

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MARIO VEGA,

Claimant,

v.

DAN WARD/GLENN WARD DAIRY,  
L.L.C.,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

**IC 2010-028874**

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

**Filed March 7, 2013**

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on October 23, 2012. Claimant was present and represented by Kent D. Jensen of Burley. Neil D. McFeeley of Boise represented Employer/Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on December 31, 2012.

**ISSUES**

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

1. Whether Claimant suffered an accident causing injury arising out of and in the course of his employment, and, if so,

2. Whether Claimant gave timely notice thereof, and, if so,
3. Whether Claimant is entitled to reimbursement of the costs of surgery to amputate his right 4<sup>th</sup> toe; and
4. Whether Claimant is entitled to any workers' compensation benefits whatsoever.

### **CONTENTION OF THE PARTIES**

Claimant, a dairy worker with pre-existing Type 2 diabetes, contends that his right 4<sup>th</sup> toe amputation was caused by a cow stepping on it. He seeks reimbursement for the surgical removal of that toe and all related benefits. He relies on an MRI report to support his position.

Defendants contend that it was Claimant's uncontrolled diabetes, and not any work-related trauma, that caused bone and/or skin infections leading to the amputation. Claimant's own treating physician supports their position. Further, Claimant failed to timely report his un-witnessed accident as soon as practical, thus prejudicing Defendants regarding the ability to investigate the alleged accident and to assume management of his medical care.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing;
2. Claimant's Exhibit 1 admitted at the hearing.
3. Defendants' Exhibits 1-6 admitted at the hearing.

## **FINDINGS OF FACT**

1. Claimant was 45 years of age and resided in Burley at the time of the hearing. He began working at Employer's dairy in early September 2010 as a cow milker. As part of a three-member crew, Claimant would bring cows from the corral into the milking barn 20 at a time on each side of a row of milking machines. Claimant testified that on October 14, 2010, a cow stepped on the 4<sup>th</sup> toe of his right foot. Two days later he showed his right foot to a co-worker, but because he thought his injury would soon get better, did not immediately report his injury to his supervisor.

2. When his right foot failed to improve, Claimant presented to Cassia Regional Medical Center ER on November 4, 2010, with a chief complaint of cellulitis. It was noted in the History of Present Illness:

Mr. Vega is a 43-year-old gentleman who was brought here to the emergency room accompanied by his sister for persistent pain and swelling in his right fourth toe that he has had over the past 2-3 months. Of note, he has reported he has been increasingly swollen. He has been irritated. He has not been able to notice a whole lot of feeling in his foot. He is diabetic and has reportedly been off his diabetic medications also in the past several months as well. He reports today that he had further difficulty as he had difficulty seeing because of blurry vision. He also reports that he has been very depressed and struggling because of the foot sore and several other social issues he has currently been dealing with.<sup>1</sup> He denies any fevers. He does report he has some chills. He denies any nausea or vomiting. He reports nothing seemed to improve his foot over the past several weeks.

Defendants' Exhibit 1, p. 2.

3. Claimant was diagnosed with osteomyelitis of the 4<sup>th</sup> toe of the right foot. An MRI of Claimant's right foot was ordered and he was admitted for eventual amputation of his right 4<sup>th</sup> toe. Claimant's diabetic medication was reinstated.

4. Claimant's recovery from his toe amputation was uneventful.

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<sup>1</sup> Claimant was apparently homeless at this time.

## DISCUSSION AND FURTHER FINDINGS

The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. Green v. Columbia Foods, Inc., 104 Idaho 204, 657 P.2d 1072 (1983); Tipton v. Jansson, 91 Idaho 904, 435 P.2d 244 (1967).

An accident is an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b).

An injury is a personal injury caused by an accident arising out of and in the course of any employment covered by the workers' compensation law. Idaho Code § 72-102(17)(a).

The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. Callantine v. Blue Ribbon Supply, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. Dean v. Dravo Corporation, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also Callantine, Id.

The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the

events of an industrial accident and injury are causally related. Paulson v. Idaho Forest Industries, Inc., 99 Idaho 896, 591 P.2d 143 (1979); Roberts v. Kit Manufacturing Company, Inc., 124 Idaho 946, 866 P.2d 969 (1993).

Finally, it is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). However, our Supreme Court has also held that 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).

5. There is no mention in any medical record, contemporaneous or otherwise, associated with Claimant's right 4<sup>th</sup> toe infection that mentions anything about a cow stepping on Claimant's right foot. Claimant's testimony that he told the ER physician about the cow stepping on his foot is not credible. Claimant testified as to the fact that there is no mention in the physician's records regarding a cow stepping on his foot: "I don't see that that's my problem." Hearing Transcript, p. 19. The Referee disagrees; it is indeed his problem.

6. Claimant relies exclusively on the November 5, 2010 right foot MRI to establish medical causation. That report concluded:

1. Enhancement of the lateral proximal portion the distal phalanx of the fourth toe, compatible with osteomyelitis.
2. Edema without enhancement throughout the remainder of the distal phalanx may be reactive or **related to injury/fracture**.

Claimant's Exhibit 1, p. 1. Emphasis added.

7. Claimant contends that the language ". . . related to injury/fracture" supplies the nexus between his alleged injury and the need for his amputation surgery. However, a

notation by his treating surgeon puts to rest any notion that Claimant's 4<sup>th</sup> right toe infection was traumatically caused. A document prepared by the hospital entitled Physician Communication Documentation Clarification directed to Claimant's treating surgeon asks:

Questions/Comments: Mario Vega is a 43-year-old male admitted with with toe cellulitis with osteomyelitis. This patient also had diabetes and was noncompliant with his treatment. Please indicate if the cellulitis/osteomyelitis has any cause due to or connected with the diabetes.

Physician Response: Boehmer, Bernard R. Please document your response to the above comment(s) and designate the significance of this as a diagnosis. [Dr. Boehmer hand-wrote the following]: Poor diabetic care is a major risk for causing his toe infection.

Defendants' Exhibit 3, p. 12.

8. Claimant's treating physician's assertion that Claimant's poor diabetic care was a major risk factor in causing Claimant's right 4<sup>th</sup> toe infection trumps the radiologist's concern that Claimant's swelling may be related to injury or trauma. Dr. Boehmer expressed his opinion unequivocally that it was poor diabetic care that was the major risk factor for causing his toe infection. As Dr. Boehmer was never informed that Claimant was contending that the need for his amputation surgery was caused by a cow stepping on his foot, he did not address trauma as a possible cause of his toe infection.

9. The Referee finds that Claimant has failed to prove the need for his toe amputation was caused by an accident arising out of and in the course of his employment with Employer.

10. The remaining issues are moot.

#### **CONCLUSIONS OF LAW**

1. Claimant has failed to prove that the need for his right 4<sup>th</sup> toe amputation was caused by an accident arising out of and in the course of his employment with Employer.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 6**

2. All remaining 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 \_\_5<sup>th</sup>\_\_ day of March, 2013.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Michael E. Powers, Referee

### CERTIFICATE OF SERVICE

I hereby certify that on the \_\_7<sup>th</sup>\_\_ day of \_\_March\_\_, 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:

KENT D JENSEN  
PO BOX 276  
BURLEY ID 83318

NEIL D MCFEELEY  
PO BOX 1368  
BOISE ID 83701-1368

ge

*Lina Espinosa*

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**ORDER**

**Filed March 7, 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 the need for his right 4<sup>th</sup> toe amputation was caused by an accident arising out of and in the course of his employment with employer.
2. All remaining issues are moot.

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

DATED this \_\_7<sup>th</sup>\_\_ day of \_\_March\_\_, 2013.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
/s/  
Thomas P. Baskin, Chairman

\_\_\_\_\_  
/s/  
R. D. Maynard, Commissioner

\_\_\_\_\_  
/s/  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_\_  
/s/  
Assistant Commission Secretary

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/s/