BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY SMITH, Claimant, v. COMPLETE AIR MECHANICAL, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2019-006831** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed March 30, 2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, this matter was originally assigned to Referee Alan Taylor. He disqualified himself by order dated May 23, 2019. The Industrial Commission reassigned this matter to Referee Brian Harper, who conducted a hearing in Boise on October 29, 2019. Claimant appeared *pro se*. Jon Bauman represented Employer and Surety. The parties presented oral and documentary evidence at hearing. Claimant elected to provide oral argument at hearing in lieu of a written brief. Defendants submitted a brief. Claimant filed a handwritten statement deemed herein as a reply brief. As explained *infra*, the Commission deems the case to have come under advisement on February 4, 2020.

Referee Harper disqualified himself on December 3, 2019, giving as reason his belief that his impartiality might reasonably be questioned by Claimant, as a result of derogatory comments made to the Referee by Claimant, and the threat of lawsuit made both orally and in writing by Claimant. The Commission reassigned the matter to Referee Douglas A. Donahue on December 3, 2019. Various attempts by Referee Donahue to reach Claimant for the purpose of scheduling a status conference were unsuccessful. Finally, on January 21, 2020, Referee Donahue issued a notice of status conference, to be held February 4, 2020, and caused the same to be served to

Claimant at his last known address. Claimant did not attend the status conference.

The Commission is mindful of the Court's belief that a Referee who hears a case must be allowed to craft an opinion, if for no other reason than to assist the Court in its review of a "takeover" decision authored by the Commission. *Ayala v. Robert J. Meyers Farms, Inc.*, 165 Idaho 355, 455 P.3d 164 (2019). Ideally, Referee Harper, the referee who heard this case, would have issued a proposed decision for the Commission's acceptance or rejection. Had the Commission crafted its own opinion, the rejected opinion would have been available for the Court to review in connection with any appeal of the Commission's decision. Any determination which could only have been made by the person who heard the case, could then be compared to the Commission's treatment of that determination. Of course, Referee Harper recused himself before crafting an opinion. Various attempts were made to engage Claimant in a discussion of how the case should proceed following Referee Harper's disqualification. Whether the case should be tried anew, or whether the parties would consent to submission of the record to Referee Donahue for decision, was a discussion which never took place, because Claimant could not be located, and left no information about how he might be reached. Following Claimant's failure to participate in the February 4, 2020 status conference Referee Donahue eventually deemed that the best course was to decide the case based on the cold record. The Commission supports this decision. As set forth below, a review of the record reveals that Referee Donahue reached his decision based on the documents and testimony in evidence. Although he (and later, the Commission), did make a credibility determination that is central to the issue of compensability, that credibility determination is of the substantive variety. Accordingly, under the circumstances of this case we find it appropriate for the proposed decision to come to us the way it has, i.e. without the generation of a decision authored by the Referee who presided at hearing, and absent the agreement of

Claimant to proceed in this fashion. The Commission has reviewed the proposed decision authored by Referee Donahue and agrees with the outcome. However, the Commission believes different treatment of the issues is warranted and hereby issues its own findings of fact, conclusions of law and order.

ISSUE

The issues to be decided according to the parties at hearing are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho code section 72-701 through Idaho code section 72-706, and whether these limitations are tolled pursuant to Idaho code section 72-604;
2. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;
3. Whether Claimant's condition is due in whole or in part to a subsequent injury disease or cause; and
4. Whether and to what extent Claimant is entitled to medical care.

CONTENTIONS OF THE PARTIES

Claimant contends Defendants are lying. He walked into a ladder and chipped a tooth.

Employer and Surety contend Claimant failed to establish a *prima facie* case for benefits including: Claimant has failed to reasonably locate the time of the alleged accident because he has provided inconsistent allegations about the time, place, and nature of events which might constitute an accident; he has failed to show a reasonable medical probability of a causal relationship to his alleged conditions and any specific event; he failed to provide timely notice of an accident; and he first alleged an accident after he separated his employment from Employer.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and his Employer Aaron Caesar Rodriguez; and

2. Joint exhibits 1 through 34 and a binder of exhibits from claimant.

FINDINGS OF FACT

1. Claimant began working for Employer about July 2018.

2. Claimant alleged he was injured in an accident involving a ladder which chipped a tooth. The alleged accident was unwitnessed, because it occurred while Claimant was working alone. Claimant testified that he was "slowly scooting" the ladder when "all of a sudden the ladder stopped" and "felt like [he] was hit with a hammer" when it struck him in the face. Claimant testified that he did not know he was working alone and looked for the boss immediately after the accident. He testified that after stopping a nosebleed he immediately noticed his tooth was chipped and cracked. He continued working.

3. The job on which the alleged accident and injury occurred took place on November 2, 5, and 6, 2018.

4. At hearing, Claimant testified that he was hurt on November 13, 2018 finishing that job which had started a week or two earlier.

5. Payroll records show that job finished on November 6, 2018. Daily timesheets for Claimant, which identify the job "mini splits," the location "Floating Feather," and/or the customer "Kinney," confirm these dates.

6. Claimant worked at another location "Cimarron," performing another job, on November 13, 2018. Multiple text messages passed between Claimant and Employer between November 11 and 14. No express wording or reasonable inference suggests Claimant had reported an accident or injury by text. Also, the mere existence of these texts is inconsistent with Claimant's testimony that Employer had told him not to phone or text. There is one text in which Employer stated, "… I have very little cell service …" Text references do refer to a phone call in which these

parties got disconnected, but they do not indicate that Claimant reported an accident or injury then.

7. A visit to Terry Reilly services on January 10, 2019 for a complaint of shortness of breath did not include any suggestion of nose, face, or tooth complaints.

8. Claimant separated his employment from Employer on January 16, 2019.

9. Claimant was examined at St. Al's Nampa facility on January 21, 2019 about ongoing shoulder and thumb pain following an alleged worker's compensation accident unrelated to this Employer or claim. No mention of the instant alleged accident is found nor are any complaints of symptoms regarding his nose, face, or tooth. Claimant was released to work without restrictions effective January 28, 2019.

10. On February 17, 2019, Claimant visited St. Luke's ER Meridian with the flu. No mention of the alleged accident or injury to Claimant's nose, face, or tooth is found despite a workup which included a description of Claimant's sinus condition arising from the flu.

11. On March 1, 2019, Claimant visited Primary Health Nampa for follow-up of his right shoulder and thumb complaints. No mention of the alleged ladder accident or complaint about his nose, face, or tooth is found.

12. On March 16, 2019, Claimant first sought medical care for any condition involving an alleged ladder accident. On that date he complained of a fractured nose and chipped tooth. He visited St. Luke's ER in Meridian. Nathan Andrew, M.D., examined him. A CT revealed no fracture but did note paranasal sinus disease and poor dentition. Dr. Andrew's note identified a "subtle crack at the distal end of the tooth." He did not suggest treatment for the crack in the tooth. His record acknowledges Claimant's allegation of a ladder incident but does not offer an opinion about a causal relationship between it and any observed medical condition.

13. On March 26, 2019, Scott Pugh, D.D.S., a dentist at Terry Reilly Health Services

in Nampa, examined Claimant. Claimant denied lumps or sores in the mouth, denied bleeding gums when brushing teeth, denied any pain in the mouth, face, eyes, neck, or throat. He answered "yes" to a question about injures to his face, jaw, or teeth.

14. On April 12, 2019, Dr. Pugh authored a note confirming that Claimant had visited about tooth #9, the upper incisor which is the subject of this claim. Dr. Pugh recorded Claimant's allegation about the ladder incident but did not offer an opinion about a possible relationship between the alleged incident and the condition he observed. He issued an "active treatment plan" identifying 14 teeth, including that incisor, which needed work.

15. Terry Reilly billing for service provided by Dr. Pugh on May 20, 2019 states: "DENTAL EXAM WITHOUT ABNORMAL FINDINGS" after a "Comprehensive oral evaluation".

16. On November 21, 2019, Dr. Pugh identified nine clinical conditions affecting Claimant's teeth. None of these mention a traumatic source.

Prior Medical Care

17. Claimant occasionally sought treatment for sinusitis. A couple of exam notes incidentally record "good dentition" in 2011 and 2012.

18. Two 2014 ER visits for migraines resulted in CT scans of his head. No relevant condition was reported.

19. Another 2014 ER visit reports Claimant gave a history of a broken facial bone. The exam note regarding his head notes only "normocephalic, atraumatic."

20. A March 2017 St. Luke's ER Meridian note recites an alleged work accident in which Claimant states he was struck by a metal tube to his *left* face six months prior. Claimant was reporting jaw pain and loss of a dental filling. Examiner observed "poor dentition" and

swelling on the *right* mandibular region. Diagnosis was "dental abscess." By history Claimant also reported "couple of teeth pulled."

21. Other prior medical records do not significantly add evidentiary weight to any issue under consideration for this claim.

22. Claimant currently receives Social Security disability benefits allegedly for post-traumatic stress disorder, right upper extremity complaints, chronic bronchitis, and various other diagnoses.

Additional Findings

23. In his answers to interrogatories, Claimant averred that he gave notice to employer of the subject accident by text message. *See* J. Ex 20 1367-1369. In the course of discovery, Claimant requested that Defendants produce cell phone records to substantiate his claim. Text messages were obtained from AT&T and Verizon by subpoena. The text records in evidence purport to be a full dump of text messages between Claimant and Employer from September 23, 2018 forward. These records fail to show that Employer received any text regarding the subject accident from Claimant at or around the time he claimed to have sent it. Claimant has since changed his story to assert that the notification was delivered in the course of a phone call to Employer on or about November 13, 2018. Employer denies receipt of such a phone call. Claimant's employment ended January 16, 2019. Employer acknowledges that he first received notice of the subject accident on February 22, 2019, via text message, in which Claimant described an incident with a ladder and announced his intention to pursue a claim for workers' compensation.

24. Claimant prepared a Form 1 which he dated February 27, 2018 [sic, he clearly meant 2019]. In it he states the ladder accident occurred December 20, 2018 and that Employer was notified the same day. On March 15, 2019, Claimant signed a Complaint, again alleging an

accident date of December 20, 2018. There is no daily timesheet showing that Claimant worked at all on December 20, 2018.

DISCUSSION AND FURTHER FINDINGS OF FACT

25. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998). A witness's credibility is judged as either observational or substantive. *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 331, 179 P.3d 288, 294 (2008). *See also Moore v. Moore*, 152 Idaho 245, 269 P.3d 802, (2011). Observational credibility requires the Commission to be present for the hearing, but substantive credibility may be judged on inaccuracies or conflicting facts of record. *Id*.

26. Entitlement to workers' compensation benefits is dependent on the existence of an injury, causally related to an accident. *See* I.C. § 72-102(18). Idaho Code § 72-102(18) provides, inter alia,

> (a) "Injury" means a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law.

> (b) "Accident" means 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.

The Claimant bears the burden of proving both the occurrence of the event and the relationship between the event and the injury for which benefits are sought. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995). A claimant may fail to meet this burden where testimony is inherently contradictory, and deemed not credible. *See Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003),

27. In *Painter*, the Court treated an injured worker's burden of proof under facts bearing some similarity to those at bar. Painter had a long history of low back problems, starting with a 1971 work accident. He suffered from progressive low back pain worsening in the three years prior to September 1997. There was some evidence that in early September, Painter was upset about what he perceived as a workplace demotion. On September 15-16, 1997, Painter allegedly experienced the sudden and severe onset of back pain while lifting heavy parts. The lifting incidents were unwitnessed. Painter filed no accident report, even though he knew this was expected of him, and later gave conflicting statements about the timing of the alleged incidents. Painter made notations on his personal calendar about the events, but told no one. Thereafter, he sought medical care on numerous occasions for his low back, but failed to tell his medical providers that he related his discomfort to the events of mid-September. Claimant asked to reopen his 1971 claim. When this request was denied, he attempted to process his medical bills through his nonoccupational health insurance. It was not until December 19, 1997 that Painter filed claims for the accidents of September 15 and 16 of 1997. At hearing, the Commission found that the alleged events of September 15 and 16, if proven, were sufficient to constitute accidents under the

provisions of I.C. § 72-102. However, because Painter's testimony was inherently contradictory, and therefore not credible, he could not meet his burden of proving that the accidents occurred as alleged. On appeal, the Court noted that it is Claimant who bears the burden of proving the occurrence of the accident, and that the proof in this case consisted almost entirely of Painter's testimony that the accident occurred as he alleged. Therefore, the determination to be made was whether Painter could be believed. The Court found that substantial and competent evidence supported the Commission's determination that Painter could not be believed. The inquiry did not stop there, however. Because the Commission did not hear the case, the Court next considered the question of whether the Commission was competent to make a judgment about Painter's credibility. Credibility determinations are either observational (requiring the Commission's eyes-on evaluation of a witness's testimony), or substantive (a judgment based on the grounds of numerous inaccuracies or conflicting facts, and not dependent on observation of the witness's testimony). In *Painter*, the Commission's judgment was based on numerous internal inconsistencies/conflicts presented by Painter's testimony. The Commission's credibility determination was therefore upheld.

28. Here, the Claimant has made conflicting statements about when the accident occurred. In his Form 1 and in his complaint, he alleged that his accident occurred on December 20, 2018. However, at the hearing he maintained that the accident occurred on November 13, 2018. He maintains that the November 13 accident occurred while working on, or installing, "mini-splits" at the "Kinney" site, yet other persuasive evidence shows that Employer had no such work scheduled at that location on that date. Claimant initially stated that he notified Employer of the accident by text message, yet when the records failed to bear this out, he changed his story, stating that he gave notice via a telephone call with Employer. Though afforded multiple opportunities to

describe his injuries and the circumstances of his accident to his medical providers, it was not until March 16, 2019 that a medical record reflects a reference to the subject accident.

29. This matter was originally heard by Referee Brian Harper, who recused himself following hearing. The matter was then subsequently assigned to Referee Donohue, who has submitted a proposed decision to the commission for review. We have declined to adopt the same, yet come to the same ultimate conclusion based on our assessment of Claimant's credibility. As in *Painter*, Claimant's ability to prove his case rests on our acceptance of his testimony. There are simply too many internal inconsistencies in Claimant's testimony, and too many conflicts between that testimony and other persuasive evidence, to allow us to give credence to Claimant's current insistence concerning the occurrence of the alleged accident. From this we conclude that Claimant has failed to prove the occurrence of the alleged accident. We need not address the other issues raised by the parties.

CONCLUSIONS OF LAW AND ORDER

1. Claimant failed to establish by a preponderance of the evidence that a compensable accident causing injury occurred;

2. All other issues are moot

3. The matter is dismissed.

Pursuant to Idaho Code § 72-218, this decision is final and conclusive as to all matters adjudicated.

DATED this ____30th_____ day of March, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Monroe

Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the _____30th_____ day of _____March_____, 2020, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail and email service as specified below upon each of the following:

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