BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TROY ANTHONY BREKER, Claimant, v. BRIAN'S TIRE & AUTO, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)))))))))))))))))	**IC 04-505358** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED MAR 15 2006

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Pocatello, Idaho, on November 3, 2005. Claimant appeared *pro se*. M. Jay Meyers represented Defendants. The parties submitted briefs, and the case is now ready for decision.

ISSUES

After due notice, the issues are as follows:

1. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604.

2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate; and

4. Whether and to what extent Claimant is entitled to the following benefits:

(a) temporary partial and/or temporary total disability benefits (TPD/TTD);
(b) permanent partial impairment (PPI);
(c) disability in excess of impairment;
(d) retraining; and
(e) medical care.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his elbows, particularly his left elbow, at work. He is totally and permanently disabled by the combination of this and prior injuries. In post-hearing briefing Claimant alleges for the first time that the accident date was not February 4, 2003, but rather, actually on or after March 9, 2003, and that Idaho Code § 72-705 bars the application of statutory notice and limitations requirements because he was mentally incompetent. Moreover, Employer had actual knowledge of the accident at the time it occurred.

Defendants contend Claimant failed to file a claim within the statutory requirements. Claimant was not injured by the subject accident. Alternatively, if injured, he refused immediate medical attention and did not seek medical attention for over one year.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant and Employer Brian Grandstaff;

2. Claimant's exhibits 5, 7 – 11, 13 – 19 (Claimant withdrew proposed exhibit 6 during the hearing); and

3. Defendants' exhibits 1-14.

(Claimant attached a significant amount of documentation to his briefs, including portions of the withdrawn exhibit 6. These documents are not admitted and receive no weight. To the extent they are duplicative of admitted documents, the admitted documents, of course, receive proper consideration.)

FINDINGS OF FACT

1. Claimant worked for Employer as an automobile mechanic. He was a good mechanic.

2. Claimant suffered serious physical injuries – primarily to his pelvis, hips, and lower extremities – from an automobile accident in 1981.

3. On January 14, 2002, Kevin S. Hill, M.D., performed a vocational rehabilitation evaluation. He examined Claimant. Among his diagnoses he noted "possible ulnar neuropathy" of Claimant's left hand upon Claimant's report of decreased sensation.

4. Claimant suffered a fractured pelvis in an automobile accident in July 2002.

5. Employer was aware of Claimant's injuries from these automobile accidents.

6. Although Claimant had been hired for short periods on a contract basis in 2000 and/or 2001, he was hired as a regular employee on January 28, 2003. On February 4, 2003, Claimant was pushing an engine stand upon which an engine was attached. It fell over. Mr. Grandstaff heard the noise and briefly tried to help Claimant right the engine stand. It was too heavy to lift.

7. Mr. Grandstaff asked Claimant if he was hurt and offered to get Claimant immediate medical care. Claimant denied he was hurt and refused treatment. Thereafter, Claimant occasionally complained of left arm pain along with his complaints about his other physical problems. Each time Claimant mentioned left elbow or arm pain, Mr. Grandstaff encouraged Claimant to visit a doctor. Claimant consistently refused treatment. He continued working through August 2003 when he quit.

8. On March 8, 2004, Claimant returned to Employer and informed Employer of his intent to file a workers' compensation claim. Employer completed a Form 1 on that date.

9. Claimant first sought medical care for his elbow on June 22, 2004, well over one year after the accident. He reported at that time that the injury date was February 4, 2003.

10. On July 8, 2004, Douglas Favor, M.D., examined Claimant for his complaint of bilateral elbow pain, worse on left. Claimant again reported the accident occurred on February 4, 2003. X-rays were negative. Dr. Favor found no objective signs to support Claimant's complaints and his diagnosis included, "etiology uncertain."

11. On July 17, 2004, James R. Collet, M.D., examined Claimant. He found no objective basis for Claimant's elbow complaints. He noted Claimant's left grip strength was inconsistent. His diagnosis included, "etiology uncertain." Nevertheless, at some point in the summer or fall of 2004, Dr. Collet imposed lifting and other restrictions applicable to Claimant's left arm.

12. On September 29, 2004, Jeffrey Johnson, PA-C, examined Claimant and found no objective signs to support Claimant's upper extremity complaints.

Discussion and Further Findings

13. **Timeliness.** Idaho Code § 72-701 requires, *inter alia*, that "a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident." The accident occurred on February 4, 2003. Claimant made his claim on March 8, 2004. Claimant's belated assertions that the accident occurred later in March 2003 are neither credible nor supported by competent evidence.

14. Here, the statute of limitation is not tolled by application of Idaho Code § 72-604, which requires that the employer "has knowledge" of an "injury." Claimant denied suffering an injury and repeatedly refused medical treatment. Idaho Workers' Compensation Law does not require an employer to report an accident in which no person claims to be hurt. Moreover, when

Claimant finally did claim to be injured, Employer immediately prepared and filed a report.

15. Likewise, Idaho Code § 72-705 does not toll the statute of limitation here. Claimant misunderstands the definition of the term "mentally incompetent" when he asserts that the statute applies because he did not know he was injured. Claimant failed to present evidence that his mental capacity or function was sufficiently lacking to qualify as mentally incompetent.

16. Claimant failed to make a claim within the statutory time period required by Idaho Workers' Compensation Law.

17. **Causation.** A claimant must prove he was injured as the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995).

18. Here, no medical opinion links Claimant's elbow complaints, or any other physical complaints, to the February 4, 2003 accident. Moreover, Claimant refused to seek medical attention for over one year. Additionally, the January 2002 note from Dr. Hill indicates Claimant has complained about his left upper extremity before the accident. Claimant failed to show it was likely that his subjective complaints of elbow pain were related to the accident.

19. Whether by lack of causation or by application of Idaho Code 72-701, all other issues are rendered moot.

CONCLUSIONS OF LAW

1. Claimant failed to file a claim within the time required.

2. Claimant failed to show his condition was caused by the accident.

3. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED in Boise, Idaho, on this 2ND day of March, 2006.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2ND day of March, 2006, 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:

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db /S/_____