BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KATHY ALLEN, Claimant, v. A FULL LIFE AGENCY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 04-522851** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 26, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee Michael E. Powers, who conducted a hearing in Boise, Idaho, on April 20, 2005. Claimant was present and represented by Mark V. Withers of Nampa. Kent W. Day of Boise represented Employer and Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken but the parties submitted post-hearing briefs, and this matter came under advisement on June 24, 2005.

ISSUES

As agreed to by the parties at hearing, the issues to be decided are:

1. Whether Claimant complied with the notice limitations set forth in Idaho Code §§ 72-701-706 and, if not, whether those limitations were tolled pursuant to Idaho Code § 72-604.

2. Whether Claimant suffered a personal injury caused by an accident arising out of and in the scope of her employment.

CONTENTIONS OF THE PARTIES

Claimant contends she injured her back on February 19, 2004, in the course and scope of her duties as a caregiver when she lifted a heavy wheelchair from the back seat of her automobile. The patient she was attempting to transfer, who also happened to be her mother, witnessed the event. Because Claimant was under the mistaken impression that her employer was uninsured for workers' compensation purposes, she did not immediately report her accident, but she did so as soon as she next saw her supervisor a short time later and again when she discovered in November of 2004 that Employer was in fact insured. Further, it was her supervisor who led her to believe that there was no coverage so any statute of limitation regarding reporting should be tolled.

Defendants contend that Claimant's supervisor never told Claimant that Employer had no workers' compensation coverage and, in fact, Claimant acknowledged that she received and read Employer's policy and procedure manual regarding the immediate reporting of any accident causing an injury, no matter how minor. Claimant's late reporting prejudiced Defendants in that her back condition continued to deteriorate in the time between her accident and when Employer learned of it and she eventually required surgery. Further, Defendants were robbed of the opportunity to timely and properly investigate the claim regarding compensability.

Claimant counters that she was relatively new to the workforce and otherwise unsophisticated in workers' compensation matters and, therefore, was reasonable in her belief that her employer had no workers' compensation insurance and it would have been futile to timely report her accident.

FINDINGS OF FACT

1. Claimant was 56 years of age at the time of the hearing and resided in Payette, Idaho. Employer is a statewide agency that provides in-home health care services. Claimant became employed by Employer in 2001 to care for her mother and stepfather who she had been caring for on

her own previously without pay. Two other employees of Employer shared caretaking duties in that regard with Claimant.

2. Claimant alleges that on February 19, 2004, she injured her back while lifting a wheelchair from the rear seat of her vehicle; the chair had slipped down between the back seat and the back of the front seat and was "stuck" and difficult to remove. She testified that she felt immediate pain and heard her back "pop." Claimant was in Emmett at the time and had just arrived, with her mother, at her mother's eye doctor for a scheduled appointment. Afterwards, she called her husband in Payette to have him meet them when they returned to have him assist with getting the wheelchair out and helping get her mother back into her house.

3. Claimant first sought medical care on August 16, 2004, when she presented to Dominican Health Services in Fruitland. There is nothing mentioned about the wheelchair incident in the notes for that date but there is the following handwritten notation: "Been helping lift mother who is wheelchair bound."[1] She was prescribed Norco and Flexeril and was to follow-up with "PCP" or Dr. Zimmerman, who had performed back surgery on her in 2002.

4. Claimant next saw a physician's assistant at Valley Family Health Care at which time she reported that she injured her back while lifting a wheelchair <u>into</u> her car. An MRI was ordered.

5. Claimant saw Christian Zimmerman, M.D., on August 31, 2004. Claimant again reported that she injured her back while lifting her mother's wheelchair <u>into</u> her car. Dr. Zimmerman performed an L4 laminectomy and facetectomy, L3-4 decompression, L4-5 posterolateral interbody fusion, and L3, 4, 5 pedicle screw fixation and arthrodesis on September 8, 2004.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-701 provides in pertinent part: "No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable

[1] The handwritten notes are very difficult to decipher, but the above is this Referee's best interpretation.

but not later than sixty (60) days after the happening thereof . . ." (Emphasis added). The Idaho Supreme Court has held that the notice must be sufficient to apprise the employer of any accident arising out of and in the course of employment causing the personal injury. *Murray-Donahue v. National Car Rental Licensee Association*, 127 Idaho 337, 339, 900 P.2d 1348, 1350 (1995). Idaho Code § 72-704 provides in pertinent part: "Want of notice or delay in giving notice shall not be a bar to proceeding under this law 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." The claimant bears the burden of proving that timely notice was given or that employer was not prejudiced by the lack of timely notice. *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 525, 960 P.2d 1254 (1998).

6. Claimant contends, and Defendants deny, that she gave timely notice of her accident and injury during a conversation with her supervisor, Valanda Bivens (Val) on March 3, 2004, the first time she had seen Val since her accident. Claimant testified:

> Q. (By Mr. Withers): Can you describe what happened on March 3rd [*sic*] [2] when she came over?
>
> A. Yeah. We were sitting – we were all sitting at the table, mom –
>
> Q. At your mother's house?
>
> A. Yes. And we were talking and I said – I told her that I had hurt myself lifting that wheelchair out of the car and I says, boy, it's really too bad we don't have workmen's comp and she said, yeah, huh, it really is, but we don't. That [*sic*] was her exact words. I can remember it was just - - because I was just so shocked, but I didn't -

Hearing Transcript, p. 32.

Claimant's 85 year-old mother parroted Claimant's testimony in that regard during her hearing testimony.

[2] Both Claimant and Val testified that Val had come to Claimant's mother's home to discuss a monthly Quality Assurance Report; the report is dated March 4, 2002. Defendants' Exhibit J, pp. 75-76.

7. Claimant uses that same conversation for the proposition that she did not need to give notice in any event because she was under the impression that because Employer was ostensibly uninsured, no notice was required to be given. Her logic in that regard is circuitous.

8. Val credibly testified that she never told Claimant that Employer was uninsured for workers' compensation purposes on March 4th or any other time. She testified that there might have been some discussion about not having health insurance, but not workers' compensation insurance and such a conversation would have likely taken place in August or September when Claimant had her mother placed in an assisted care facility because she could no longer care for her for reasons unrelated to any back injury. The Referee finds Val's testimony in that regard more likely than Claimant's and her mother's in that there were no medical benefits provided by Employer and Val would have absolutely no reason to lie about the existence (or non-existence) of workers' compensation insurance.

9. Val first learned that Claimant was alleging a work-related accident on or about November 17, 2004, when Claimant's sister, also an employee of Employer, so informed her. She then wrote a report memorializing her version of events that was consistent with her hearing testimony. Defendants' Exhibit J, pp. 86(A) and (B).

10. Claimant's argument that Employer's failure to file the report identified in Idaho Code § 72-601 tolls the statute of limitations is specious. If Claimant informed Val of her accident and injury on March 4, 2004, as she testified, she was well within the statute of limitations for reporting and there would be no reason to argue that the statue of limitations should be tolled. Because the Referee finds that Claimant did not tell Val of a work-related accident and injury on March 4th, Val was under no obligation to file any report pursuant to Idaho Code § 72-601, and the statute of limitation regarding notice was not tolled in any event.

11. The Referee finds that Claimant failed to report her accident and injury as soon as practicable but not later than 60 days of the happening thereof. Claimant's testimony that she

informed Val of her accident and injury on March 3, 2004, is not credible. Further, the Referee finds that Claimant has failed to prove Defendants have not been prejudiced by her failure to timely report the same. Her low back condition continued to deteriorate from the date of the accident until she finally went to a doctor in August. Had Defendants been timely informed, they could have had Claimant examined[3] medically upon receipt of the notice. Further, an investigation concerning the compensability of the claim could have been conducted when the events were fresher in the memories of those involved. The importance of the ability to immediately investigate became apparent when Defendants eventually learned of the alleged accident and obtained medical records that were inconsistent with Claimant's deposition and hearing testimony regarding how the accident happened, i.e., taking the wheelchair out of the car versus putting it into the car. If Claimant was putting the wheelchair into the car, she would not have been on Employer's clock as she, by her own admission, did not even begin working for Employer until she got to Emmett where she got the wheelchair out. She put the wheelchair in in Payette at least 45 minutes before she clocked in so the accident and injury would not have been in the course and scope of her employment.

12. While the Referee is not persuaded that Claimant's understanding regarding whether or not Employer carried workers' compensation insurance is relevant in the first place, it is difficult to believe that she came to that understanding. First, Claimant testified that she also did not believe Employer carried workers' compensation at the time of what she alleges was an industrial accident and injury in 2002 that also resulted in a back surgery.[4] She testified that she and her husband were forced into bankruptcy when they could not pay her medical bills. Her description of that accident is eerily similar to the 2004 accident in that it also involved the lifting of the same wheelchair. One would

[3] Claimant testified that she did not go to a doctor sooner because she had no money and she thought Employer had no workers' compensation insurance. She waited until her pain became unbearable to see a doctor, even though she was on her husband's health insurance policy. Had she informed Employer sooner, she would have been able to be examined sooner, rather than suffer needlessly from February to August assuming Defendants at least conditionally accepted the claim pending further investigation.

[4] The Referee takes judicial notice that Employer was duly insured for worker's compensation purposes in 2002.

think that Claimant would have made sure Employer was carrying workers' compensation insurance after she returned to work with a bad back subject to re-injury, especially after having suffered "the indignities of bankruptcy." Claimant's Opening Brief, p. 20. Second, Claimant testified that she was "shocked" upon learning that Employer was not covered during her conversation with Val on March 4, 2004. Why would she be "shocked" if she was under the impression that Employer had been uninsured since her first accident in 2002? Further, if Claimant thought she was covered by workers' compensation, why did she not give notice on the date of her accident as she testified she would have done had she known she was covered? The coverage versus no coverage issue is a red herring.

13. The Referee finds that Claimant failed to timely report her accident and injury and her claim is, therefore, barred and should be dismissed with prejudice.

CONCLUSIONS OF LAW

1. Claimant failed to timely report her accident and injury and her claim is barred and should be dismissed with prejudice.

2. The remaining issue is 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 __15th __ day of ___July____, 2005.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __26th __ day of __July__, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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