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IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT DOCKET NO. 42473-2014
INDUSTRIAL COMMISSION NO. 2012-21676

SCOTT CHADWICK,
Claimant/Appellant,

v.

MULTI-STATE ELECTRIC, LLC,

Employer,

STATE INSURANCE FUND,

Surety.
Defendants/Respondents.

DEFENDANTS/RESPONDENTS' BRIEF

Appeal from the State of Idaho Industrial Commission
Thomas Baskin, Presiding Chairman

APPELLANT
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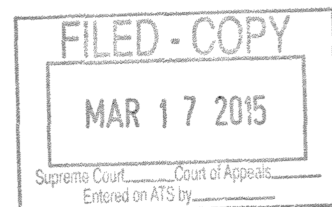

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COME NOW the Defendants/Respondents, Multi-State Electric, LLC, Employer, and State Insurance Fund, Surety, (hereinafter referred to as "Defendants"), by and through their attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., and submit this Defendants/Respondents' Brief. Defendants assert that the decision of the Industrial Commission was correct factually, substantively and procedurally and its Order dismissing the Complaint should be affirmed.

I. STATEMENT OF THE CASE

Appellant/Claimant's (hereinafter referred to as "Claimant") "Statement of the Case" is apparently contained in the "Case History" in his brief. That "Case History" fails to comply with Appellate Rule 35(a) and does not contain a statement of the case, a description of the course of proceedings or an accurate statement of the facts supported by citations to the record. Such failure to support by use of citations is grounds for dismissal of an appeal.

A. Nature of the Case.

Claimant contended that he was injured in one or more industrial accidents. Defendants asserted that Claimant had not borne his burden of proving that an industrial accident or accidents occurred or that he suffered an injury in an industrial accident and argued that, in any event, Claimant had not provided proper notice under Idaho Code §72-701. The Industrial Commission concluded that Claimant failed to prove that he had suffered an injury from a

workplace accident and had failed to prove that he satisfied the notice requirement of the Worker's Compensation statute. It dismissed Claimant's Complaint and Claimant moved for reconsideration. The Industrial Commission denied that motion and the Claimant appealed.

Defendants do not deny that Claimant had a bad back for many years prior to his employment with the Employer. They do not deny that Claimant informed his Employer at various times that his back was hurting. Rather, they deny that any "accident" occurred. They assert that Claimant did not tell the Employer or the Surety or the medical providers that his back pain was the result of an industrial accident until long after the alleged incidents. Instead, he "remembered" the incidents long after the alleged dates that they occurred and only after he realized that he would need to identify an "accident" in order to receive worker's compensation benefits to treat his chronic back problems. Defendants also assert that Claimant did not have an industrial "accident" as defined in the Worker's Compensation statute which caused the chronic condition for which he is seeking treatment.

B. Course of Proceedings.

On or about March 18, 2013, Claimant filed his Complaint with the Industrial Commission. (Agency's Record (hereinafter "R") p. 1). Defendants answered, denying that any accident occurred and denying that proper notice was provided. (R p.12). Discovery proceeded and the hearing occurred on January 31, 2014. Post-hearing briefing was conducted and on May 20, 2014 the Industrial Commission issued its Findings of Fact and Conclusions of Law and Order. (R p. 14). The Commissioners chose not to adopt the Referee's recommendation. The

Industrial Commission decision found that Claimant had not borne his burden of proving that he suffered a compensable injury in a workplace accident and also found that he had not provided proper notice. (*Id.* p. 29). Claimant filed a "Notice of Appeal/Brief and Statement of the Facts" on June 9, 2014 which was not a proper notice under the Idaho Appellate Rules but was accepted as a "Request for Reconsideration" by the Industrial Commission. Defendants responded (R p. 39) and the Industrial Commission issued an Order denying reconsideration on July 17, 2014. (*Id.* p. 48). Claimant filed a Notice of Appeal on August 28, 2014. (*Id.* p. 51).

C. Statement of Facts.

Claimant is a 47 year old electrician who had worked as an electrician for almost thirty years. (Chadwick Deposition, R, Defs Exh pp. 58-59). He underwent two years of training sponsored by an electrical union in 1990 – 1991 even though he had begun working as an electrician in 1985. (*Id.* pp. 60-61). His work has been heavy labor, including use of concrete saws, jackhammers and tampers, and pulling wire which consists of carrying heavy strands of cable.

In approximately 1997, Claimant moved to Idaho and worked for various electrical contractors. (*Id.* pp. 63-65). In approximately 2006, Claimant went to work at Employer Multi-State Electric and worked there until August 6, 2012. (*Id.* p. 65). When there was work available at Employer, Claimant would work forty hours a week. (*Id.* p. 68). He seldom, if ever, worked on Saturday.

Prior to the alleged incidents at issue in this case, Claimant was involved in at least three motor vehicle accidents. In one his fractured his hip and was on crutches for three months. (R. Defs Exh p. 66). In another one he apparently hit his head on the windshield and "maybe went to a chiropractor." In the third one, on December 7, 2009, he apparently suffered some injury to his neck. (*Id.* and Defs Exh p. 1). Claimant sought chiropractic treatment for the 2009 injury from Dr. Kevin Rosenlund of Kuna Chiropractic Clinic and treated for cervical and thoracic problems. (*Id.* p. 7).

On May 29, 2012, a Tuesday, Claimant presented to Dr. Rosenlund with low back pain which began on May 26, 2012, a Saturday. (*Id.* p. 9). While the chart note states the condition arose while the Claimant was "jumping out of the truck," Claimant admitted that he didn't remember telling the chiropractor that he hurt his back at work: "So that's how it came into there being, supposedly, two accidents that I had at work. I originally didn't go to [Dr.] Kevin [Rosenlund] and tell him it was a work-related accident." (*Id.* p. 71, at Depo p. 58 l. 21 – p. 59 l. 2). Claimant admitted:

> A: I don't recall telling him that I hurt myself at work; that it was a workmen's comp. claim because I paid him directly, thinking I'm a little sore, I need some adjustments, and that's all. . . .
>
> Q: Do you remember [telling the chiropractor that you jumped off a truck?]
>
> A: I don't remember saying those words to him specifically, no.
>
> Q: Do you remember ever jumping off the truck?

A: I jump and climb in and out of the truck all the time with my tool bags on. I climb in and grab a roll of wire. When I say "jump," I don't mean I'm jumping two feet off a cliff. It is just stepping, jumping out of the van. It is not like a hop, jump.

Q. All right. So when you told your chiropractor that back in May of 2012, you were talking about, as I understand what you're saying, is that -- just sort of the normal getting in and out of the truck and walking with a tool bag? That's when your back started hurting?

A. Yes. That's when I first started seeing the chiropractor.

Q. So you didn't tell him a particular incident? It was just your normal work? Is that generally correct?

A. He questioned me on why I was there. So it would have been specified as, yes, it was an incident or -- not an accident. The reason why I'm there. And it wasn't -- I don't believe it was documented as he's coming in for an accident and he's going to have a claim. It was like, you know, "Hi, Doctor. My back is hurting. Can you help me?" And him questioning me and manipulating me.

Q. Do you know -- I mean, what you were referring to, my understanding is you must have talked to him, the chiropractor, back in May and saying -- he asked, "Why are you here?" You said, "My low back hurts from jumping in and out of the truck," or whatever; is that accurate?

A. Yes, it is accurate. I went to see him because my back was hurting and work had – I started getting busy. It was slow working up to May of 2012. It was hit-and-miss work. I was hardly working. And when we picked up the Einstein Oilery job, prior to that job I had done three jobs in between, I believe, January, February, March, beginning of the year was slow. And I was finishing a job in downtown Boise the end of April. Finishing that, starting Einstein, starting a Bull Frog and an A&R, and these are all small, tenant improvement jobs that I'm working on by myself. And I do everything. Brad shows up, looks at stuff and goes on his way. And it was just -- we're both happy we're working. We've got jobs finally. So things were rolling along, and my back started hurting me. I went to the chiropractor at the end of May.

Q. So you started getting busier and working harder and your back started gradually hurting, and that's when you went to the chiropractor?

A. Yes.

Q. Had you had back problems before -- low back problems before that? Were you having back pains before May of 2012?

A. No. It may have been aches, but it wasn't nothing significant to even go to a chiropractor. And I had seen the chiropractor past in -- prior to my auto accident in 2009. It was not my first time to see a chiropractor.

Q. After the auto accident in 2009, you said the last time you went to him was March of 2010?

A. Yeah, March or May. Something like
that.

Q. Had you gone to a chiropractor between March of 2010 and May of 2012?

A. No.

Q. All right. But were you having low back pains during that time period?

A. Not that I recall. Just maybe aches and pains, and it would have been a comment to Brad, you know, "moving slow."

Q. Okay. Because your back hurt or something?

A. Yeah, my back was aching.

Q. And that's kind of what you continued to tell him after May until August; is that right? That you were moving slow and having back problems and needed to either go to the chiropractor or whatever; is that correct?

> **A.** That is correct. And it wasn't until after I started seeing the documents of all of the doctor's notes that it came into where the May incident happened. I still don't include that as what my claim was, it is just part of leading up to the injury of July.
>
> . . .

(*Id.* at 71, Depo p.59, l.4 – p. 63, l. 13).

Brad Baker, the owner of the Employer, testified at the Hearing that Claimant never told him of any May work incident and he never knew of any such claimed accident until months later when the Claimant was filing a formal claim for the alleged July accident. (Hearing Transcript (Tr) p. 92 ll. 9-20). Claimant acknowledged he never told the Employer of any alleged work comp accident in May although he might have mentioned that his back was hurting and he was "moving slow." (R p. 72, Depo. p. 62 l.22 – p. 63, l.13).

Claimant admitted in his deposition that it was not until he had copies of his prior medical records after providing a release to the State Insurance Fund in September or October of 2012 that he even recalled the May accident. "And it wasn't until after I started seeing the documents of all the doctor's notes that it came into where the May incident happened. I still don't include that as what my claim was, it is just part of leading up to the injury of July." (*Id.* at 72. Depo. p. 63, ll. 8-13) (emphasis added).

Claimant also acknowledged to a State Insurance Fund Investigator in a recorded statement that he never told the Employer of any "accident" in May and indeed did not believe there was any accident in May. (R, Defs Exh 9, Recorded Statement of Claimant at 45:00 –

45:55). This is reinforced by the fact that Claimant paid for all chiropractic treatment by himself and never requested the Employer to pay for any such treatment. Claimant's wife testified that she recalled no complaints of an injury until the July-August date, although before then he had back complaints. (Tr p. 79, ll 15-22). Indeed, even as late as July 30, 2013, a year later, Claimant told Dr. Richard Manos, Spine Institute of Idaho, that while he began having back pain in May of 2012: "He denies any specific injury but states that he does wear a tool belt and he was doing a significant amount of bending and twisting at that time." (R, Defs Exh p. 42).

Claimant's "Affidavit in Support of Prima Facia" filed with the Commission in September of 2013 says that in May his back starting aching more from the "physically demanding job I have." (R, Defs Exh p. 53). There is no indication that there was any type of accident.

Claimant also contends that he injured or reinjured his low back in an incident on July 26, 2012, involving either the picking up or the usage of a "trencher" rented at Tates Rents. On July 30, 2012, four days after the alleged trencher accident, Claimant visited Kuna Chiropractic Clinic. (R, Defs Exh p. 9). Nowhere in that chart note is there any mention of any trencher accident. On August 6, 2012 the Claimant again visited Kuna Chiropractic Clinic and was advised to seek an evaluation with a physician. (R, Claimant's Exh E, pp. 175-77). There is still no mention of any trencher incident.

On August 6, 2012, Claimant presented to Ann Weiss, M.D., at Primary Health Medical Group. The "Reason for Appointment" was back pain which started "last Thur." (R, Defs Exh p. 13). (The Court will note that August 6, the date of the appointment, was Monday, and "last

Thursday" from that date would have been August 2, not July 26.) The "Reason for the Appointment" goes on to state that the Claimant "has been seeing a chiro for low back since June. Pain got worse today." The "History of Present Illness" notes that the Claimant "has had chronic back pain for many years . . .. Having severe pain in lower right back today, does not recall recent injury or strain." He complained of "past symptoms; chronic pain" and "denies "acute injury." The chart note also specifies that the visit was "Self Pay" and says nothing about any workers compensation claim. (*Id.*). There was absolutely nothing mentioned about a trencher accident.

On August 13, 2012, Claimant sought treatment at McKim Chiropractic Clinic. (R, Defs Exh p. 10). The "Information Chart" notes that Claimant received chiropractic care on and off in the past. The New Patient History form notes that his symptoms have been "on/off" for a year. The symptoms began a week ago "gradually." (*Id.* p. 12). There is no mention of any trencher incident.

Claimant also went to Advantage Walk-In Chiropractic on August 15, 2012. (R, Defs Exh p. 44). A New Patient History form indicates that the symptoms began approximately August 1, 2012, and they began "gradually." (*Id.* at 46). Nowhere is there any mention of a trencher incident.

Claimant returned to Primary Health Medical Group on August 17, 2012 and saw Physician Assistant Colin Soares. (*Id.* p. 15). He complained of an old injury "cumulative injury" and denied an acute injury. Claimant now claimed this was a work comp injury because it was "related to work exacerbated by, onset was at work, repetitive motion, labor." Nowhere

was there any mention of a trencher incident or any other specific injury. The x-ray report of that same date indicated that indications were "Right sided low back pain. No known injury." (*Id.* p. 18). The preliminary x-ray results were negative for acute injury. (*Id.* p. 16).

Claimant returned to Primary Health Medical Group on August 23, 2012, and saw Dr. Stephen Martinez. Dr. Martinez's explanation of why this was a "work comp injury" provided: "injury occurred at work DOI: 5/29/12 suffered injury to low back while on the job. No falls or trauma, but feels that repetitive lifting and bending activities while on the job is the cause of his back pain. He states he was seen recently in urgent care and claimed that it was not a work related condition, but now he feels that it is indeed a work related condition." (*Id.* p. 19). This report was sent to the Employer.

Once the Employer was informed that Claimant was contending his low back pain was a workers compensation claim, he filled out the "First Report of Injury" on August 27, 2012. (R, Defs Exh p. 33). He noted that on August 6, 2012 Claimant had reported that his back hurt and he could not come to work, and specified that the injury date was "weekend of August 4, 2012" because the Claimant had never told him of any work injury or incident. (*Id.* at p. 24).

Indeed, Claimant himself did not know how or when he allegedly injured himself at work. This is seen in the transcript of a telephone message left with the State Insurance Fund by the Claimant on October 11, 2012, more than sixty days after the alleged industrial accident. (R, Defs Exh p. 25). Claimant states that he has been "scratching my brain, trying to figure out when I could have hurt myself at work, and I think I have pinpointed the date of the accident and where and how it happened."

This post-hoc creation of an accident is reinforced by the email Claimant sent to the State Insurance Fund on November 6, 2012, more than three months after the alleged industrial accident. (R, Defs Exh p. 26). In that email, Claimant sets forth his actual recollection of the situation, which directly conflicts with his testimony a year and a half later at Hearing. In the email he does not state any industrial accident occurred in late May and admits that he did not tell the Employer of any industrial accident in early August. Indeed, he admits that he did not recall any specific accident until he went back over the records months later to try to figure out when he "must have" injured himself: "So when I went back to your doctors I told them it was work related but I did not recall an accident." (*Id.* p. 27). The Claimant states:

> From the beginning "meaning" the first day I called into work 8/6/12 telling Brad I couldn't come to work cause my back pain was so bad and I needed to go to a regular doctor to get pain meds Brad knew I was having back pains, but did not question why or how because it wasn't the first time I complained about back pain nor did I tell him it was an accident that happened at work.

(*Id.* at 26).

Claimant's testimony now is that on July 26, 2012, "between me picking up this trencher at Tate's Rents in the morning and taking it over to Eagle Road and doing a trench, I hurt my back, at some point, loading and unloading or using this trencher." (R, Defs Exh, p. 68, Claimant's depo at 47, ll. 17-23). Even if that situation would constitute an "industrial accident," there is absolutely nothing in the medical records that backs up his story. Brad Baker, the Employer, testified under oath at the Hearing that until the date of the Hearing itself he had never heard from the Claimant that he contended anything about Tates Rents or a "trencher accident."

(Tr. pp. 93-94). Mr. Baker testified that Claimant never told him that any of his back pain was related to work and never knew this was a workers compensation allegation until after Primary Health sent materials. (*Id.* p. 94). Claimant had his wife testify that she believed that Claimant "would have said that I injured my back but I don't know why and -- or how?" (*Id.* p. 83, ll. 15-24).

Perhaps the clearest explanation of the Claimant's causation problems is found in the transcript of the statement the Claimant made to the Investigator for the State Insurance Fund on September 26, 2012. (R, Folder 2 of Defs Exh 9). At 11:15 on the recording, Claimant is asked about his injury. When asked if there was a specific date when his back became injured or whether this was a cumulative injury over time when working for the Employer, the Claimant states it was cumulative from not just when he worked for Multi-State Electric, but prior employers as well. He acknowledged he could not specifically say when or how his back pain got triggered and denied there was any specific accident but simply that his pain developed gradually at the end of July or beginning of August. (*Id.* at 10:55). He discussed that the injury may have occurred when he was dealing with a scissors lift but made no mention at all of a "trencher." (*Id.* at 13:35). He talked about pain on July 31, 2012. When Claimant was asked when he first told the Employer that his back pain was work related, he acknowledged that he never informed the Employer that the injury was work-related or was a workers compensation injury and certainly never told him of any particular incident. (*Id.* at 19:55 – 22:48). Claimant acknowledged that he has had low back pain off and on for years. (*Id.* at 27:40 – 28:06).

Claimant denied he had any accident in May but rather he had normal aches and pains for which he went to the chiropractor for "maintenance." (*Id.* at 45:00 - 45:45).

Claimant's own text messages emphasize the reality that he did not tell the Employer about an accident. On Claimant's Exhibit D, page 84, he states: "I also mention[ed] I didn't have accident but work-related" on August 15, 2012. As late as October 17, 2012, Claimant's text to Employer Brad Baker states: "I didn't have an accident at work, but it's work related so we will have to talk about what's next." (*Id.* p. 91). In addition, his own notes recognize that no report of an accident was ever made: "I called John and asked if he remembers me saying I had an accident-injury? He said no! That's because I wouldn't have done that." (*Id.* p. 114).

The handwritten Complaint filed by the Claimant has "?" after 5/29/12 when asked about the date of injury. (R, p. 1). Indeed, in that Complaint filed by the Claimant on March 18, 2013, he admits: "I did not use the words I hurt my back, had an accident at work, on the job!" (R, p. 1).

The Industrial Commission reviewed the exhibits and the hearing transcript as well as the pre-hearing deposition testimony of the Claimant. Rather than accepting the Referee's recommendations, the three Commissioners issued their own Findings of Fact, Conclusions of Law and Order. (R, p. 14). They carefully went through the factual background and the medical history and carefully analyzed the applicable statutory and case law. They found that the Claimant had failed to prove that he suffered an injury from a workplace accident on May 29, 2012 or July 26, 2012 and failed to prove that he had satisfied the notice requirements of Idaho Code §72-701. The Commission dismissed the Complaint with prejudice. The Commission also

considered Claimant's "Request for Reconsideration," which contained no new facts or legal arguments. The Commission noted that it examined the evidence in the case and reviewed the record and determined that substantial competent evidence supports the decision as it stands. (R, p. 49).

II. ADDITIONAL ISSUES ON APPEAL

A. Whether the Commission Had Substantial and Competent Evidence to Conclude that Claimant Failed to Prove that He Suffered an Injury from a Work Place Accident.

B. Whether the Commission Had Substantial and Competent Evidence to Conclude that Claimant Failed to Prove that He Satisfied the Notice Requirements of Idaho Code §72-701.

C. Whether Defendants are Entitled to Attorneys' Fees on Appeal Pursuant to Idaho Appellate Rule 11.2 as the Appeal is Not Well-Grounded in Fact or Warranted by Existing Law.

III. LEGAL ARGUMENT

A. Standard of Review

In reviewing decisions by the Industrial Commission, "this Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual findings if they are supported by substantial and competent evidence." *Knowlton v. Wood River Medical Center*, 151 Idaho 135, 140, 254 P.3d 36, 41 (2011) (citing Idaho Code § 72-732). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *McNulty v. Sinclair Oil Corp.,* 152 Idaho 582, 584-85, 270 P.3d 554,

556-57 (2012) (quoting *Uhl v. Ballard Med Prod., Inc.,* 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Zapata v. J.R. Simplot Company,* 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). The Court does not reweigh the evidence, and "[t]he Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous." *Knowlton*, 151 Idaho at 140, 254 P.3d at 41. All facts and inferences are viewed in the light most favorable to the party who prevailed before the Commission. *Zapata,* 132 Idaho at 515, 975 P.2d at 1180. As the Court has noted, "We will not re-weigh the evidence or consider whether we would have drawn a different conclusion from the evidence presented." *Watson v. Joslin Millwork, Inc.,* 149 Idaho 850, 854, 243 P.3d 666, 670 (2010).

B. Worker's Compensation Law

"The terms of the Idaho Worker's Compensation statute are liberally construed in favor of the employee. However, conflicting facts need not be construed liberally in favor of the worker." *Mazzone v. Texas Roadhouse, Inc.,* 154 Idaho 750, 755, 302 P.3d 718, 723 (2013). The Commission is not required to construe facts liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 363, 834 P.2d 878, 880 (1992). The Worker's Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain worker's compensation benefits a worker must prove that his disability results from an injury, which was caused by an accident

arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 650 P.2d 1072 (1983); *Tipton v. Jansson,* 91 Idaho 904, 435 P.2d 244 (1967).

The Worker's Compensation Act defines the key elements of a claim. Idaho Code § 72-102(18)(b) defines "accident" as "an unexpected, undersigned 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." Subsection c defines "injury" and "personal injury" and states that they shall be construed to include only "injury caused by an accident, which results in violence to the physical structure of the body." Idaho Code § 72-102(18)(c).

Hard work is not an accident. *Perez v. J.R. Simplot Co.,*120 Idaho 435, 816 P.2d 992 (1991). An increase of pain over a period of weeks without a discernible causative event is not an accident. *Konvalinka v. Bonneville County,* 140 Idaho 477, 905 P.3d 628 (2004)

"A claimant bears the burden of proving that an injury-causing accident occurred by proving that an unexpected, undesigned and unlooked for mishap or untoward event took place." *Langley v. State of Idaho, Industrial Special Indemnity Fund,* 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). To prevail on a workers' compensation claim, the claimant bears the burden of establishing an accident by a preponderance of the evidence. *Painter v. Potlatch Corp.,* 138 Idaho 309, 63 P.3d 435 (2003); *McGee v. J.D. Lumber,* 135 Idaho 328, 335, 17 P.3d 272, 279 (2000). "A claimant has the burden of proving a probable, not merely a possible, causal connection between the employment and the injury ...." *Stevens-McAtee v. Potlatch Corp.,* 145 Idaho 325, 332, 179 P.3d 288, 295 (2008). "An accident must cause an injury, and an injury

must be caused by an accident. The terms are not synonymous, however." *Konvalinka,* 140 Idaho at 480, 95 P.3d at 631.

The factual background and the Claimant's testimony in this case are similar to those in the recent case of *Clark v. Shari's Management Corp.,* 155 Idaho 576, 314 P.3d 631 (2013), and the case of *Hazen v. General Store,* 111 Idaho 972, 729 P.2d 1035 (1986). In the Court's words in *Clark*:

> In *Hazen,* this Court affirmed the Commission's denial of a worker's compensation claim, finding that the claimant's disc herniation was the result of the "aging process" and "not the result of employment." *Id.* at 973, 729 P.2d at 1036. There, although Hazen had discussed her injury with her employer, she did not attribute it to an accident at work and did not file a Notice of Injury with the Industrial Commission. *Id.* It was only after Hazen underwent surgery that she first attributed her injury to a work-related accident. *Id.* ...
>
> Having carefully reviewed the record before us, we are struck by the similarity of the facts in this case to those presented in *Hazen.* As with the claimant in *Hazen,* Clark discussed her injury with her employer but did not attribute the injury to a specific accident at work until after discovering that she required surgery. Clark told medical providers that she did not know what the cause of her pain was, attributing it to a variety of reasons including nothing at all ("out of the blue"), "standing funny," her weight, working many years as a waitress without taking care of her body, and work in general. Although Clark indicated her injury might be work-related, she never suggested that her injury was due to an accident at work until she filed a worker's compensation claim after discovering her need for surgery. As we did in *Hazen,* we find that substantial evidence supports the Commission's finding that the Claimant's injury was not caused by an industrial accident.

Clark at 583, 314 P.3d at 638.

The Workers' Compensation law requires an employee who suffers an accident to give certain notice to the employer. *Page v. McCain Foods, Inc.*, 141 Idaho 342, 345, 109 P.3d 1084, 1087 (2005). This requirement serves the purpose of giving the employer a timely opportunity to investigate the accident and surrounding circumstances in order to avoid paying an unjust claim. *Id.*

"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 but no later than sixty (60) days after the happening thereof . . . ." I.C. §72-701. The plain language of Idaho Code § 72-701 requires that a claimant give an employer notice of the accident no later than 60 days after the happening thereof.

> Therefore, because of the plain and unambiguous wording of I.C. § 72-701 and I.C. § 72-102(18)(b), we hold the claimant must give notice of the accident within 60 days after it occurred and not within 60 days after the Claimant became aware the accident caused a personal injury.

Arel v. T&L Enterprises, Inc., 146 Idaho 29, 189 P.3d 1149 (2008).

C. The Commission Did Not Err in Finding That No Accident Occurred in July 2012.

The Industrial Commission reviewed all of the factual background and medical evidence, and concluded that there was no industrial accident on July 26, 2012. The Commission stated:

> Contemporaneous medical records fail to reflect that Claimant gave a history regarding this incident, and the incident itself does not figure in the September 26, 2012 recorded statement taken by Surety's investigator. We find that the evidence fails to establish that such an event occurred. More so than with the alleged

> accident of May 26, 2012, Claimant's assertion that such an accident occurred is not the product of his memory of an inciting event, but is rather the result of his subsequent reconstruction of his activities at or around the time his low-back condition progressed to the point that he was no longer able to work.

(R, p. 24). This conclusion is supported by substantial and credible evidence.

Claimant cannot bear his burden of proving that there was any July 26 trencher accident. Indeed, the medical records are to the contrary. Claimant went to Kuna Chiropractic Clinic for his regular "maintenance" a few days after the alleged trencher incident. (R, Defs Exh, p. 9). There is absolutely no mention of any new incident or accident or injury, even though the trencher incident allegedly occurred only a few days prior. Just as significantly, there is absolutely no mention of any trencher incident or accident or specific injury in the records of the Primary Health Medical Group immediately after July 26, 2012. To the contrary, for many visits the notes denied any acute injury or any accident. Indeed, the August 6, 2012 note from Dr. Weiss states: "does not recall recent injury or strain." (R, Defs Exh, p. 13). Dr. Weiss also noted that Claimant had chronic back pain for many years and denied an acute injury. (*Id.*). Claimant visited two separate chiropractors and said not a word about an accident or acute injury to them either. (R, Defs Exh, pp. 10 & 44). When he returned to Primary Health Medical Group and saw Mr. Soares on August 17, 2012, Claimant complained of "Old injury cumulative injury" and denied an acute injury. (*Id.*). Even when Claimant went to Dr. Martinez to try to get the case established as a workers' compensation case, he acknowledged "no falls or trauma, but feels that repetitive lifting and bending activities while on the job is the cause of his back pain. He states

that he was seen recently at urgent care and claimed that it was not a work-related condition, but now he feels that it is indeed a work related condition." (*Id.* p. 19).

The reality of this situation is that, as the Claimant himself acknowledges, and as he stated to the State Insurance Fund investigator, there was no specific accident but rather an accumulation of problems from 25 or 30 years of heavy labor working for the Employer and previous employers. "The injured worker must do more than show an onset of pain while at work in order to sustain his or her burden of proving an event or mishap occurred." *McGee,* 135 Idaho at 335, 17 P.3d at 279 (quoting *Perez v. J.R. Simplot Co.,* 120 Idaho 435, 438, 816 P.2d 992, 995 (1991)).

Claimant may have been able to retroactively point to an onset of pain sometime in late July or early August, but this is insufficient under the workers' compensation statute:

> Although an accident may and usually does cause the onset of pain, "an accident" under the workers' compensation law is not simply the onset of pain. ... To establish that a mishap or event occurred, an injured worker must do more than show an onset of pain while at work. ... Workers' compensation is not meant or intended to be life or health insurance; it is purely accident and occupational disease insurance. ... The elimination of the accident requirement would transform workers' compensation into health insurance. Any such change in the law is the province of the legislature, not this Court or the Industrial Commission.
>
> The Industrial Commission found that the hard work performed by the claimant in March and August 1997 constituted an accident that aggravated her pre-existing osteoarthritis. Hard work is not an accident.... In this case, there is no evidence of an unexpected, undesigned, and unlooked for mishap, or untoward event other than the onset of symptoms from claimant's pre-existing condition. That is not sufficient to constitute an accident under the workers' compensation law.

Konvalinka v. Bonneville County, 140 Idaho 477, 479, 95 P.3d 628, 630 (2004).[1]

D. The Commission Did Not Err in Finding that the Claimant Had Not Proven that Any Incident Produced an Injury.

A claimant has the burden of not only proving that an untoward mishap/event occurred, but also must prove that the incident produced violence to the physical structure of his body. Idaho Code § 72-102(18). "The Claimant in a worker's compensation case carries the burden of proving that the condition for which compensation is sought is causally related to an industrial accident." *Duncan v. Navajo Trucking,* 134 Idaho 202, 203, 998 P.2d 1114, 1116 (2000). The Commission found that a May 2012 event might have occurred (despite the evidence to the contrary), but concluded that even if a May incident occurred the Claimant had not met his burden of demonstrating that this incident caused damage to the physical structure of his body:

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[1] The Commission found that an accident or event may have occurred in late May ("whether on May 26, May 29 or some other date in late May, we cannot determine") (R at 24), based on Kuna Chiropractic and Dr. Rosenlund's records. That conclusion, however, is not supported by the evidence.

Claimant admits both in his deposition and to the State Insurance Fund investigator that there was no accident in May of 2012. Indeed, he admitted as much at the Hearing. While Kuna Chiropractic's note suggests the Claimant's low back was injured when he "jumped" out of a truck at work, Claimant acknowledges that he never said this to the chiropractor but instead said his back began to hurt (more than the usual aches and pains he always experienced) as a result of being busy at work, walking with a tool belt and getting in and out of his truck. His testimony was:

> Q: So, that's what you discussed about this May incident, which was - - gradually started hurting because you started working hard.
>
> A. My opinion.

(Tr p. 70, ll. 4-7).

He acknowledged that he went to the chiropractor for "maintenance" of his chronic low back pain. His wife did not remember any accident in May of 2012.

> Importantly, Claimant himself has no conviction whatsoever that this incident produced an injury. He did not describe a sudden worsening of symptomatology following this incident, and although Dr. Rosenlund appears to attribute some part of Claimant's symptomatology to the event described, we do not believe that this chart note, to the extent that it might be viewed as the expression of an opinion on the issue of causation, rests upon an adequate foundation. We conclude that Claimant has failed to meet his burden of proving that the accident of May 26, 2012 caused damage to the physical structure of his body.
>
> Even if it be assumed that the July 2012 incident occurred as alleged by Claimant, we find, as well, that the evidence fails to establish that this incident caused damage to the physical structure of Claimant's body.
>
> Dr. Manos opined in a chart note on July 30, 2013 that lifting a trencher could have caused Claimant's L4-5 disc herniation. His opinion states a possibility, but it is insufficient to establish, to a reasonable medical probability, that lifting a trencher to attach it to a truck hitch on July 26, 2012 caused this injury. Claimant has failed to prove by a preponderance of evidence that he suffered workplace accidents resulting in injury.

(R pp. 24-25).

This conclusion is supported by the evidence discussed above. Claimant testified that he did not have a May accident and never told the chiropractor he had any accident. Indeed, he did not recall a May incident until after he started renewing medical records in August. He did not tell his physician immediately after the alleged July incident that he even had had an accident in May and instead stated he has had "chronic back pain for many years." (R Defs Exh, p.13).

Similarly, there is no proof of any accident in July or August. Certainly there is no proof that any "condition" was caused by the alleged accident or that Claimant suffered an "injury" as defined by the worker's compensation statute.

E. The Commission Did Not Err in Finding Claimant Had Not Provided Notice of Either Incident.

The Commission analyzed all of the written evidence and considered the testimony and recorded statement of the Claimant and concluded that Claimant's claim failed for lack of proper notice. This conclusion is not clear error but is supported by the record.

There is absolutely no evidence that Claimant informed the Employer or Surety of any claimed accident of May 2012. Again, Claimant's testimony at Hearing and in his deposition and his statement to the State Insurance Fund investigator make clear that while at most he may have informed Mr. Baker that his back was bothering him, he never informed anyone at the Employer about a claimed accident. Indeed, he appeared to forget there was any "accident" in May when making a claim for an alleged July accident until after he had received copies of past medical records and noticed that his chiropractor had put down on the chart note an entry regarding "jumped out of truck at work." It was only after reviewing this document that Claimant even suggested any type of belief that he had suffered an accident in May. Obviously he could not have given notice when he did not even think there was an accident.

Claimant's testimony at hearing is also instructive. The Referee asked him about the alleged May incident:

> Q. Okay. Well what happened? What happened to create your condition?
>
> A. The original incident, I believe, was stepping, jumping out of my work van or our work trailer that hauls our scissor lift to jobs. The exact date is unclear of what day it happened, because of the dates that were written down of May 26th and

> May 29th. That May 26th actually falls on a Saturday and I don't have any evidence saying that I actually worked on that Saturday or if – when I worked, what location it was, and only through the doctor's notes to – let's see, May, June, July, August, September – four months later that I learned what I had said to a doctor when the medical evidence was requested by the defendant, State Insurance Fund.
>
> Q. So, do you remember what you said to the doctor?
>
> A. Only after reading his statement. I don't – I told him I don't know exactly how I got hurt at work. I told him I didn't fall off a trailer and break my leg, because it wasn't that kind of event. It was – you know, they say industrial accident, I say I hurt myself. I wouldn't go to Brad and say I had an accident today, my back hurts, or I'm sore today. I wouldn't have done that.

(Tr. p. 21, ll. 5-25, p. 22, l. 1).

Mr. Baker's testimony at hearing was quite clear and consistent that the Employer was not informed of any claimed May accident until September or October of 2012, months after the May "accident" allegedly occurred. Claimant's testimony at hearing was much less consistent and much less credible. His other statements are replete with comments that he admitted that he did not tell the Employer of any particular incident or accident in late May of 2012. This is reinforced by the fact that the Claimant paid for the chiropractic "maintenance" on his own and never requested the Employer to pay or submitted any type of notice or demand for reimbursement from the workers' compensation system until at least late September.

Claimant also failed to give notice of any "trencher incident" for more than sixty days. While Claimant did notify the Employer that his low back was hurting in August and that he traced it to continuing strenuous activity at his employment, he never gave written notice of any

alleged incident involving a trencher until months later and only after he was asked repeatedly by the State Insurance Fund about how his injury occurred. The medical records and the recorded interview of Claimant show that only after mid-October 2012, more than sixty days after the alleged July accident, did the Claimant even mention orally a trencher incident. Indeed, Claimant testified at hearing that "as I stated before I didn't know exactly when, where, and how [the alleged accident] happened when I spoke to many doctors. ..." (Tr. p. 34, ll. 18-21; *see also* p. 35, ll. 8-17). This delay prejudiced the Defendants in investigating the claim and directing medical treatment.

The Commission found that Claimant first provided Defendants written notice of his alleged July 26, 2012 industrial accident in an email dated November 6, 2012, 103 days after the alleged industrial accident. (R p. 26). It found that he had never previously notified his Employer, Brad Baker, of a specific accident. It found that Claimant had never provided notice of any alleged May 29, 2012 at least until August 2012 after he had reviewed the past medical records. (*Id.*) This is supported by the fact that Claimant himself did not believe he had a "accident" in May 2012 and acknowledged that the first time he even concluded that he had suffered an "accident" was after reviewing his medical records in August or September to try to make a claim.

The Commission then went on to consider the issue of prejudice. Under Idaho Code §72-104, a claimant must establish that his failure to give proper statutory notice has not prejudiced the employer. Claimant must affirmatively prove that the employer was not prejudiced by the

lack of timely notice. *Jackson v. JST Manufacturing,* 142 Idaho 836, 136 P.3d 307 (2006). The Claimant did not even attempt to meet his burden.

To the contrary, Claimant's failure to provide timely notice hampered Defendants' ability to investigate the validity of the claim(s) and hampered their ability to provide reasonable medical treatment if there had been an industrial accident. The Commission's conclusion that Claimant had failed to meet his burden of proving that Defendants were not prejudiced by his delays in reporting his claimed industrial accidents is supported by the record.

F. The McKim Report.

Claimant claims that the Commission misread evidence by misreading the "new patient history" form from his visit with chiropractor McKim on August 13, 2012. The Claimant claims that his writing should have been read to say that his pain started "a week ago" rather than four weeks ago. Even if the Commission misread the handwriting, this is immaterial since the evidence is still that the Claimant's sciatica came on "gradually" without an accident. (R, Defs Exh p. 12). Moreover, this reading requested by Claimant supports the Commission's findings because "one week" before August 13 is long after the alleged July 26 trencher accident. The McKim records reemphasize the point that the Claimant reported that his recurring sciatica had restarted gradually without the recurrence of any incident on July 26 or any other date.

G. The Commission Did Not Abuse its Discretion in Not Setting a Hearing Before the Full Commission or in Any Discovery Matters.

Although Claimant's argument is unclear, it appears he is contending that the Industrial Commission was obligated to schedule a hearing before the full Commission because the Claimant so requested. While the Industrial Commission's Judicial Rules of Practice and Procedure allow for the full Commission to hear a claim, this is a matter of discretion for the Commission. This Court "will not supplant the views" of the Commission with its own pursuant to the abuse of discretion standard of review. *Warren v. Williams & Parsons, PC, CPAs,* ______ Idaho _______, 337 P.3d 1257, 1266 (2014). Moreover, the Claimant did not raise this issue with the Commission other than in his Response to Defendants' Request for Calendaring and the issue was therefore waived. In any event, the full Commission did not simply accept the Recommendation of the Referee but instead reviewed all of the evidence and made the decision itself.

The Claimant has also raised a claim that the Commission erred in failing to order Defendants to provide requested discovery. There is absolutely no proof that Defendants failed to provide appropriate discovery responses. There is also no proof that Claimant brought any motion before the Commission regarding that issue. Accordingly, this issue was also waived. More importantly, evidentiary issues are governed under an abuse of discretion standard, *Warren, supra,* 337 P.3d at 1264, and there is no suggestion that the Commission abused its discretion in any discovery matters.

H. Defendants are Entitled to an Award of Fees Under Idaho Appellate Rule 11.2.

Claimant is simply asking the Court to reweigh the evidence presented to the Commission. While the Claimant is acting *pro se* and has been given extraordinary latitude by the Referee and the Industrial Commission and this Court, he is still bound by the rules. Rule 11.2, IAR, provides that a party who is not represented by an attorney shall sign each brief and that such signature constitutes a certificate that he believes "after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

This Claimant brought his Complaint and had his day "in court" at the Hearing in which he was granted great latitude to present his evidence and testimony. The full Industrial Commission considered his claim and after reviewing all of the evidence and testimony determined that there was not a valid claim. The Claimant submitted a document which was not a proper Notice of Appeal but nevertheless the Commission considered it as a Request for Reconsideration, reviewed the Request and once again denied that motion as Claimant had not provided any new information but simply wanted a redetermination of the facts. Similarly, this appeal is simply a request that the Supreme Court re-review the facts and come to a different conclusion. His brief is deficient procedurally and substantively. The Claimant simply wishes the Supreme Court to rehash the evidence and perhaps come to a different conclusion because he did not prevail. His multiple pleadings and appeal have cost the Defendants needless increase in

the cost of litigation and Defendants are entitled to an award of attorney fees. *See Sims v. Jacobsen*, _____ Idaho _____, 342 P.2d 907 (2015).

IV. CONCLUSION

Claimant's contention appears to be that his years of hard work as an electrician caused his back pain. He appears to contend that, looking backward, his July-August onset of pain came during a time when he was picking up and/or using a trencher and therefore he must have hurt his back while lifting or using that trencher, even though he did not know it at the time and even denied any such incident to his medical providers. Claimant appears to argue that notice to the Employer was satisfied because the Employer knew he was having back pain at various times during his employment.

Unfortunately, those contentions are not supported by evidence or the Idaho Workers' Compensation statute. Claimant did not have an accident and never even reported an incident to his Employer until after he recognized that he needed significant medical treatment and that he would have to identify some incident in order to qualify for workers' compensation medical benefits.

Defendants submit that Claimant did not have an accident in late May of 2012 and did not even suggest to the Employer that he had any type of an accident for long past 60 days. Defendants submit that Claimant did not have a "trencher" accident in late July 2012 and only came up with that explanation months later. He did not report either to the Employer or the medical providers that he had any accident in late July 2012. He did not present evidence that

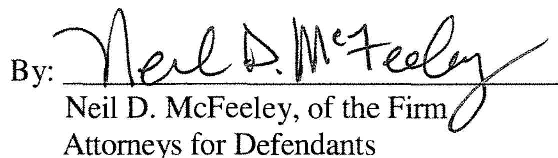
his continuing chronic back pain was caused by any accident. Moreover, he did not give notice of any "accident" for more than 60 days and Defendants have been prejudiced by the delay.

Defendants proved below that Claimant did not have any accident and that he did not provide timely notice. Claimant did not bear his burden at the hearing of proving that he was entitled to Title 72 benefits. But the issue before this Court is not whether Defendants proved their case, nor even whether this Court would have decided the claim below differently. The sole issue is whether the Industrial Commission's conclusions are supported by substantial and competent evidence, viewed in the light most favorable to the prevailing party – the Defendants. There appears to be no real issue that the Commission had more than substantial and competent evidence to support its findings. "The Commission's findings are binding on this Court when supported by substantial competent evidence." *Shubert v. Macy's West, Inc.*, _______ Idaho _____, ____ P.3d ______, 2015 WL8369634 (February 27, 2015).

Defendants respectfully request the Court to affirm the decision of the Industrial Commission dismissing Claimant's Complaint with prejudice and award Defendants attorney fees pursuant to Idaho Appellate Rule 11.2.

DATED this 17th day of March, 2015.

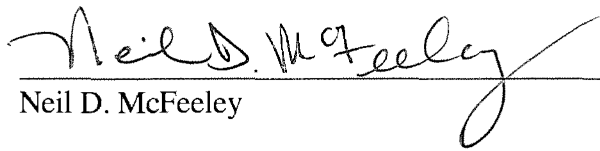
EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

By: 
Neil D. McFeeley, of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of March, 2015, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Scott Chadwick 5486 Deer Flat Road Nampa, Idaho 83686	[✓] U.S. Mail [ ] Hand Delivery [ ] Overnight Mail [ ] Fax



Neil D. McFeeley