illnesses are none. PAST SURGICAL HISTORY: Cervical fusion in 1998 with excellent result." Claimant's Exhibit F, p. 1. Dr. Jorgenson reviewed Claimant's cervical x-rays and MRI, noting that Claimant's prior C5-6 fusion had not gone on to solid arthrodesis. Claimant's Exhibit B-2, p. 32.

FIRST REPORT OF INJURY

26. On February 24, 2009, Claimant filed a First Report of Injury, alleging that his fall occurred on January 21, 2009, at midnight, that he "attempted to give notice to no avail," and that after he fell while going out back to dump the garbage, "Adrian then helped me dump the garbage." Claimant's Exhibit A.

27. On March 12, 2009, Claimant's counsel wrote Defendants regarding Claimant's alleged January 21, 2009 accident, demanding immediate authorization of cervical surgery and temporary disability benefits.

FURTHER MEDICAL CARE

28. On March 25, 2009, Claimant presented to a member of Dr. Jorgenson's staff, Shannon Gardiner, P.A.-C., for preoperative evaluation. Gardiner recorded: "He reports in the

past, he has had cervical fusion which overall did not cause him pain until his fall.” Claimant’s Exhibit F, p. 5.

29. On March 31, 2009, Claimant reported to Dr. Jorgenson that he fell on January 28, 2009, while taking some trash out of the trashcan and landed directly on his thoracic spine. Dr. Jorgenson performed anterior cervical decompression and fusion at C6-C7, with revision of C5-C6 fusion, and application of anterior locking plates at C5, C6, and C7. During surgery, Dr. Jorgenson found and removed a free disk fragment in the right neural foramen at the C6-7 level.

30. On April 10, 2009, Dr. Jorgenson examined Claimant and noted that his right arm pain had completely resolved, although he continued to experience neck and right shoulder discomfort.

31. On April 20, 2009, Claimant, through counsel, filed the Complaint herein. He alleged an injury date of January 21, 2009.

32. On April 22, 2009, Claimant reported to Christian Peterson, MSPT, COMT, that he slipped on the ice and landed on his back at work while dragging a heavy garbage can out to the dumpster.

33. On June 22, 2009, Dr. Jorgenson examined Claimant in follow-up to his cervical fusion. Claimant then reported low back pain, which he asserted commenced with his January 28, 2009, accident and had persisted since that time.

34. On July 15, 2009, Claimant presented to Active Chiropractic and reported that he “fell on ice dumping garbage @ work—Applebees—landed on tailbone & LB—knocked wind out of him, LB P was immediate.” Claimant’s Exhibit J, p. 2.

35. On September 3, 2010, Dr. Jorgenson opined that Claimant's cervical injuries and need for surgery were related to his January 21, 2009 accident. Claimant's Exhibit F, p. 30. Dr. Jorgenson's opinion assumed the veracity of Claimant's account of his alleged accident. Dr. Jorgenson had no opportunity to review or consider Claimant's prior medical records before arriving at his causation opinion.³

36. On September 23, 2009, neurosurgeon Paul Montalbano, M.D., examined Claimant for complaints of difficulty swallowing after his 2009 cervical fusion. After referencing Claimant's 1998 cervical fusion, Dr. Montalbano recorded that Claimant: "denies ever having any problems in terms of neck pain or upper extremity symptomatology prior to the fall in January of 2009." Claimant's Exhibit I, p.1. In his post-hearing deposition, Dr. Montalbano opined that if Claimant had right arm symptoms prior to his alleged January 2009 fall, then a continuation of those symptoms would most likely relate to the prior inciting event that caused his acute right arm pain. Dr. Montalbano concluded that Claimant's condition immediately prior to his 2009 cervical surgery could well have been caused by the event which precipitated his complaints of right arm symptoms after his 2007 injury at Best Bath.

37. At the time of hearing, Claimant's right arm symptoms had resolved, however, he still described pain in his neck, right shoulder, and lower back.

DISCUSSION AND FURTHER FINDINGS

38. 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

³ In his post-hearing deposition, Dr. Jorgenson testified that knowing Claimant's symptoms prior to his alleged 2009 accident would be significant in determining causation of his cervical condition. Dr. Jorgenson expressly acknowledged that knowing Claimant had neck and right arm symptoms in 2007, and prior triceps atrophy, would be significant.

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).

OCCURRENCE OF AN ACCIDENT

39. The threshold issue is whether Claimant suffered an industrial accident at Applebees on or about January 28, 2009. Claimant's testimony and credibility, the testimony of his co-worker and supervisors, and circumstantial medical evidence, are all relevant to this issue.

Claimant's Hearing Testimony

40. At hearing, Claimant testified that on January 28, 2009, he was taking the trash out to the dumpster behind Applebees when he slipped on the ice, fell on his "backside," and "laid there for a few minutes or seconds, whatever." Transcript, p 32. He testified that Adrian Acevedo, a co-worker, knew that Claimant had fallen. Claimant testified that his fall occurred "at night or right when my shift began." Transcript, p. 33. His shift began that evening at 5:00 p.m. and ended at midnight. Claimant testified that the fall hurt his "backside," but he did not notify his supervisor about the fall the night it occurred because the CWC van was waiting and he was supposed to finish by midnight.

41. CWC rules, which Claimant had previously received, require an inmate to give immediate notice of any work injury to both the employer and the CWC. It is undisputed that Claimant did not give notice of his alleged accident to CWC, although Claimant testified that the CWC van driver who picked him up at the end of his shift noticed how he was walking and asked him what happened. Transcript, p. 34. Claimant testified that after his shift, he began to notice tingling in his hands.

42. Claimant testified that he attempted to notify his supervisors at Applebees during his next work shift on February 3, 2009, but they entirely ignored him.

Acevedo's Testimony and Credibility

43. Claimant's friend and co-worker at Applebees, Adrian Acevedo, provided a written statement on July 20, 2009, regarding Claimant's alleged accident. The totality of Acevedo's statement follows:

In January of 2009 I worked at the Applebees Restaurant near the airport.

My coworker was Adam Sapien.

On one particular evening working with Adam Sapien, I remember Adam complaining of having fallen down while taking trash to the dumpster.

I remember Adam's complaints because I had fallen in the same location approximately one hour earlier.

That evening I was working as a cook in the kitchen and Adam was working as a dishwasher.

Defendants' Exhibit 12, p. 996. Significantly, there was no mention of actually seeing Claimant fall or get up after having fallen.

44. In his pre-hearing deposition on January 14, 2010, Acevedo testified that he saw Claimant getting up after falling while taking out the trash at Applebees:

Q. Okay. How did you know that there was an accident?

A. Well, I saw him getting up.

Q. Did you see him fall?

A. I didn't see him fall, but I saw that he was getting up, and he had—everything was wet.

Q. You mean his clothes were wet?

A. Uh-huh. Yes.

Q. Was he all the way up when you saw him?

A. No. He was just getting up. He was coming up.

Claimant's Exhibit Q, p. 3 (Acevedo Deposition, p. 11).

At hearing, Acevedo testified, through an interpreter, that he saw Claimant “when he was standing up from a fall.” Transcript, p. 123. Acevedo went on to describe Claimant’s reaction:

Q. You indicated on direct examination that you did not actually see claimant fall; is that correct?

A. Yes, that is correct. I didn’t see him. I saw when he was standing up. And I saw him, that he was, like, holding his back.

....

Q. Could you please demonstrate to me how he was holding his back.

A. Can I stand up?

Q. Oh, yes.

A. I remember that he fell. And when he stood up, he started to hold his back here. And I was coming out of the door of Applebee’s. And I asked him, “What happened?” And I told—he told me, “I fell. And I hit my back.” And I was teasing him, telling him, “Oh nothing happened to you, you old guy.”

Q. Can you actually show me how he was holding his back.

A. He was holding right here in the back, in the back. Then the next day was when he showed up even worse, that he couldn’t walk.

Q. Okay.

REFEREE JUST: I’ll just note for the record that the Witness was demonstrating with his—both hands above his belt line in the middle of his back.

Transcript pp. 140-141. Acevedo’s testimony and demonstration assert that Claimant complained only of lower back pain. There was no mention of neck, shoulder, or upper extremity symptoms.

45. Close comparison of Acevedo’s initial statement, pre-hearing, and hearing testimony of the alleged accident suggests an evolving description.

46. While working at Applebees, Acevedo joked about using more than one name. His last day of employment with Applebees was February 6, 2009. Acevedo testified in his

pre-hearing deposition that he stopped working for Applebees because he found a better job. Under cross-examination at hearing, Acevedo admitted, and Defendants' Exhibit 11 establishes, that Applebees terminated Acevedo's employment for giving false identification on his application and I-9 documentation.

47. At hearing, Acevedo testified, in response to Defendants' counsel's inquiry, that he had not talked to Claimant for four months prior to the hearing. However, when subsequently questioned by Claimant's counsel, he acknowledged that he had talked to Claimant both the day, and the week, before hearing. At hearing, Acevedo's counsel repeatedly instructed him not to answer a variety of general foundational questions appropriate for virtually any fact witness.

48. The Referee finds that Acevedo's credibility is suspect, and his testimony is of questionable validity.

The Managers' Testimonies

49. Although Claimant testified that he unsuccessfully attempted to report his accident to one or more supervisors at Applebees on February 3, 2009, all of the Applebees managers testified otherwise.

50. Applebees' assistant manager Stephen Youngerman testified that Claimant never notified him in person or by phone of any work accident in January or February 2009. Youngerman finished his shift at 5:00 pm on January 28, 2009. Thus he would not have been present when Claimant alleges his accident occurred.

51. Debi Blair, general manager at Applebees, testified that Claimant never notified her of his alleged work accident in January or February 2009.

52. Tod Berg, an assistant manager, testified that Claimant's allegation that Applebees managers ignored him when he attempted to give notice of his alleged fall was

definitely a fabrication. Berg testified that Claimant never gave him notice in person or telephonically that he suffered an accident in January or February 2009.

53. Mike Moiza, assistant manager at Applebees, testified that Claimant's work was not up to par, that he was hired as a line cook, but ended up just being able to wash dishes. Transcript, p. 206. Moiza testified that he was the supervisor on duty during Claimant's last day at Applebees, but that Claimant never notified him of any accident or injury.

Corroborating Medical Evidence

54. Claimant asserts that the testimony of Dr. Jorgenson supports not only a causal connection between his alleged accident and need for cervical surgery, but also corroborates the occurrence of his alleged accident. Claimant argues that Dr. Jorgenson affirmed that the free disc fragment he removed during Claimant's March 2009 cervical surgery supports the allegation of his fall, because it was the product of recent trauma. However, both Dr. Jorgenson and Dr. Montalbano testified that a free disc fragment can exist for an extended period—months and years before being reabsorbed—and does not necessarily indicate recent trauma. Thus, the medical evidence does not compel a finding of cervical trauma in January 2009, let alone cervical trauma from an industrial accident, as Claimant alleges.

Claimant Lacks Credibility

55. Claimant's credibility is critical to resolving the issues presented. He has provided misleading and evasive testimony. His accounts of the alleged industrial accident have not been entirely consistent. The notes of various medical providers record different dates and details of the alleged accident. The testimony of other employees fails to corroborate Claimant's accounts regarding notice of the alleged accident. Clear evidence in the record establishes Claimant's propensity to fabricate.

56. Misleading testimony. The record establishes Claimant's tendency to provide vague and misleading testimony. Several critical areas of Claimant's testimony are both verbose and vague, making them difficult to understand. Communication styles differ widely among individuals. However, repeated vague responses to precise questions suggest intentional evasion and less than full disclosure of relevant information. One illustration will suffice.

57. During his pre-hearing deposition, Claimant testified that he added the handwritten notation on his Work and Appointment Schedule, contained in Defendants' Exhibit 9, to document his industrial accident under the date of January 28, 2009, *before* submitting the schedule to prison authorities at the end of January 2009. Claimant's Exhibit P, p. 23 (Claimant's Deposition, pp. 86-87). However, at hearing, Claimant reviewed Defendants' Exhibit 9 and Claimant's Exhibit M. He testified that he added the handwritten notations on his Work and Appointment Schedule contained in Defendants' Exhibit 9 to document his two weeks' notice and his injury under the dates of January 21 and 28, 2009, respectively. Ultimately, Claimant acknowledged that he made these notations on his own copy of the schedule after he handed in the original schedule to prison authorities:

Q. BY MR. LUKER: I want to look at Defendants' Exhibit 9. And then I'd like you to look at Claimant's Exhibit M again. So we're looking at Defendants' Exhibit 9 and Claimant's Exhibit M. So we talked about Exhibit M—what's Defendants' Exhibit 9? Have you seen that before?

A. Yes.

Q. What is Defendants' Exhibit 9?

A. They're both the same. They're both—Exhibit 9?

....

Q. Okay. And it's different than the one that's in Exhibit M, isn't it?

A. It is.

Q. How is it different?

A. Because I remember writing down after I'd called—I'd gotten a copy of it before I handed it in. And I had documented that, my two-week notice, because I had them mixed up with that, the two-week notice and then my injury. They're a week apart, like a week apart, my two-week notice and then my injury.

Transcript, pp. 57-58.

58. Jill Yordy assisted in managing inmate work and appointment schedules at IDOC. She confirmed that Claimant's Exhibit M was an accurate copy of the Work and Appointment Schedule that Claimant completed while at IDOC. Claimant's Exhibit M and Jill Yordy's testimony establish that Claimant did not make the handwritten notations reflected in Defendants' Exhibit 9 *before* submitting his Work and Appointment Schedule to prison authorities. If Claimant promptly made such documentation for his own use, it seems unlikely that he would then advise Dr. Jorgenson on February 23, 2009, that his work injury occurred on January 20, 2009, or file his First Report of Injury on February 24, 2009, alleging a work injury on January 21, 2009.

59. Evasive testimony. Perhaps Claimant's erroneous deposition testimony about submitting the copy of his Work and Appointment Schedule to the prison's job coordinator may be the product of simple forgetfulness. However, a second illustration shows deliberately evasive testimony in Claimant's explanation of his termination by Best Bath in 2007 for controlled substance abuse. In response to questions from his own counsel at hearing, Claimant repeatedly evaded this fact before finally acknowledging it:

Q. [By Claimant's counsel] And just because I know that this is an area the defendants will probably ask about, why didn't you continue to work with Best Bath?

A. Why didn't I?

Q. Yes.

A. One of the main reasons was my hours. I was supposed to be given a raise. I was supposed to be given a—or a—what do they give out? Every six months, they're supposed to see you for a possible raise or a promotion. It's an evaluation-type thing. I was never given one of them.⁴ And I mentioned it to my boss man. And he would ignore it. He'd ignore it.

So I finally talked to my PO and told them I wasn't making enough money there. I didn't—I told them basically what was going on with my employment. I felt I was treated unfairly. And everybody else had their evaluations within six months or a six-month period.

Q. Okay. Did you quit? Or were you fired?

A. No. After this accident, I mean, I was supposed to be on a limited or restricted job. But my supervisor kept me doing the same thing. If I didn't do it, nobody else did. I had no choice. I was going to give them my two weeks' notice. And I talked to a few of the supervisors there about getting transferred. And he said that—he kept—they kept—they had openings. But my boss wouldn't transfer me. He wanted me on that job. So I had no—I mean, I wanted to—I don't want to quit unless I had another job waiting because I was out on parole. And he wouldn't—he wouldn't move me.

Q. So I guess—I'm sorry. You didn't quite answer my question. Did you quit? Or did they—did they fire you? Did they terminate you?

A. I admitted to—they did a UA. And I admitted that I had done a line of whatever it was, coke or meth, the week before because they were doing UA's. I give them a UA. And they came back telling me that it wasn't of temperature. So as I'm waiting for doing another UA, my area is getting swamped with tubs. And so we made an agreement that I would give them another UA after—after work, after—or before I went to my rehab or my physical therapy.

And I told them, "By the way, I did"—"I relapsed. I did a line. I regret doing it." Right then they blew up and said, "You're fired," just for being honest with them. And I asked them, I go, "I'll take a UA if it comes up." And they still fired me.

Transcript, pp. 39-40.

⁴ Claimant had worked for Best Bath less than six months at the time of his February 2007 injury. His work duties were then temporarily restricted due to his lower back injury, likely delaying a comprehensive performance evaluation.

60. Inconsistent testimony. Claimant has provided inconsistent dates and details about his alleged industrial accident. On February 12, 2009, Claimant told Dr. Hassinger that he fell at work approximately two weeks earlier and twisted his neck when he was falling. On February 23, 2009, Claimant told Dr. Jorgenson that he fell at work on January 20, 2009, and struck his thoracic spine. On February 24, 2009, Claimant filed a First Report of Injury alleging his fall occurred on January 21, 2009, at midnight. On March 31, 2009, Claimant told Dr. Jorgenson that he fell on January 28, 2009, and landed directly on his thoracic spine. On April 20, 2009, Claimant's counsel filed the Complaint herein, alleging an injury date of January 21, 2009. At hearing, Claimant testified that he fell and landed on his "backside" on January 28, 2009, "at night or right when my shift began." Transcript, p. 33. His shift began that evening at 5:00 p.m.

61. Claimant has testified inconsistently about his efforts to report the alleged accident. He first testified that he tried to report his accident and no Applebees manager would listen to him, so he called and reported it to Aetna, his private health insurer. However, Claimant later testified that he had already called and reported his accident to Aetna, so he did not make further efforts to report his accident to his supervisors at Applebees on February 3, 2009, his last day of work. Furthermore, at Claimant's deposition, he expressly denied notifying any supervisor at Applebees by telephone about his alleged accident. Claimant's Exhibit P, p. 27. However, on cross-examination at hearing, Claimant testified that he did notify a supervisor by telephone and was told that they would complete the written accident report during his next scheduled work shift. Transcript, pp. 98-106. As previously noted, all Applebees supervisors denied receiving such notice.

62. Deliberate pre- and post-claim deceit. The record clearly reveals Claimant's propensity to fabricate. When first employed by Applebees on April 25, 2008, Claimant drove a vehicle to work. This was prohibited by the rules of the CWC program. Moreover, Claimant had no legal driving privileges. While driving, Claimant was stopped by a police officer for failure to signal. Knowing that he should not have been driving, Claimant gave the officer his brother's name, birth date, and social security number. Another police officer arrived, who recognized Claimant from the CWC program, and identified him. Claimant was then taken back to prison. The incident establishes not only an intentional falsehood, but also deliberate premeditated deceit. During cross-examination at hearing, Claimant acknowledged that on September 7, 2010—the month prior to the hearing—he was stopped by a police officer for failure to signal, and when asked to identify himself, he again provided his brother's name to the officer.

63. Claimant's propensity to deliberately withhold relevant information and provide inaccurate information in order to obtain his desired objectives is well-documented in the record and was demonstrated at hearing. His capacity to engage in deliberately premeditated deceit is also documented. Claimant lacks credibility.

64. Having observed the witnesses at hearing, and considered their testimony and other evidence in the record, the Referee finds that Stephen Youngerman, Debi Blair, Ryan Hahn, Tod Berg, Michael Moiza, and Jill Yordy are more credible witnesses than Adrian Acevedo and Claimant. Acevedo's credibility is suspect, and his testimony is of questionable veracity. Claimant is not a credible witness. The Referee finds that Claimant did not notify any supervisor of his industrial accident on or before February 3, 2009. The Referee finds Claimant's testimony that he fell on January 28, 2009, while at work for Applebees,

unconvincing. Claimant has not proven that he suffered an industrial accident at Applebees in January 2009.

CAUSATION, MEDICAL CARE, TEMPORARY DISABILITY BENEFITS

65. Having failed to prove the occurrence of an industrial accident at Applebees in January 2009, all other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has not proven that he suffered an industrial accident at Applebees in January 2009.

2. All other issues are moot.

RECOMMENDATION

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

DATED this 19 day of December, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ADAM L. SAPIEN,)
)
 Claimant,)
)
 v.)
)
 APPLEBEES,)
)
 Employer,)
)
 and)
)
 HARTFORD INSURANCE COMPANY)
 OF THE MIDWEST,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2009-005591

ORDER

Filed: December 22, 2011

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 this recommendation. 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 not proven that he suffered an industrial accident at Applebees in January 2009.
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 22 day of December, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
Thomas P. Baskin, Commissioner

/s/ _____
R.D. Maynard, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of December, 2011, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS, and ORDER** were served by regular United States Mail upon each of the following persons:

DANIEL J LUKER
PO BOX 6190
BOISE ID 83707-6190

LORA RAINEY BREEN
PO BOX 2528
BOISE ID 83701-2528

djb

/s/ _____