BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH A. RICHARDSON, Claimant, v. THE SHERWIN WILLIAMS CO., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	**IC 2019-008586** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue. Claimant was initially represented when the claim was filed, but he appeared at hearing *pro se*. David Gardner represented Employer and Surety. The parties presented oral and documentary evidence at hearing. Claimant waived his opening brief. Defendants submitted a brief. Claimant filed a reply brief. The case came under advisement on October 29, 2021 and is ready for decision.

ISSUES

The issues to be decided according to the parties at hearing are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho code section 72-701 through Idaho code section 72-706, and whether these limitations are tolled pursuant to Idaho code section 72-604;
2. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;
3. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident; and
4. Whether and to what extent Claimant is entitled to the following benefits:
    a. Temporary partial and/or temporary disability benefits,
    b. Permanent partial impairment (PPI),

c. Permanent disability in excess of impairment, and
d. Medical care.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered an inguinal hernia lifting 5-gallon cans of paint at work. He did not immediately file a claim because he did not know whether he was seriously injured. He seeks benefits for the medical care and for mental stress, anxiety and depression Employer caused by denying his claim here and his claim for unemployment compensation. Defendants' attorney has misstated facts about this claim.

Employer and Surety contend Claimant failed to establish a *prima facie* case: Claimant has failed to reasonably locate the time of the alleged accident because he has provided inconsistent allegations about the time, place, and nature of events which might constitute an accident; he has failed to show a reasonable medical probability of a causal relationship to his alleged conditions and any specific event; and he failed to provide timely notice of an accident. Clamant also failed to establish a basis upon which PPI or temporary or permanent disability can be awarded.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;

2. Claimant offered exhibits A through I. None were provided pursuant to JRP 10 as required. Exhibits H and I were excluded; and

3. Defendants' exhibits 1 through 4.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. Claimant began working for Employer in April 2018 as a color consultant. He

worked three 8-hour days per week. A portion of his duties included lifting 5-gallon cans of paint. He estimated that in a normal day he might lift as few as five or as many as 30 5-gallon cans. The job did not require lifting primarily, but some lifting of various weights was usual.

2. Claimant acknowledges that there was no discrete event. He does recall a moment—but not the date—when his pain increased as he lifted a 5-gallon can, but he states the pain had been present "at least a week or two before" the January 7-12 window. He did not immediately "rush over here and file a claim" because he did not yet know the cause of his pain. Claimant also vacillated about when he first noticed this pain, maybe March, maybe February, maybe earlier.

3. The first medical note referring to this pain is dated January 31, 2019. The note is ambiguous about when intermittent right groin pain began, whether "3 weeks ago" or "3-4 days ago, began to burn." Examination failed to reveal a hernia. Nevertheless, inguinal hernia was among the suspected diagnoses.

4. On February 21 a hernia was detected upon examination.

5. On March 14 a medical note reported "symptoms began about 2-3 months ago." Surgery was recommended.

6. Surgery to repair the hernia was performed May 2, 2019.

7. He has no residual difficulty since the hernia repair surgery.

8. Treating physician Thomas Clagett, M.D. authored a letter to Claimant and his former attorney in which he stated that Claimant did not mention a "workplace-related injury nor was the date of the injury included." Claimant did mention that his pain worsened lifting heavy paint cans. He opined Claimant's injury "could have been caused or exacerbated by an industrial incident."

9. Hernia surgeon Marcus Torgenson, M.D. noted he could "only go off of the history provided by the patient." He noted this "history could be consistent" with development of a hernia. He released Claimant to activity as tolerated.

Vocational History

10. Claimant was 74 years old at hearing and at the time of this decision is 75.

11. Claimant received an MBA in 1971. He has worked with foreign trade delegations and stock brokerage firms. He has "put together IPOs." Claimant's adult work life has included substantial executive-level positions.

12. Claimant testified he gave Employer notice of the injury On March 8, 2019. The Form IA-1 reports a date of March 13, 2019, and a date of injury January 7, 2019. Claimant's complaint identifies the date of injury a January 8-11 and that he gave oral notice "earlier" and submitted a first report of injury on March 8.

13. Claimant also asserted that his supervisor "knew" he was in pain. Claimant does not convey how he knew that Employer knew nor when Employer knew. Similarly, Claimant testified about the mental processes of his physicians without supporting indicia upon which the thinking and knowledge of other persons can be objectively assessed.

DISCUSSION AND FURTHER FINDINGS OF FACT

14. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted

testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

15. Claimant makes a good first impression. He is articulate and intelligent. He does not appear prone to exaggeration. His written brief is not indicative of his ability. Claimant is a credible witness.

16. Claimant primarily seeks two things; damages for pain and suffering, specifically mental anguish about how he was treated by Employer after his hernia, and repayment of medical expenses paid by Medicare.

17. Idaho Worker's Compensation Law requires an "accident … be reasonably located as to time when and place where it occurred, causing an injury." Idaho Code §72-102(18)(b).

18. Claimant testified that while he could recall a moment when the pain exacerbated, he could not link its inception to an incident or event.

19. A claimant must give notice of an accident within 60 days. Idaho Code §72-701. *See*, *Arel v. T&L Enterprises, Inc.*, 146 Idaho 29, 189 P.3d 1149 (2008). Where notice is given untimely, a claimant bears the burden of showing the defendants suffered no prejudice from the late notice. *Jackson v. JST Mfg.*, 142 Idaho 836, 136 P.3d 307, (2006).

20. Claimant alleged he gave oral notice on or before March 8, 2019. He acknowledged that he waited until he was sure about what was wrong before he did so. Unfortunately, without a date of inception one cannot establish that this oral notice was given within the required 60 days. It is Claimant's burden to establish that he was within the required time frame. Claimant suggests,

rather, that a date of manifestation—that is, the date he knew it was a hernia—should be the relevant date rather than the date of accident and injury. Idaho Workers' Compensation Law does not provide this option for an accident-and-injury claim.

21. A claimant bears the burden of proving that 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 evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. 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. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000), *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). 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 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

22. No physician of record has opined to a reasonable medical probability that Claimant's condition was likely related to an industrial accident. A mere "could have" is insufficient. Even in *Jensen*, the physician ranked the industrial cause as highest on his list of possibilities. Here, the express reservations underpinning the opinions of the physicians shows they lacked conviction about their opinions.

23. Having failed to identify a specific accident or untoward event, having failed to establish a date upon which it can be determined whether notice was given within 60 days as required by law, and having failed to establish it likely through medical opinion that Claimant's

hernia was caused by an industrial accident, Claimant has not met his burden of proof to establish a compensable claim.

CONCLUSIONS

1. Claimant failed to establish by a preponderance of the evidence that a compensable accident and injury occurred;

2. Claimant failed to show he gave timely notice of his alleged accident and injury;

3. Claimant failed to show by medical evidence that his condition is causally related to the alleged work accident; and

4. This matter should be dismissed.

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 3rd day of NOVEMBER, 2021.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2021, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and Electronic Mail upon each of the following:

JOSEPH RICHARDSON
[redacted]

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH A. RICHARDSON, Claimant, v. THE SHERWIN WILLIAMS CO., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	**IC 2019-008586** **ORDER** FILED DEC 13 2021 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own. Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant failed to establish by a preponderance of the evidence that a compensable accident and injury occurred;
2. Claimant failed to show he gave timely notice of his alleged accident and injury;
3. Claimant failed to show by medical evidence that his condition is causally related to the alleged work accident; and
4. This matter is dismissed.

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

DATED this 10th day of December, 2021.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Paul Jeffries
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2021, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic mail upon each of the following:

JOSEPH RICHARDSON
[redacted]

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