BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE WERTS,

Claimant,

v.

STARWEST SATELLITE, INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,
Defendants.

IC 05-510129

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION

Filed: May 8, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on February 10, 2006. Craig K. Vernon of Coeur d'Alene represented Claimant. Paul J. Augustine of Boise represented Defendants. The parties submitted oral and documentary evidence. No post-hearing depositions were taken; the parties submitted post-hearing briefs. The matter came under advisement on March 27, 2006 and is now ready for decision.

ISSUE

By agreement of the parties at hearing, the sole issue to be decided is:

1. Whether Claimant suffered an injury from an accident arising out of and in the course of employment.

CONTENTIONS OF THE PARTIES

Claimant asserts that he banged his elbow on some masonry as he descended a steep and narrow stairway into the basement of a customer's home in the course of installing a satellite dish for Employer, resulting in lateral epicondylitis of the right elbow.

Defendants contend that Claimant was not injured in the course of his employment. He did not report any work injury until nearly two months later, although he had several opportunities to do so. In the interim, he had been doing a lot of construction work on his own home. Further, the owner of the home where the satellite installation occurred was present at the time Claimant said he was injured but could not corroborate Claimant's version of events.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Amy Werts taken at hearing;

2. Claimant's Exhibits A 1 through A 4 and B 1 through B 6; and

3. Defendants' Exhibits A, and C through L, which included the pre-hearing depositions of Claimant, Wayne Fister, and Machelle Austin.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Employer sells satellite television services, including installation of satellite receivers and other service and repair functions.

2. Claimant started working for Employer on March 9, 2005. Before reporting to work on March 9, Claimant signed a number of certifications regarding workplace policies and procedures. Included among the twenty-some pages of forms was a form entitled Procedures for

Reporting Work-Related Accidents or Injuries, which was signed by Claimant on March 4, 2005. The policy requires that work-related accidents and injuries be reported to a supervisor within twenty-four hours.

3. From March 9 through March 17, Claimant went on service calls with an individual named Troy Laing. Claimant was unsure of the exact nature of their work relationship, as Claimant was more knowledgeable about satellite service and installation than Laing. Claimant presumed that Laing was his training supervisor.

4. On March 17, Claimant and Laing started their day at 7:00 or 7:30 a.m. They completed their first job, somewhere in the Silver Valley, and proceeded to their second job at the home of Wayne Fister. They arrived at Mr. Fister's home in mid to late-morning.

5. Mr. Fister advised that there had been satellite service at the home previously, and showed Laing and Claimant where the satellite dish had been situated. Laing assigned Claimant to work on the wiring for the satellite dish in the home while Laing worked outside to install the receiver.

6. Mr. Fister took Claimant inside the home to show him where the old cable was installed in the basement of the home. As evidenced by Claimant's Ex. B 3, the stairs into the basement were steep and narrow and lacked a handrail. Descending the stairs there was a wall on the right and the drop into the basement on the left.

7. Two lights illuminated the stairs—one at the top and one at the bottom. Both lights could be turned on or off by switches located at the top and bottom of the stairs. Mr. Fister testified that he turned on the lights with the switch at the top and then preceded Claimant down the stairs, warning him of the low overhead clearance on the stairway.

8. Claimant was carrying his tool belt and a box of cable in his left hand, and was

brushing the wall with his right side, while using his right hand to locate the overhead obstruction. As Claimant proceeded down the stairs behind Mr. Fister, he banged his elbow on some protrusion or edge present in the masonry. Claimant described the pain as the same pain he had experienced when he had hit his "funny bone."

9. Claimant testified that the basement was dark as he descended the stairs and that Mr. Fister had to walk into an adjacent "room" in order to turn on a light. Because of the poor lighting, Claimant was not sure what he struck his elbow against, but presumed it was rebar.

10. Claimant cursed when he struck his elbow, and Mr. Fister chuckled and remarked that despite his warnings, Claimant had struck his head. Claimant replied that he had bumped his elbow.

11. The acute pain in his elbow resolved fairly quickly into an ache. Claimant was able to finish out his workday without problems and use all his tools. When Claimant and Laing returned to the office at the end of the day, everyone else had already gone home.

12. When Claimant arrived home the evening of March 17, he used an ice pack on the elbow and took some ibuprofen.

13. On March 18, Claimant worked in the office completing paperwork. His elbow didn't bother him.

14. On March 19, Claimant was working alone for the first time. He had three calls scheduled for that day. Claimant completed the first service call. He had equipment problems with the second call, and as a result was unable to make it to the third call. Claimant spoke to Laing while he was working on the second service call, and learned that because the first installation did not use new equipment, he would not be paid for his work, and that he would only be paid the standard piece rate for the second job which was taking hours longer than

anticipated because of equipment incompatibility and the dilapidated state of the residence. Claimant experienced some discomfort using the cordless drill, but was able to do everything he needed to do to complete an installation.

15. Claimant was angry about the work and pay situation, so he called in sick on March 20 in order to "cool off" and decide whether he wanted to continue working for Employer.

16. On March 21, Claimant went in to the office and told Employer he was quitting. He did not mention striking his elbow on March 17. Claimant continued to believe that it was just a minor bump and that any pain or discomfort would resolve within a few days without the need for medical treatment.

17. After leaving Employer, Claimant spent his time finishing a small guesthouse he had constructed on land he owned in Worley, and getting plans approved for the residence that was to be built on the property. Claimant intended to finish the guesthouse and obtain all necessary approvals for the house construction and then sell the property.

18. Claimant experienced only occasional discomfort as he painted the interior of the guesthouse and grouted tile that had already been laid. In late March or early April, Claimant started staking out the foundations of the planned residence, and noted that the pain in his right elbow was getting worse. He was icing it daily and taking ibuprofen daily. Claimant also noticed that he was having trouble gripping things with his right hand, as well as gripping and lifting his young son to put him in his car seat.

19. When Claimant began having problems gripping with his right hand, he decided he needed to seek medical attention. On May 10, he called Employer and spoke to Machelle Austin, H. R. assistant, and recounted how he had injured his elbow on March 17. Ms. Austin filled out a first notice of injury and claim for benefits form on the same date and advised

Claimant he could seek medical care at his choice of providers.

20. On May 11, Claimant saw Donald Chisholm, M.D. at the urgent care clinic operated by North Idaho Family Physicians, LLC. Claimant told Dr. Chisholm of the March 17 incident, which marked the onset of his elbow and right upper extremity symptoms. Dr. Chisholm examined Claimant and diagnosed lateral epicondylitis. He prescribed a brace and physical therapy. Claimant started physical therapy at River City Physical Therapy the same day.

21. Claimant received a call, evidently from Surety, seeking the address of the home where the accident occurred. Claimant did not know the address, but several days later drove to Kellogg to obtain the information. While there, Claimant revisited the site of his injury. He noted changes to the wall adjacent to the stairway, including that curtains over a window along the wall had been removed, and observed for the first time the place where he had bumped his elbow. He saw that what he had thought to be rebar was actually masonry protruding from a ragged hole where the masonry had been removed, exposing the framing underneath.

22. Surety denied Claimant's claim on June 24. When Claimant learned that his claim had been denied, he returned to Mr. Fister's home and took the photographs that have been admitted as Claimant's B 1 through B 6.

23. Claimant continued receiving physical therapy until July 14. Claimant stopped the therapy because of the cost and because he was moving to Twin Falls.

24. Claimant is a credible witness. His testimony was consistent in his reporting to Employer and Dr. Chisholm and in his pre-hearing deposition and his hearing testimony.

DISCUSSION AND FURTHER FINDINGS

25. The burden of proof in an industrial accident case is on the claimant. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). A claimant must prove not only that he or she was injured, but also that the injury was 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).

An "accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An "injury" is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17).

Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

26. Defendants contend that Claimant has failed to carry his burden of proving that he had an accident in the course of his work for Employer that caused his right lateral epicondylitis. Defendants base their argument on four essential points: 1) Claimant did not report the accident to Employer until 54 days had passed; 2) Mr. Fister's deposition testimony contradicts Claimant's version of events; 3) Dr. Chisholm's opinion as to causation is based entirely upon Claimant's subjective reporting; and 4) Claimant engaged in a number of activities following his departure from Employer that could have caused his injury.

A careful review of the evidence with regard to each of these arguments shows that Defendants' evidence does little to discredit Claimant's version of events.

27. Failure to Report. Employer's policy required that Claimant report injuries or accidents within twenty-four hours. However, a violation of Employer's policy does not deprive Claimant of the right to pursue his workers' compensation claim—it merely subjects him to some discipline for violation of the Employer's policy. In fact, Claimant's reporting the accident and injury to Employer within 54 days complies with Idaho Code § 72-701, which requires notice as soon as practicable but not later than sixty days after the accident occurred.

Claimant's reason for not reporting the accident sooner should ring a bell with every one who has ever sustained a seemingly minor injury, assumed it would resolve itself within a few days or weeks, and then realized sometime later that the injury had not resolved or had actually gotten worse. In this case, Claimant banged his elbow as he was descending a stairway. The immediate pain was just what Claimant had experienced when he had struck his "funny bone" before. The accident itself was minor and not uncommon. Nothing about the accident itself suggested it was serious in any way. The acute pain resolved quickly and the next day the elbow didn't bother him at all. After that he experienced only occasional discomfort when he performed specific activities, and when he used his right arm a lot, it would ache at the end of the day. It was not until some time had passed, the pain increased and became more persistent, and Claimant realized that he could not grip items with his right hand, that he recognized he had an injury that needed treatment. Claimant's failure to report the accident immediately may have violated Employer's policy. In hindsight, it might not have been the best course. But it is by no means unusual in these proceedings nor is it evidence of fabrication on Claimant's part.

28. Mr. Fister's Testimony. Defendants assert that Mr. Fister's deposition testimony does not corroborate Claimant's version of events. Mr. Fister did not dispute Claimant's story, he simply said he didn't know whether or not Claimant injured his elbow descending the stairs,

and didn't recall any conversation with Claimant regarding the incident. That Claimant recalled a conversation that was meaningful to him because of the events surrounding it is not unusual. That Mr. Fister does not recall the conversation is also not unusual—he had no reason to recall a mundane exchange with a service technician.

The only material issue on which the testimony is at meaningful variance is with regard to the lighting in the basement. Mr. Fister said that he turned on the lights at the top and bottom of the stairway before he descended the stairs in front of Claimant. He admitted that when he got to the bottom of the stairs he had to cross the "room" to another area of the basement to turn on the light in the area where the cable wiring was located. Claimant said that it was dark descending the stairs, that there was little or no natural light, and it wasn't until Mr. Fister turned on the light in the basement that the stairs were illuminated.

This discrepancy alone is insufficient grounds on which to conclude that Claimant's accident didn't happen when and where he said it did. Being familiar with the stairs, and with some ambient light, Mr. Fister may not have turned on the light. Or, he may have turned on the lights but they provided little illumination. When Claimant returned to the Fister residence on two different occasions, the level of ambient light may have changed significantly depending on the time of year (March or June), time of day, and whether it was a cloudy or sunny day. Additionally, Claimant noted that curtains covering a window in the stair wall had been removed between the date of the accident and when he returned to take photos of the scene. There may be other explanations for the discrepancy in testimony regarding the lighting in the basement area. Without more, this testimonial inconsistency is insufficient to controvert Claimant's version of events.

29. Dr. Chisholm's Opinion. Defendants argue that Dr. Chisholm's causation opinion

should be disregarded since it is based entirely upon the version of events that Claimant provided. Dr. Chisholm opined that Claimant's injuries were consistent with the mechanism of injury Claimant described, and even noted that the gradual onset of worsening symptoms was typical for the particular injury. Of course Dr. Chisholm based his causation opinion, in part, on what Claimant told him. There were no prior medical records pertaining to the injury that Dr. Chisholm could refer to. All he had was Claimant's version of events. Dr. Chisholm found Claimant's version of the facts to be consistent with the findings on exam. Had that not been the case, or had Dr. Chisholm doubted Claimant's account, then the medical records would certainly have noted Dr. Chisholm's concerns.

30. Claimant's Subsequent Activities. Defendants contend that Claimant's activities in finishing his guesthouse and laying out the foundation for the residence on his Worley property could have caused his lateral epicondylitis. Defendants offered no medical testimony to support this contention. Dr. Chisholm's opinion that the accident on March 17 caused the lateral epicondylitis is unrefuted.

CONCLUSION OF LAW

1. Claimant has carried his burden of proving that he sustained an injury from an accident arising out of and in the course of employment on March 17, 2005.

RECOMMENDATION

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

DATED this 26 day of April, 2006.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of May, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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