

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

TIOFOILO L. VELA,  
Claimant,  
v.  
SAMUEL JAMES ROSTI dba  
SAM ROSTI FARMS,  
Employer,  
and  
IDAHO STATE INSURANCE FUND,  
Surety,  
Defendants.

**IC 2012-019756**

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

**Filed November 27, 2018**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on August 15, 2018. Claimant appeared *pro se*. Neil McFeeley represented Defendants. Oral and documentary evidence was admitted. When offered an opportunity to provide posthearing briefing, Claimant indicated he would submit a brief, but never did. Defendants expressed a preference to file a posthearing brief only in response if Claimant first did so. The briefing period expired on October 31, 2018. No brief from Claimant was forthcoming. This matter is now ready for decision. 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**

The following issues are to be decided:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;
2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
3. Whether and to what extent Claimant is entitled to:

- a) temporary disability,
  - b) permanent disability based upon medical factors (impairment),
  - c) permanent disability in excess of impairment, and
  - d) medical care;
4. Whether the claim is barred by Idaho Code § 72-701;
  5. Whether the claim is barred by Idaho Code §§ 72-439 or 448; and
  6. Whether the claim is barred by Idaho Code § 72-706.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he suddenly developed lung problems after gassing gophers about May 2011. The condition worsened. He reported it to Employer about September 2011. He will never be able to work again.

Defendants contend Claimant has failed to present a *prima facie* case for entitlement to workers' compensation benefits. He lacks competent medical evidence that the alleged incident caused his respiratory problems, and—even if it did—he failed to give timely notice of his claim and to file a timely Complaint.

### **EVIDENCE CONSIDERED**

The record in the instant case included the following:

1. Oral testimony of Claimant and his partner Tracey Nielsen at hearing;
2. (Claimant offered exhibits, but Defendants' objection to untimely evidence was sustained;) and
3. Defendants' exhibits 1, 2, and 4 through 7.

At and after hearing, Claimant referred to additional documentary evidence which he had not offered as evidence at hearing. His hearing and posthearing requests to later submit additional documentary evidence were denied. JRP 10 requires timely identification and exchange of documentary evidence. Claimant had been directed to familiarize himself with

the rules soon after he filed his Complaint. He was encouraged to seek legal advice. It is not the province of the Commission to provide legal advice to any party before or during a hearing. Claimant was afforded a relaxed opportunity to provide oral witness testimony at hearing. The Referee did not immediately rule upon Defendants' objection to the untimely documentary evidence Claimant proffered but allowed Claimant to present his oral testimony in full to allow an extended opportunity to qualify his proffered documents. Claimant failed to offer a basis upon which these documents could be admitted.

### **FINDINGS OF FACT**

1. Claimant worked for Employer for about seven years as a farm laborer through the 2011 harvest. He formally separated from Employer about May 6, 2012. Idaho Department of Labor classified the separation as a "quit" for purposes of unemployment benefits.

2. Claimant filed a Form 1 (IC FORM IA-1) about June 2012. He alleged COPD and other respiratory issues as a result of breathing fumes for killing gophers. The Form 1 alleges an injury date of "9-11 thru 10 ..." based on "three straight weeks" exposure. It alleges that Employer was notified on October 30, 2011. It describes the injury as "chemical asphyxiation." Claimant's "signature" is a digital stamp. The preparation date is June 14, 2012, and the Commission's receipt date is June 15, 2012. Tracy Nielsen is listed as the preparer of the Form 1.

3. Claimant's "wife," Tracy Nielsen, worked for Employer at some point contemporaneously with Claimant, but the duration and dates of her employment are unclear.

4. Boilerplate language on the Form 1 states, "This report shall not be evidence of any fact stated herein in any proceeding in respect of the injury, illness or death on account of which this report is made."

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 3**

5. Surety reviewed the claim and denied it. In a letter dated October 4, 2012 Surety denied the claim for lack of evidence of accident and/or occupational disease. A summary of payments form shows Surety made no payment on this claim as of November 2, 2012.

6. In both hearing and deposition testimony, Claimant was unable to provide an approximate date within the 2011 season when he last used the pesticide. He recalled a specific incident in which he breathed fumes and had a respiratory reaction, but could not recall the month or year in which it occurred.

7. As a youth, Claimant suffered from tuberculosis.

8. Claimant has a family history of asthma. He was diagnosed with asthma in 2013.

9. Claimant smoked tobacco for at least 20 years and admitted to past marijuana use. When he quit smoking are matters involving inconsistent representations by Claimant at different times. Claimant is routinely exposed to second-hand cigarette smoke.

10. Ms. Neilsen testified, "I have watched my husband deteriorate over the last six years."

11. On March 29, 2018 Claimant visited Terry Reilly Health Services seeking a physical examination to qualify for health insurance. The record noted Claimant had no complaints but was taking Percocet and Soma for right shoulder pain; Claimant denied experiencing shortness of breath; Claimant did report a family history of asthma (his mother). Examination revealed Claimant's lungs "clear bilaterally to auscultation."

#### **DISCUSSION AND FURTHER FINDINGS OF FACT**

12. 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, 603 P.2d 575 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

13. At hearing, the Referee observed that Claimant exhibited a quiet, controlled demeanor. By contrast, Ms. Nielsen was agitated and prone to exaggeration in both words and gestures. Both on and off the record, Ms. Nielsen had to be reminded that her only role in the hearing was as a witness.

14. Both Claimant and Ms. Nielsen clearly believe Claimant's respiratory problems were caused by fumes from the gopher pills. However, Ms. Nielsen's testimony about battery and murder is clearly hyperbole. It is contradicted by Claimant, inherently improbable, and taints acceptance of her other allegations. The Referee examined Defendants' exhibits 4 and 5 and found a great difference between Ms. Nielsen's handwriting and Claimant's signatures. The language—both word usage and tone—is clearly consistent with her testimony and inconsistent with Claimant's. Her language shows hyperbole. In prehearing deposition, Claimant specifically denied details of allegations asserted in these documents which he signed. Having signed his name to letters drafted by Ms. Nielsen and—in deposition and at hearing—having contradicted statements made in those letters, Claimant's testimony is impeached. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's or

his witness's presentation or credibility.

15. A claimant is required to give written notice within 60 days of the alleged accident or manifestation of occupational disease. Idaho Code § 72-701; § 72-448. However, “[o]ral notice to the employer may provide the employer with actual knowledge of an injury, thus obviating the necessity of a written notice.” *Murray-Donahue v. Nat'l Car Rental Licensee Ass'n*, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995); Idaho Code § 72-704.

16. Claimant's first written notice of record was prepared June 14, 2012. However, Claimant alleges oral notice was given directly to his Employer on or about October 30, 2011. Assuming, for the sake of discussion, that Employer did learn of the claim on October 30, 2011, then such notice would be timely for any accident occurring, or occupational disease manifesting, no earlier than 60 days prior to October 30, 2011, i.e. September 1, 2011. Claimant testified he began experiencing lung symptoms in the “middle” of his years working for Employer. Inconsistently, he testified that the alleged acute exposure occurred in May 2011 and he reported it orally in September 2011. From Claimant's testimony, the Commission is unable to ascertain when the accident occurred, or the occupational disease manifested. However, we need not resolve this factual issue because the claim fails for another reason. No benefits were paid on this claim, giving Claimant one year from the date of the claim, June 14, 2012 at the latest, within which to file his complaint pursuant to Idaho Code § 72-706(1). This he failed to do; the complaint was not filed until November 3, 2016. The complaint is therefore time barred.

#### **CONCLUSIONS OF LAW AND ORDER**

1. Claimant failed to file a timely complaint.
2. All other issues are moot.

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

DATED this \_\_\_\_\_27th\_\_\_\_\_ day of NOVEMBER, 2018.

INDUSTRIAL COMMISSION

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

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

\_\_\_\_\_/s/\_\_\_\_\_  
Aaron White, Commissioner

ATTEST:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_27th\_\_\_\_\_ day of \_\_\_\_\_November\_\_\_\_\_, 2018, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

TIOFOILO LUNA VELA  
704 6<sup>TH</sup> STREET NORTH  
NAMPA, ID 83687

NEIL D. MCFEELEY  
BRAD VANDENDRIES  
P.O. BOX 1368  
BOISE, ID 83701

\_\_\_\_\_/s/\_\_\_\_\_