BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JENNIFER L. ELLISON Claimant, v. FEDERAL EXPRESS CORP., Employer, and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Surety, Defendants.	**IC 2019-032415** **IC 2020-011369** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED MAY 15 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a bifurcated hearing in Twin Falls, Idaho, on December 6, 2022. Matthew Vook represented Claimant at the hearing. H. Chad Walker represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. One post-hearing deposition was taken. The matter came under advisement on April 3, 2023.

ISSUE

There is but one issue for resolution at the present time, to wit, whether Idaho Code § 72-704 works to prevent the application of Idaho Code § 72-701, which would otherwise bar Claimant's untimely notice of her February 12, 2020, neck injury claim.

CONTENTIONS OF THE PARTIES

Claimant asserts she injured her neck as the result of an alleged industrial accident on February 12, 2020. She acknowledges she did not comply Idaho Code § 72-701, which required her to report the accident to Employer at the latest within 60 days of the accident. She also acknowledges there is insufficient evidence to establish that Employer had independent knowledge of the accident despite her failure to report it. Finally, Claimant understands she carries the burden of proving that no prejudice resulted to Employer by her failure to timely give notice.

Claimant argues Employer's lack of prejudice through a patchwork of arguments, including the COVID pandemic, Employer's delay in handling Claimant's previous claim, Claimant's supervisor changing his cell phone number, and Claimant's belief that either her injury would subside on its own, or if she timely mentioned her neck injury it would upset her supervisor, so she elected to postpone giving notice. When the totality of the evidence is considered, Employer was not prejudiced by Claimant's late reporting.

Defendants argue Claimant has not met her burden of proof, and to the contrary, her late reporting did prejudice their ability to timely investigate what appears from the record to be a questionable claim. Instead, Claimant underwent various medical treatment modalities, including an MRI which led to a recommendation for surgery, prior to notifying Employer her need for surgery was due to an unreported, unwitnessed accident back in February. Defendants had no opportunity to timely investigate Claimant's accident claim or participate in her course of treatment. The record does not affirmatively show that Defendants were not prejudiced by Claimant's untimely reporting.

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EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant;

2. The hearing testimony of witness Ronald Straley;

3. Joint exhibits (JE) 1 through 23 admitted at hearing; and

4. The deposition transcript of Mark Slabaugh, M.D., taken on December 28, 2022.

FINDINGS OF FACT

1. Claimant worked for Employer since December 6, 1989, until the time she retired on August 24, 2022.[1] Over her career she made several worker's compensation claims, including one in California in 2015, and another in Idaho in 2018. She also made a claim for carpal tunnel syndrome in Idaho in 2019 and the subject claim for a neck injury in 2020. These final two claims are discussed in greater detail below.

2. Claimant had issues with burning, numbness and tingling in her hands for years, but by the fall of 2019, the symptoms became so severe that Claimant sought medical assistance. She was diagnosed with severe carpal tunnel syndrome. Her condition was medically attributed to her employment by Tyler Wayment, M.D. on October 23, 2019. Subsequent physicians also confirmed this causal relationship.

3. Claimant continued to work into February 2020, while treating with injections and therapy.

4. In November 2019, Claimant reported her carpal tunnel syndrome to Employer. Eventually, the claim was accepted, but only after an initial denial and delay, to Claimant's

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[1] It appears Claimant may have been on long term disability with Employer, and not actually working in the field, for the final two years of her employment.

frustration. However, all benefits due under that claim were eventually paid, including surgeries performed in June of 2020.

5. Claimant testified that on February 12, 2020, while moving a heavy package as part of her employment, she "tweaked" her neck when the package contents shifted. She recalls the date because later that day she had an appointment with Dr. Wayment. At that visit, the doctor placed a bilateral five-pound lifting restriction on Claimant, which would limit her to light duty work.

6. Claimant presented the doctor's note with restrictions to her supervisor, Ronald Straley, the following day. She testified she chose not to mention the neck injury at that time because Mr. Straley was "upset that now he didn't have a body on the road" to cover her route. Tr. p. 30, ll 8-15. She also pointed out that she had been waiting four months for acceptance of her carpal tunnel claim at the time of her neck injury. Finally, she noted she did not want to report the accident immediately because she had long-standing neck issues, as well as other temporary aches and pains which were common to her line of work. Claimant wanted to wait and see if the neck pain would subside on its own, especially now that she would no longer be doing her regular delivery duties.

7. Claimant testified her neck pain did not resolve and she subsequently sought medical treatment for her complaints through February and March. Even though she was now receiving medical and chiropractic care she still did not notify her supervisor of her claim during this time frame.

8. Although Claimant testified she left text messages and voicemails on her supervisor's work cell phone beginning in late March or early April, he did not return her communications. She thought perhaps he was upset with her because she had been off work.

Eventually she learned he had switched his cell number in March. At hearing, Mr. Straley acknowledged he did change his cell phone work number but also noted he had a dedicated land line at work, and Claimant could have contacted him by calling the office.

9. Claimant eventually submitted her claim for the alleged neck injury on May 1, 2020, via email to her supervisor. By the time she submitted her neck claim she had received chiropractic treatment, injection treatment, and an MRI which showed a surgical condition.[2]

10. Claimant concedes her accident reporting was untimely, but argues several theories to excuse her late reporting, as discussed below.

DISCUSSION AND FURTHER FINDINGS

11. Idaho Code § 72-701 provides, in pertinent part that "[n]o 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 days after the happening thereof …

12. The mandate of Idaho Code § 72-701 is tempered by Idaho Code § 72-704, which excuses late reporting "if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice."

13. In the present case, Claimant does not assert, and the record does not support, the notion that anyone with Employer had knowledge of Claimant's alleged February 12, 2020, accident prior to her reporting it. Instead, Claimant argues Employer has not been prejudiced by her delay in reporting the accident in question.

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[2] Claimant underwent surgery on her cervical spine in March 2021, after her claim was denied.

14. Claimant understands she carries the burden of proving Defendants were not prejudiced. *See, e.g., Murray-Donahue v. National Car Rental Licensee Ass'n,* 900 P. 2d 1348, 127 Idaho 337 (1995). She advances several arguments in her attempt to meet her burden of proof.

CLAIMANT'S ARGUMENTS AND RESPONSE THERETO

15. Claimant first attempts to blame COVID-19 and the "shutdown" of many Idaho businesses for her delay. She claims her sixty-day deadline would have expired "in the midst of a statewide stay at home order." Clt's Opening Brief, p. 7.[3]

16. It is true Governor Little issued a stay-at-home order on March 15, 2020, which lasted through April 30. However, Claimant failed to demonstrate how the lockdown of many "non-essential" businesses prevented her from reporting her claim. To begin with, there was no COVID emergency on February 13, 2020, when she spoke directly with her supervisor to give him her physician's lifting restrictions but chose not to use that conversation to report her injury. In fact, there was no lockdown for the entire first month after Claimant's alleged injury, while she was undergoing medical treatment. Claimant continued to receive medical care during the lockdown, *e.g.,* on March 30, and April 1, 20, and 22. Claimant did not claim to be unable to contact Employer due to any personal condition during the lockdown. Nothing in the record suggests Claimant could not have emailed her supervisor at any point between February 13 and May 1, 2020. For that matter, nothing in the record suggests Employer was shut down during

[3] Claimant's argument ignores the provision of Idaho Code § 72-701which states that notice must be "given to the employer as soon as practicable" and automatically assumes she can choose to wait to notify Employer at any time of her choosing within 60 days of the accident, even bypassing opportunities to file such notice if she feels the timing is not good for her. The exploration of what weight, if any, should be given to the language of Idaho Code § 72-701which provides that notice must be "given to the employer as soon as practicable" will have to wait for another case, because here, the parties have not argued Claimant failed to give notice "as soon as practicable" but rather that she failed to give notice within the outer limits of what is statutorily permitted, to wit, 60 days.

the time frame in question and would have been unable to investigate the Claim and direct Claimant's care during this time.

17. Claimant makes a point the Industrial Commission issued an order directing Referees to "take additional precautions" before dismissing a complaint; she also cites modification of deadlines for filing documents with various other judicial tribunals. For example, the Supreme Court of Idaho issued an order modifying deadlines for court filings in its courts. The Supreme Court extended filing deadlines "set by any court order or rule."

18. The examples given by Claimant differ substantially from her situation herein. Both the Supreme Court and the Industrial Commission were commenting on *discretionary deadlines imposed by them*, **not** *statutory deadlines imposed by statute*. Nothing *requires* the Commission to dismiss an inactive file. Filing deadlines set by a court or rule can be modified. No order issued from either the Supreme Court or the Industrial Commission were attempting to void a statute. Asking the Commission to do so is beyond the authority of the Commission. COVID or not, Claimant must comply with the provisions of the Idaho Code, and thus must prove a lack of prejudice to Employer by her late filing. She may not duck that burden by pointing to the COVID emergency.

19. Claimant next argues that if she had undergone an MRI earlier (which she asserts was delayed by COVID), she might well have reported her claim earlier and thus timely. Despite the speculative nature of such a claim, her argument raises certain questions. As Defendants point out, Claimant did not report a recent accident when seen by physicians soon after February 12, 2020. To the contrary, she discussed chronic neck complaints which had plagued her for several years with no mention of a recent accident. Certainly, one could argue, as Defendants have impliedly done, that it was only after Claimant learned her cervical spine

condition was such that surgery was a reasonable option, and realized the implications of that surgery, its costs, and resulting impairments and disabilities, did she elect to try to shift the financial burden to Employer with a claim of accident. While a causation issue is not in play currently due to the narrow issue to be decided, the timing of Claimant's MRI in relation to her reporting the claim can cut both ways. But in no event does it prove a lack of prejudice to Employer.

20. Next, Claimant argues that "because Mr. Straley changed his phone number" without informing Claimant, "there is no prejudice" to Defendants. Clt's Opening Brief, p. 10. Her speculation is that if he had not changed his phone number, she likely would have timely reported her accident. Again, her assertion is admittedly speculative, and more importantly, there is not any rational connection between prejudice to Defendants and Mr. Straley's phone number. One questions whether the corollary would be true; if Mr. Straley had not changed his phone number, would Defendants be prejudiced if Claimant had simply been unable to reach him on his cell phone? Her argument also begs the question that if Claimant could not reach Mr. Straley by phone, why did she not simply email him her claim in March, the way she did in May? Regardless, the standard of proof is on Claimant to establish that Defendants were not prejudiced by Claimant's late reporting. That burden is a difficult one to prove and cannot be proven simply by the fact that one means of communication between Claimant and Employer was not available to Claimant where several others were still available.

21. Finally, Claimant argues that Defendants could not be prejudiced by her delay in reporting because history has shown that when Claimant did make a claim Surety inordinately delayed accepting it. In other words, since delay is the standard operating procedure for Surety, delay cannot be prejudicial. Claimant points out that when she made a claim for carpal tunnel

syndrome and supported her claim with two physicians' opinions on causation, it still took Surety (particularly one adjuster, Kim Takagi) over four months to accept the claim after initially denying it. As Claimant put it, "there is no reason to believe Ms. Takagi or any other representative of the Surety would have handled the February 12, 2020 claim any more expeditiously than she handled the October 23, 2019, claim." Clt's Opening Brief, p. 10. Claimant asserts Surety's lack of action on the carpal tunnel claim proves that Defendants cannot argue delay is prejudicial.

22. Claimant's argument is not persuasive. Showing a surety delayed in the actual investigation once untimely notified does not establish a lack of prejudice to Defendants. The initial urgency of investigation is already compromised. *See Parsons v. Western Trucking,* IIC 85-491189 (April 28, 1987). Every claim must stand on its merits. Claimant's 2018 knee injury claim was in Claimant's testimony "a good experience." Her carpal tunnel experience was not so favorable, although eventually it was accepted and benefits paid. To assume her neck injury, if timely reported, would have been untimely adjusted is speculative. Consequently, the delay in handling Claimant's 2019 claim does not demonstrate employer's opportunity to make an investigation was not prejudiced.

DEFENDANTS' ADDITIONAL ARGUMENTS

23. Defendants argue that even though Claimant had discussions with multiple doctors about her neck, had received steroid injections and an MRI, she still chose not to inform Employer of her claim. Instead, she waited until she was referred for surgery to finally make a claim for her

past and future medical treatment associated with her claimed accident. Claimant's substantial treatment without any input or direction from Defendants is prejudicial to their investigation.[4]

24. Defendants further note that simply because Claimant's treatment might have been the same if timely notice had been given, that fact, even if established, is not dispositive in proving lack of prejudice. In the present case, Defendants were deprived of the chance to timely investigate the accident, take witness statements, review security footage if available, and direct Claimant's care in a timely manner.

ANALYSIS

25. In order to excuse lack of timely notice, Claimant must *affirmatively* prove that Employer was not prejudiced by the lack of timely notice. *Jackson v. JST Manufacturing,* 142 Idaho 836, 136 P.3d 307 (2006). Merely alleging that 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. *See generally, 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). As noted in *Dick*, "[t]he purpose of the notice requirement is to give the employer … timely opportunity to make an investigation of the accident and surrounding circumstances to avoid the payment of an unjust claim."

26. The Commission has previously acknowledged that Claimant bears a difficult burden to prove a negative when compelled to establish that Employer was not prejudiced. *Mora v. Pheasant Ridge Development, Inc.,* 2008 IIC 0548. In that case, the Commission held

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[4] It would also appear that the past medical treatment undertaken by Claimant could be compensable at the *Neel* rate should Claimant prevail in establishing a causal connection between such treatment and her alleged accident of February 12, 2020.

that the claimant failed to prove his employer was not prejudiced by a 5-month reporting delay because he adduced no affirmative evidence establishing that employer was *not* prejudiced. *Id.* The Commission noted 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.*

27. While the burden on Claimant is formidable, it is not impossible.[5] In *Moser v. Utah Oil Refining Co.*, 66 Idaho 710, 168 P.2d 591 (1946), a doctor's medical testimony established that Claimant's brain tumor, which was aggravated by a work accident and caused Claimant's death, was an untreatable condition from which Claimant was doomed to die and no knowledge of the accident by employer could have possibly changed the outcome. In that unique circumstance, timely investigation of the accident by employer could not have changed the outcome where employer did not deny the claim on the basis that no accident occurred. Therefore, the Idaho Supreme Court held that the claimant successfully proved the employer experienced no prejudice from the delay.

28. Here however, Claimant finds herself in a difficult position similar to the claimant in *Mora*. Claimant has set forth no affirmative proof establishing Employer was not prejudiced by her reporting delay. Employer was unable to investigate the validity of her claim until several

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[5] In *McCoy v. Sunshine Mining Co.*, 97 Idaho 675, 551 P.2d 630 (1976), the Court stated that the employer had conducted a full investigation of the accident and was not prejudiced. *Id.* at 632-33. The Court also held that the employer failed to contest the issue of timely notice in the answer to the complaint and had therefore waived the right to contest timeliness. Additionally, a small number of claimants have been able to prove the employer experienced no prejudice in cases before the Idaho Industrial Commission. *See Hendrickson v. Micron Electronics*, 033100 IDWC, IC 98-024129 (Idaho Industrial Commission Decisions, 2000), *Corn v. Albertson's Inc.*, 050288 IDWC, 86-562525 (Idaho Industrial Commission Decisions, 1988).

months after the fact. More importantly, Claimant has the burden of proving lack of prejudice with affirmative evidence.

29. Claimant's "excuses" for late filing fall short of establishing affirmative proof of Defendants' lack of prejudice, as required under Idaho Code § 72-704. It is Claimant's burden of proof to show that her delay did not prejudice the employer, with the presumption being employer *is* prejudiced. Claimant's employer should have had the opportunity to examine the accident and see if there was any corroboration, either on video or through witnesses. Further, if a compensable accident was found, employer should have had the opportunity to take mitigating steps to ensure her injury was not aggravated by continued work, possibly increasing employer's total liability. Despite this, Claimant's arguments and evidence primarily pertain to her own difficulties in filing, and not to the prejudice employer is presumed to have experienced from the delay.

30. When the record as a whole is considered, Claimant has failed to prove by a preponderance of evidence that Employer was not prejudiced by her delay in reporting her industrial accident of February 12, 2020. As such, Claimant's claim for benefits for her alleged accident of February 12, 2020, is barred by the workings of Idaho Code § 72-701.

CONCLUSIONS OF LAW

1. Considering the record as a whole, Claimant has failed to prove by a preponderance of evidence that Employer was not prejudiced by her delay in reporting her industrial accident of February 12, 2020.

2. Claimant's claim for benefits for her alleged accident of February 12, 2020, was untimely filed and thus time barred under Idaho Code § 72-701.

RECOMMENDATION

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

DATED this 12th day of April, 2023.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JENNIFER L. ELLISON Claimant, v. FEDERAL EXPRESS CORP., Employer, and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Surety, Defendants.	**IC 2019-032415** **IC 2020-011369** **ORDER** FILED MAY 15 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 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, IT IS HEREBY ORDERED that:

1. Considering the record as a whole, Claimant has failed to prove by a preponderance of evidence that Employer was not prejudiced by her delay in reporting her industrial accident of February 12, 2020.

2. Claimant's claim for benefits for her alleged accident of February 12, 2020, was untimely filed and thus time barred under Idaho Code § 72-701.

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

DATED this the 11th day of May, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2023, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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