BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JARED D. LEACH, Claimant, v. ACCOMPLISH MOVING, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2016-015137** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed November 8, 2019**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Coeur d'Alene on May 2, 2019. Reed Larsen represented Claimant. Steven Fuller represented Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on September 11, 2019 and is ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order.

ISSUES

The issues to be decided according to the Notice of Hearing are:

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

2. Whether Claimant suffered a personal injury arising out of and in the course of employment;

3. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;

4. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

5. Whether Claimant is medically stable, and if so, the date thereof;

6. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;

7. Whether Claimant is entitled to benefits for permanent partial impairment (PPI) and the extent thereof;

8. Whether Claimant is entitled to permanent partial disability (PPD) benefits, and the extent thereof.

At hearing, the parties stipulated to reserve issues of medical stability, TPD/TTD, PPI, and PPD. Tr., 186. The parties stipulated to the issue of Claimant's entitlement to mileage reimbursement for traveling from Pocatello to Coeur d'Alene for the hearing.

CONTENTIONS OF THE PARTIES

Claimant contends he was injured on June 6, 2015 while moving a heavy antique gasoline pump in the course of Ms. Kloos' residential move. He claims that he felt immediate pain in his neck and right shoulder when single-handedly unloading the pump from a moving truck. The dolly shifted, struck his shoulder, and dropped him to one knee. Claimant asserts that he was in obvious distress and promptly reported the event to Employer and requested medical care, but Employer refused. On June 13, 2015, Employer fired Claimant and evicted Claimant from his basement rental. About 90 days later, Claimant moved to Pocatello. Claimant frequently complained of symptoms of his industrial injury while incarcerated in the Bannock County Jail. Claimant filed a First Report of Injury on June 2, 2016. Claimant argues that

Employer's failure to file a First Report of Injury tolls the statute of limitation, and that the five-year statute of limitation applies due to Surety's voluntary payment of a medical bill. Claimant still needs medical care and requests mileage reimbursement for his travel from his Pocatello residence to attend the Coeur d'Alene hearing. Claimant's history of drug use and mental health issues should not be used to discredit his testimony of a work accident and injury.

Employer and Surety counter that Claimant's testimony is inconsistent, uncorroborated, and not credible. The Kloos' residential move occurred on May 6, 2015. Thus, Claimant never gave written notice of his alleged injury within 60 days, and his claim should be dismissed pursuant to Idaho Code § 72-701. Further, Claimant cannot show that Defendants were not prejudiced by his untimely notice. Because the one-year statute of limitation had already lapsed, Surety's mistaken payment of a June 18, 2016 medical expense does not revive Claimant's late notice and filing.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, of coworker Jonathan Christmann, of customer Toddy Kloos, of Employer's owner Hananiah Beggerly, and of Claimant's co-worker and owner's brother John Beggerly;

2. Joint exhibits A through L;

3. Claimant's exhibits 1 through 12; and

4. Post-hearing deposition of Robert Friedman, M.D.

Claimant's Exhibit 12, selected portions of text messages, are without date, context, or foundation. They were identified as hearsay at hearing and have not been shown to be admissible. Defendants' objection is Sustained. Exhibit 12 receives no weight. Defendants' Motion to Strike Exhibit 12 is Granted.

FINDINGS OF FACT

1. The parties vigorously dispute whether Claimant suffered an accident and injury in the course of his employment. Claimant, 43 years old and 6'3" at the time of hearing, alleges that on June 5, 2015, he injured his shoulder while unloading a heavy and unwieldy 14-foot antique gasoline pump from a 17-foot moving truck by himself; Claimant's assertions will be discussed in detail below. Tr., 15, 20.

2. Hananiah "Han" Beggerly owns and runs Accomplish Moving in Coeur d'Alene. *Id*. at 154. Mr. Beggerly testified that he and Claimant are small town acquaintances from Bonners Ferry. *Id*. at 159. Claimant had moved to Coeur d'Alene to escape from life stresses in Pocatello, and Mr. Beggerly hired him in the Spring of 2014. *Id*. at 18-19. Claimant's job duties consisted of loading, unloading, and driving moving trucks. *Id*. at 19-20. Toddy Kloos contacted Accomplish Moving about moving her personal property to a new residence. *Id*. at 124. Ms. Kloos is a realtor for Keller Williams, and has a background in the mortgage industry and teaching junior high. *Id*. at 125. Ms. Kloos was particularly concerned about safely transporting her antique gas pump. *Id*. at 128. Mr. Beggerly had helped Ms. Kloos move before, and was familiar with the antique gas pump; he assigned Claimant and Jonathan Christmann to the job. *Id*. at 125-126.

3. It took both Claimant and Mr. Christmann to load and secure the antique gas pump into the moving truck.

> . . . [the antique gas pump] was pretty big and pretty heavy. And the problem is you really couldn't get your hands around it. It was too big, too heavy, and when you put it on a dolly it was top heavy. So it would constantly try to flip off the dolly is what it would do.
>
> *Id*. at 24.

Due to its substantial height and weight, Claimant doubted whether or not he and his co-worker could successfully move the antique gas pump. *Id*. at 25. Claimant described the gas pump as being 14 feet tall. *Id*. at 94. However, Claimant and Mr. Christmann loaded the antique pump without incident. *Id*. Prior to unloading the pump, Claimant testified that he phoned Employer twice for additional assistance, because his co-worker, Mr. Christmann, refused to help him unload out of fear of injury. *Id*. at 25-27, 61. Because Employer refused to send help, Claimant testified that he was forced to move the pump on his own. *Id*. at 25. Claimant alleges that the load of the antique gas pump shifted while he was moving the item on a dolly down the steep truck ramp, almost crushing him underneath its weight, and causing severe injuries. *Id*. at 26. Claimant claims that he could not continue lifting after the pump incident, and that he notified Employer that evening of his injury. *Id*. at 30. Claimant later clarified that he assisted with lifting a mattress after the pump incident. *Id*. at 68.

4. Mr. Christmann described the gas pump about about eight or nine feet tall and extremely heavy. *Id*. at 104. Mr. Christmann agreed that he did not assist in unloading the gas pump. *Id*. at 106-108. However, Mr. Christmann denied refusing a request for help. He testified that he received no such request, as he was inside the house with Ms. Kloos when Claimant unloaded the gas pump. *Id*. Claimant explained later in his testimony that Mr. Christmann did not refuse to help.

> Q. Did Mr. Christmann refuse to help you with the movement of the gas pump?
>
> A. He didn't really refuse. He tried to help but in some areas they—that can be almost worse if someone—when you have something on a dolly . . .
>
> Q. Really, I'm just—I'm just asking you a simple question. Did he refuse to help you with it?

A. Kind of. He was scared of it. He didn't want to get injured.

Id. at 84-85.

Mr. Christmann reported that Claimant told him he injured his shoulder and that he was struggling to complete his duties. *Id*. at 108-109.

5. Ms. Kloos testified that her warranty deed was signed on April 28, 2015, and recorded on May 1, 2015. *Id*. at 127. She testified that she moved on or around May 6, 2015. *Id*. at 128. Employer also recalled that the move took place on May 6, 2015. *Id*. at 161. Ms. Kloos did not personally observe any accident or untoward event during the loading of the pump. *Id*. at 129. She testified that she observed Claimant unload the gas pump with a dolly, but did not observe any indication of pain or injury at that time. *Id*. at 130. Ms. Kloos denied that Claimant told her about any accident or injury. *Id*. at 130-131, 133. Ms. Kloos claimed that she kept a watchful eye on Claimant because he did not seem trustworthy. *Id*. at 141-142.

6. Claimant testified that he told Employer he needed medical care, but Employer dismissed his complaints, threatened his job, and responded that he did not have insurance. *Id*. at 31, 48. Claimant feared getting in trouble with probation. *Id*. at 31. Employer denied receiving any indication of accident or injury prior to June 2016. HB Dep., 14. Employer also denied discussing insurance with Claimant, and affirmed that he has carried worker's compensation insurance, which was continuously effective around the alleged date of this accident. *Id*. at 15-16, 35-36.

7. Notwithstanding the alleged accident, Claimant testified that he continued to work for Employer. Tr., 32. Employer fired Mr. Christmann shortly after the Kloos' residential move, and assigned his brother, John Beggerly, to work with Claimant. *Id*. at 54-55; 146. Employer

indicated that Mr. Christmann was terminated around May 9, 2015. *Id*. at 111-112. Employer denied paying Mr. Christmann under the table, and reported Mr. Christmann to the police because he felt threatened. *Id*. at 164. At hearing, Claimant retreated from his claim that Mr. Christmann was fired for doing heroin. *Id*. at 81-82. Mr. Christmann testified that he was terminated for being late. *Id*. at 103. John Beggerly worked with Claimant for about a week without incident. *Id*. at 148. John Beggerly assessed Claimant's work to be adequate. *Id*. at 149; JB Dep., 8-9. Claimant testified that he repeatedly told John that he had hurt himself in the Kloos move, and that he believed John relayed this information to Employer—a claim that Employer and Mr. Beggerly both deny. JB Dep, 8; Dep., 35-36. Claimant did not seek medical treatment immediately after the accident.

8. It is undisputed that Claimant was fired on June 13, 2015. Tr., 32-33. June 13, 2015, is more than a "couple of days" after the Kloos' move. *Id*. at 32-33. In deposition, when confronted with the inconsistency about working only a "couple of days" between the accident and termination, Claimant newly alleged that Employer had given him time off because he was hurting. D. Exh. J, 63/23-64/17. He then interjected a vague paycheck issue which somehow resolves this discrepancy in his mind. *Id*. When pressed for additional details or dates of events following the incident, Claimant frequently blamed stress for making it difficult to recall specific details. Tr., 63, 69. Claimant's employment separation was acrimonious and contemporaneous with Claimant's eviction from Employer's basement rental. *Id*. at 32-33. Employer received a threatening message after Claimant's termination on a company logo hoodie sweatshirt, which Employer believed that Claimant owned. *Id*. at 65-66. Claimant denied leaving the threatening message and insisted that the police did not believe he was responsible. *Id.* Claimant filed for

unemployment benefits and was denied. *Id*. at 172. He described the unemployment proceedings as biased in favor of Employer. He did not mention he suffered an injury during the unemployment proceedings. *Id*. at 63, 76-77, 172.

9. On the weekend after July 23, 2015, Claimant volunteered to help a friend move "large furniture pieces." Tr., 73-74; D. Exh I, 1. Claimant downplayed the demands of this moving job when he described it as more of "just sliding things around the concrete and moving painting." Tr., 74.

10. Without regular employment or housing in Coeur d'Alene, Claimant sought a change of scenery and moved to Pocatello. *Id*. at 17. Claimant acknowledged suffering from serious mental health issues and periods of self-medication, which he believes are precipitated by stress. *Id*. at 16-17. He opaquely described that his move to Pocatello upset people and caused him to be jailed for several months, although he later acknowledged he was in jail on charges of possession of a controlled substance with intent to distribute and possession of paraphernalia and had violated the terms of his probation. *Id*. at 18, 58-59. The possession charges were dismissed; Claimant pled guilty to a charge of possession of paraphernalia. *Id*. at 58-59. Claimant asserted that he reported his work-related injuries during his incarceration but was refused medical treatment in prison. *Id*. at 74-75.

11. Medical records show Claimant did not receive any medical treatment from May 2015 until May 31, 2016 when he visited Portneuf Medical Center claiming suicidal ideation. D. Exh. C. Claimant was admitted as a suicide risk at Portneuf Medical Center from May 31 to June 6, 2006. *Id*. Claimant did not report neck, shoulder, or upper extremity issues, and his neurologic signs were normal. *Id*. Claimant did not mention a work accident or injury

during the intake interview. *Id*.

12. On June 2, 2016, Claimant reported an alleged June 5, 2015 accident and injury to his right rotator cuff to social worker Judith Deffinger. D. Exh. C, 194. She noted that Claimant reported that he was working at a moving company and "states he now has a damaged R rotator cuff." *Id*. The medical records do not contain any other reference to an industrial accident and injury or to shoulder symptoms. D. Exh. C. No physician mentioned or corroborated Claimant's alleged industrial accident and injury or documented pain behavior related to an industrial accident or injury. *Id*. While at the hospital, Claimant requested a referral to assist with a social security disability application. *Id*. at 192. Per social worker Judith Deffinger, Claimant's ACT team worker believed that Claimant was "entirely able to work, just doesn't want to and said that the Judge was prompting [Claimant] to get out and get a job." *Id*.

13. While still an inpatient at Portneuf, on June 2, 2016, Claimant filed a First Report of Injury against Employer. D. Exh. A. Employer testified that June 2, 2016 was the first notice of a work accident. Tr., 38.

14. On June 18, 2016, Claimant sought medical care from Physicians Immediate Care Center. D. Exh. D, 1. Claimant reported that he injured his shoulder moving an old gas pump one year ago, and had been unable to work since the accident. *Id*. This represents the first actual medical report of a right shoulder condition. Nurse Michelle Clegg recommended an MRI. D. Exh. D, 4. Surety refused to authorize an MRI because it had just begun its investigation and because of the one-year delay of notice of injury. *Id*. Claimant's private insurance required him to attend physical therapy for 6-8 weeks before it would authorize an MRI. *Id*. On July 28, 2016, Claimant began physical therapy. Exh. D, 9.

15. On September 16, 2016, Claimant visited Physicians Immediate Care Center following an allegedly work-related accident and injury to his right foot earlier that day. Exh. D, 10. Claimant's right foot condition resolved by November 10, 2016. *Id*.

16. On May 5, 2017, Tanner Mitton, PA-C for Greg Ford, M.D. examined Claimant. D. Exh. H, 1. PA-C Mitton reviewed shoulder and neck X-rays and found no fracture, dislocation, or mal-alignment. *Id*. at 4. He treated Claimant on follow-up visits for tendonitis which, upon additional subjective complaints from Claimant, was changed to cervicalgia with radiculopathy in the cervical region. *Id*. at 18-12.

17. On May 12, 2017, Matthew Williamson, M.D., reviewed Claimant's shoulder MRI, and found that it showed mild infraspinatus tendinopathy without any tears, minor fraying of the labrum, and mild osteoarthritis in the AC joint. D. Exh. C, 218. Dr. Williamson did not identify any acute injury relevant to the degenerative findings. *Id*.

18. On May 26, 2017, Steven Larsen, M.D., reviewed Claimant's C-spine MRI, finding that Claimant had spondylolisthesis at C5-6-7, stenosis, and other degeneration at C5-6-7-T1, most notably at C5-6. D. Exh. 207-208.

19. On June 2, 2017, Claimant returned to Portneuf to complain of right shoulder pain. D. Exh. C, 223.

20. On January 12, 2018, Karen Dickerson, PA-C recommended Claimant limit work to under 25 hours per week, 4-5 hours per day, for mental health concerns. C. Exh. 9.

21. Claimant is currently working part-time for Ted Bassett. Tr., 79. He testified that he experiences neck pain if he is works too hard. *Id*. at 79-80. When asked about what his job duties entailed, Claimant offered that Mr. Bassett owns Bassett Building but that he does "all

sorts of stuff," without actually explaining his specific job responsibilities. *Id*. at 80.

Prior Medical Care

22. From May 25 through June 6, 2013, Claimant self-admitted as an inpatient at Portneuf Medical Center's psychiatric unit claiming suicidal/homicidal ideation. C. Ex., 8, 2. Claimant reported some major life stresses related to conflict with his ex-wife. *Id*. at 14. Medical records for this treatment are replete with examples of highly improbable and frankly inconsistent statements, i.e., he claimed he had been offered $65.00 per hour to work construction, but declined it. *Id*. at 17. (His testimony shows he never earned more that $17.00 per hour.) Claimant claimed that his ex-wife had him arrested for domestic violence and then was responsible for Child Protective Service's decision to take custody of his children from him because she had been caught flushing drugs down a toilet. *Id*. at 14. Claimant denied any history of problems with alcohol or illicit drug use, but then later admitted to illicit drug use. *Id*. at 8. He claimed he bought methamphetamine to "help[] the local police take down a drug cartel." *Id*. at 16.

Credibility

23. The Referee found Claimant did not have observational or substantive credibility. The Referee described Claimant's testimony as euphemistic, evasive, and inconsistent. Only Referee Donohue was in the position to make a judgment concerning Claimant's "observational" credibility. Since the Commission did not have the opportunity to observe Claimant's demeanor at hearing, it is only empowered to make a judgment concerning Claimants "substantive credibility. *Stevens-McAtee v. Potlatch Corp.*, 1345 Idaho 325, 179 P.3d 288 (2008). Here, the record is filled with conflicting facts and internal inconsistencies that render Claimant's

testimony unpersuasive and unreliable. When faced with unflattering facts about his probation violation and criminal charges, Claimant gave indirect answers. Concerning mental health court, Claimant testified that he "actually went through the program with no sanctions whatsoever" when that was not the case. Claimant minimized his personal responsibility in his legal troubles when he explained that he pled guilty to possession of paraphernalia not because he had committed any wrongdoing, but based on legal advice and to protect his wife, who had been implicated. While Claimant's charge of drug possession was dismissed, Claimant has admitted to illegal drug possession and usage. Claimant gave inconsistent statements about his methamphetamine use to his physicians, and has significant mental health challenges that are not served by his self-medication. Claimant's incomplete descriptions of unflattering events do not lend credence to his testimony, because it shows a self-serving tendency to avoid unfavorable facts. In this case, Claimant's description of the alleged accident was internally inconsistent and improbable. For example, Claimant testified that the size and width of the antique gas pump required multiple people to move, such that Claimant requested a third man to help load and unload the gas pump during phone calls to Employer, which Employer denied. While the Referee agreed with Claimant that Employer would have considered the calls to be memorable, he considered it more likely that the phone calls never occurred than that Employer was lying about receiving them. Notwithstanding the challenges of the antique gas pump's size, Claimant testified that he lifted the unloaded the gas pump by himself. The Commission cannot square these assertions with his insistence that moving the gas pump was nearly impossible with two people with his ability to move the antique gas pump by himself. Claimant also did not discuss his work injury in the contested unemployment proceedings, and did not seek medical care for

over a year after his alleged accident.

24. The Referee did not find Mr. Christmann to be a credible witness. The Referee described him as evasive, misleading, and vindictive to Employer. The Referee felt that Mr. Christmann sacrificed factual accuracy to be viewed in a more favorable light. Again, the Commission will not disturb the Referee's observational findings in this regard. Given his termination, Mr. Christmann could be expected to be less supportive of Employer's interests. Substantively, the central issue is whether the alleged accident occurred, and Mr. Christmann did not corroborate Claimant's version of events. Claimant testified with specificity that Mr. Christmann refused to help him move the antique pump; Mr. Christmann denies this occurred. Mr. Christmann also testified that Claimant was able to move the pump by himself, unwitnessed by Mr. Christmann, which does not support Claimant's assertions that he interrupted the moving process to ask Employer for additional help, or that Mr. Christmann refused because he was too scared to help.

25. The Referee found Han and John Beggerly and Ms. Kloos to be credible. Again, the Commission will not disturb the Referee's observational findings. After reviewing the substantive testimony, the Commission agrees with the Referee's finding that their testimony was reasonably consistent. Ms. Kloos' testimony about the date of the alleged accident was persuasive. She testified that her warranty deed was signed on April 28, 2015, and recorded on May 1, 2015, and that she moved on or around May 6, 2015. Tr., 127-128.

DISCUSSION AND FURTHER FINDINGS

26. 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 Section 72-102(17).

27. 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). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

28. The provisions of the 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).

29. After reviewing the evidence in this case, the Commissions finds that Claimant

has not satisfied his burden of proving that he suffered an injury caused by an accident arising out of and in the course of his employment. Claimant's history of the incident was inconsistent and not contemporaneously corroborated with any medical documentation or his unemployment proceedings. Claimant's version of events was not corroborated by his most supportive witness, Mr. Christmann, and contains contradictions too numerous to reconcile. In addition, the credible testimony of Employer, Employer's brother, who worked with Claimant, and Ms. Kloos, does not support Claimant's allegations that he suffered an accident and injury during the Kloos' residential move.

Notice and Claim Limitations

30. Even if Claimant had proven that he suffered an accident and injury arising out of the course of his employment, Claimant must still comply with the requirements of Idaho Code § 72-701.

Idaho Code § 72-701

Idaho Code § 72-701 provides, in pertinent part:

> No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident…

Notice requirement. Idaho Code § 72-702 requires that the notice must be in writing. However, strict compliance with the requirements of Idaho Code §§ 72-701 and 702 may be excused in certain circumstances. Idaho Code § 72-704 provides:

> SUFFICIENCY OF NOTICE — KNOWLEDGE OF EMPLOYER. A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. Want of notice or delay in

> giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice.

31. *Written notice.* Claimant did not provide Employer with written notice of his industrial accident. Therefore, he must establish either that Employer had actual knowledge within the time limit, or that the delayed notice did not prejudice Employer.

32. *Actual knowledge.* As detailed, above, Claimant was unable to persuade the Commission, over the weight of the evidence in the record, that he reported his injury to his supervisor within the prescribed 60 days. Similarly, the Commission finds it unlikely that Employer had actual knowledge of a shoulder injury within 60 days. The testimony of Employer that he did not know of Claimant's claim until or about June 2016, is credible. Further, Claimant's testimony that Employer was aware of the alleged accident is not supported by the record and is insufficient, standing alone, to establish that Employer was aware of the accident.

33. As a result, the Commission finds Employer did not have actual knowledge of Claimant's relevant industrial accidents.

34. *Prejudice to employer.* In order to excuse lack of timely notice, written or actual, Claimant must affirmatively prove that Employer was not prejudiced by the lack of timely notice. *Jackson v. JST Manufacturing,* 142 Idaho 836, 136 P.3d 307 (2006). Proof that the employer would not have done anything differently, or that the medical treatment would have been the same had timely notice been provided, is not dispositive. *Kennedy v. Evergreen Logging Co.,* 97 Idaho 270, 272, 543 P.2d 495, 497 (1975); *Dick v. Amalgamated Sugar Co.,* 100 Idaho 742, 744, 605 P.2d 506, 508 (1980).

35. The Commission has previously acknowledged, in a similar case, that the claimant bears a difficult burden to prove a negative when compelled to establish that an employer was not prejudiced. *Mora v. Pheasant Ridge Development, Inc.*, 2008 IIC 0548. In that case, the Commission held that the claimant failed to prove his employer was not prejudiced by a 5-month reporting delay because, notwithstanding that there was arguable proof of prejudice, the claimant actually lost because he adduced no affirmative evidence establishing that employer was not prejudiced. *Id.* The Commission noted that 1) employer was unable to timely investigate the validity of the claim, 2) the delay "arguably hampered Defendant's ability to provide reasonable medical treatment", and 3) claimant's ability to work may have been compromised during the delay, by an intervening incident or otherwise, potentially exposing Defendant to greater liability. *Id.*

36. Again, the Commission is persuaded by the credible testimony of Ms. Kloos that the residential move occurred around May 6, 2015. Tr., 127-128. She verified her house closing dates, and testified that the move happened shortly after that time. *Id*. Employer was on notice of Claimant's industrial injury as of late June 2016. Therefore, Claimant's report was at least 365 days late.

37. The Claimant in this case finds himself in a difficult position similar to the claimant in *Mora*. Employer was unable to investigate the validity of the claim until over a year after the claimed workplace accident. Employer would have had the opportunity to obtain more accurate and complete material information, had it been able to investigate sooner.

38. In addition, Claimant's reporting delay may have hampered Employer's ability to provide reasonable medical treatment. The medical evidence is Claimant's physical condition

was not evaluated until over a year after his alleged industrial accident. Although it is possible that Claimant's pathology could be the result of heavy lifting of an antique gas pump, it is insufficient to meet Claimant's burden of proving that his condition was not permanently worsened by his failure to report his accident or, ultimately, that Employer was not prejudiced in this regard.

39. In addition, Claimant's ability to work may have been compromised by other intervening causes during the delay. The possibility that some non-occupational cause may have intervened to exacerbate or even create the condition for which Claimant seeks benefits during this year-plus-long delay cannot be ruled out because Employer did not have the opportunity to make a "baseline" assessment of Claimant's injuries during the statutory period. Many speculations are possible about how Employer may have been prejudiced by Claimant's inaction. However, such speculation is inapposite to the issue before us: Claimant has the burden of proving lack of prejudice and this he failed to do. Surety's inadvertent payment of a medical bill in July 2016 does not restart the one-year statute of limitation nor convert this case to a five-year state of limitation case.

40. The Commission finds that Claimant has failed to prove by a preponderance of evidence that Employer was not prejudiced by his year delay in reporting his industrial accidents.

41. Claimant has failed to meet his burden of proving that he provided notice of his alleged workplace accident and injury as required by Idaho Code § 72-701. His Complaint should be dismissed.

Mileage for Hearing

42. The pleadings on file with the Commission reflect that on or about October 26,

2018, Defendants filed their Request for Hearing in which they requested, *inter alia*, that the hearing of this matter be set for Coeur d'Alene, Idaho. In his response, filed November 2, 2018, Claimant requested that the hearing be set in Pocatello, where he then-resided. Referee Powers held a telephone conference on December 3, 2018, to discuss the request for hearing and Claimant's response. The fragmentary notes kept by Referee Powers of that telephone conference reflect that the location of the hearing was amongst the issues discussed.

43. By Order dated December 5, 2018, the hearing was set for May 2, 2019, to be held in Coeur d'Alene. Thereafter, Claimant requested the addition of an additional issue for hearing, i.e. whether, pursuant to Idaho Code § 72-714(2) he should be reimbursed the reasonable cost of travel to and from the Coeur d'Alene hearing. This issue was added by Order dated January 7, 2019. Idaho Code § 72-714 provides, in pertinent part:

> 72-714(1) HEARINGS, WHERE AND HOW CONDUCTED. (1) The hearing may be held in the city or town or within the county where the injury or disease occurred, or in such other place as the commission deems most convenient for the parties and most appropriate for ascertaining their rights.
>
> 72-714(2) If the place of hearing claimant's testimony is outside the county and the claimant's presence is deemed necessary, the commission shall cause or required to be paid to the claimant a reasonable sum to reimburse him for his travel expense, unless otherwise agreed by the parties.

As noted, Claimant currently resides in Pocatello. He alleges that he is entitled to be reimbursed for his reasonable expenses associated with travel to and from the Coeur d'Alene hearing. The provisions of Idaho Code § 72-714(1) anticipate that the default location for hearing is the city, town, or county in which the injury occurred. However, the hearing may be held in such other place as may be most convenient for the parties. It is reasonable to surmise that at the December 3, 2018 telephone conference, the parties, and the Referee, discussed the most convenient place

to hold the hearing. Referee Powers knew, of course, that both Claimant and his attorney resided in Pocatello, and that it would be most convenient for them to hold the hearing in Pocatello. The Referee was also evidently made aware that Defendants intended to call certain witnesses who resided in the Coeur d'Alene area. These included Jonathan Christmann, Toddy Kloos, and Hananiah Beggerly and John Beggerly. The Referee must have reasoned that, on balance, the convenience of the parties would best be served by holding the hearing in Coeur d'Alene. The Commission cannot conclude that this decision was erroneous. Certainly, more expense would have been incurred in the cost associated with the travel of the four defense witnesses to Pocatello than the travel of Claimant and his attorney to Coeur d'Alene. These practical considerations made Coeur d'Alene the most sensible venue for hearing.

44. The Commission next considers whether Claimant is entitled to reimbursement for his reasonable travel expenses per Idaho Code § 72-714(2). In interpreting this statute:

> "[The Commission's] objective when interpreting a statute is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the statute's plain language. This Court considers the statute as a whole, and gives words their plain, usual, and ordinary meanings. When the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect, and we do not need to go beyond the statute's plain language to consider other rules of statutory construction.

Salinas v. Bridgeview Estates 162 Idaho 91, 93, 394 P.3d 793, 795 (2017) (citing *State v. Taylor*, 160 Idaho 381, 385, 373 P.3d 699, 703 (2016). As noted, Idaho Code 72-714(2) specifies that if the place of hearing is "outside the county" and if Claimant's attendance is deemed necessary, Claimant's travel expenses shall be paid by Defendants. The issue is the identity of the "county" that is referenced in this subsection. Claimant contends that the "county" referred to is the county in which he resided at the time of hearing, while Defendants contend that reading Idaho

Code § 72-714(2) in conjunction with subsection (1) of the statute yields the conclusion that "county" as used in subsection (2) refers to "the county where the injury or disease occurred," as used in subsection (1). Indeed, Defendants' is a plausible construction. Reading Idaho Code § 72-714(2) in a vacuum leaves the reader unable to understand which of several counties might have been intended. However, the subsection cannot be read in a vacuum and must be construed with Idaho Code § 72-714(1), which sets the default place of hearing as the county in which the injury occurred, subject to being moved to such other place as is most convenient to the parties. Quite possibly in using "county" as it did in Idaho Code § 72-714(2), the legislature meant to refer back to Idaho Code § 72-714(1), where the "county" is the one in which the accident occurred.

45. Idaho Code § 72-714(2) has been treated by the Commission on only two occasions. In *Groesbeck v. Randy Bunn*, d/b/a *Mountain Maid Service*, 1984 IIC 0116 (February 1984) claimant was employed in McCall and McCall was the place of injury. The decision also strongly suggests that McCall was claimant's place of residence at the time of her industrial injury. However, at some point after her injury she moved to Coeur d'Alene. The hearing, which claimant attended, was held in Boise. As part of her claim she sought reimbursement for travel and other expenses she incurred in connection with her attendance at the hearing. Regarding Idaho Code § 72-714, the Commission paraphrased its provisions as follows:

> Section 72-714, Idaho Code, provides that ordinarily a hearing is held in the city or town or within the county where the injury occurred, but that it may be held in such other place as the Commission deems most convenient for the parties and most appropriate for ascertaining their rights. The section also provides that if the place of hearing is outside the county where the injury occurred and the claimant's presence is necessary, the Commission shall cause or require to be paid to the claimant a reasonable sum as reimbursement for travel expenses.

The problem with the Commission's treatment of the statute is that it erroneously paraphrased the statutory language. Subsection (2) does not state that "county" means the county where the injury occurred.[1] In *McIntyre v. Total Textile Mills*, 1986 IIC 0382 (July 1986) claimant resided in Moscow, and her industrial accident incurred while working for her employer in Moscow. Hearing on the matter was held in Lewiston. Citing Idaho Code § 72-714(2), the Commission found that claimant was entitled to reimbursement for the expenses of travel she incurred in traveling to Lewiston for the hearing. The case is not particularly instructive since claimant would have been entitled to reimbursement for travel expenses under either of the constructions under consideration; the place of hearing was both outside the county in which the injury occurred and outside the county in which claimant resided.

46. Idaho Code § 72-714 was added to the statutory scheme as part of the 1971 recodification. It has not been amended since. The 1971 recodification was the product of a comprehensive review of the Idaho Workers' Compensation Laws undertaken at the direction of the legislature. As part of that process, Judge E.B. Smith was asked to undertake a study comparing the Model Act to Idaho's then-current workers' compensation laws, and make recommendations as to whether the Model Act should be adopted by Idaho. An early draft of the proposed Title 72 dated April 7, 1970 contained the following version of Idaho Code § 72-714:

> SECTION 72-714. HEARINGS, WHERE AND HOW CONDUCTED. - - (a) The hearing may be held in the city or town or within the county where the accident occurred, or in such other place as the commission deems most convenient for the parties and most appropriate for ascertaining their rights.
> (b) The commission or member thereof, or a hearing officer, referee or examiner, to whom the matter has been assigned, shall make such inquiries and investigations as may be deemed necessary.

[1] However, as discussed in footnote 3, *infra*, Commissioner Sirhall's participation in the decision may lend some support for the interpretation favored by Defendants.

> (c) In making an inquiry or conducting a hearing, the commission or member thereof or hearing officer, referee, or examiner, shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedures but may make inquiries or conduct the hearing in such manner as best to ascertain the rights of the parties.
> (d) All such hearings shall be open to the public.
> (e) All powers, authority and duties of the commission in respect to hearings and adjudication shall apply to a member, hearing officer, referee or examiner.
> (f) The authority of the commission, or of a member, hearing officer, referee or examiner, shall include the right to enter premises at any reasonable time where any injury or death has occurred and to make such examination of any tool, appliance, process, machinery or environmental or other condition as may be relevant to a determination of the cause and circumstances of the injury or death.

Disputes over the proposed draft of Title 72 proved intractable, leading the legislative committee to appoint a special subcommittee to work towards resolution of disputed issues. This subcommittee included Judge E.B. Smith, Sam Kaufman, George Greenfield, Larry Sirhall, Glen Coughlan, and Dick Dailey. Numerous meetings were held, and changes recommended to the April 7, 1970 draft legislation. The undated[2] summary of the changes proposed to the April 7, 1970 draft by the special subcommittee include the following comments on Idaho Code § 72-714:

> Section 72-714(a). Provide for payments of reasonable sums for mileage, subsistence and lodging where hearing is held outside the county where the accident occurred, unless otherwise agreed by claimant and the employer or surety. Strike sub-paragraphs (c), (d) and (e).

Therefore, the special subcommittee clearly recommended that the April 7, 1970 draft of Idaho Code § 72-714 be amended by adding language requiring the payment of Claimant's reasonable expenses of travel where the hearing was held outside the county in which the accident occurred. The special subcommittee also proposed the redaction of Paragraphs (c), (d) and (e). On December 8, 1970, a second draft of Title 72 was proposed. The version of 72-714 proposed by

[2] Probably prepared between October 8 and December 8, 1970.

that draft adopted some, but not all, of the changes recommended by the special subcommittee. The December 8, 1970 draft reads as follows:

> SECTION 72-714. HEARINGS, WHERE AND HOW CONDUCTED. - - (a) The hearing may be held in the city or town or within the county where the accident occurred, or in such other place as the commission deems most convenient for the parties and most appropriate for ascertaining their rights.
> (b) If the place of hearing claimant's testimony is outside the county and the claimant's presence is deemed necessary the commission shall cause or require to be paid to the claimant a reasonable sum to reimburse him for his travel expense, unless otherwise agreed by the parties.
> (c) The commission or member thereof, or a hearing officer, referee or examiner, to whom the matter has been assigned, shall make such inquiries and investigations as may be deemed necessary.
> (d) The authority of the commission, or of a member, hearing officer, referee or examiner, shall include the right to enter premises at any reasonable time where any injury or death has occurred and to make such examination of any tool, appliance, process, machinery or environmental or other condition as may be relevant to a determination of the cause and circumstances of the injury or death.

Notably, the December 8, 1970 draft did not include the provision to pay for claimant's expenses of travel if the place of hearing was outside the county in which the injury occurred. Instead, it merely provided that expenses of travel must be paid if the place of hearing is outside the "county." This same language is carried through to the final version of Idaho Code § 72-714. We do not know whether the failure to adopt the change recommended by the special subcommittee was intentional or accidental. It seems more likely that the failure to identify the county intended was accidental, since the statute, as adopted, fairly begs for further exposition on which of several possible counties was intended; the final draft does not evince a legislative intent to reject the special subcommittee's recommendation, since nothing else is substituted in its place that would demonstrate a legislative intent to identify the intended "county" in some other way. Based on our consideration of the statute as a whole, including both subsections of Idaho Code 72-714, as well as the foregoing discussion of the 1971 recodification, we conclude that Idaho

Code § 72-714(2) should be construed to require defendants to reimburse claimant for his reasonable expenses of travel where claimant's presence at hearing is deemed necessary, and the hearing is held at a place outside the county in which the injury occurred.[3]

CONCLUSIONS OF LAW AND ORDER

1. Claimant failed to show that he suffered an accident and injury arising out of and in the course of his employment.

2. Claimant failed to show it likely that he complied with the notice and claim limitations which are statutory;

3. Claimant has failed to prove he is entitled to mileage and associated travel expenses for attending the hearing.

4. All other issues are moot.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 8th day of __November__, 2019.

INDUSTRIAL COMMISSION

____/s/_____
Thomas P. Baskin, Chairman

____/s/_____
Aaron White, Commissioner

[3] This reading of the statute may also find some support in *Groesbeck, supra*. Larry Sirhall was on the sub-committee that recommended the above quoted change to Idaho Code § 72-714 from the April 1970 proposed draft to the December 1970 proposed draft. Thereafter, Mr. Sirhall served on the Industrial Commission and participated in *Groesbeck*, which interpreted Idaho Code § 72-714(2) to mean the county in which the injury took place; Commissioner Sirhall signed that decision, endorsing that interpretation of Idaho Code § 72-714(2).

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2019, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

REED W. LARSEN
P.O. BOX 4229
POCATELLO, ID 83205-4229

STEVEN R. FULLER
P.O. BOX 191
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_____/s/_____