

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

FILIBERTO SOTELO, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 THE PILLSBURY CO., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 LUMBERMANS MUTUAL CASUALTY )  
 COMPANY, )  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 97-006770  
98-018735**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

Filed: January 19, 2005

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted an emergency hearing in Pocatello, Idaho, on October 28, 2003. Dennis R. Peterson of Idaho Falls represented Claimant. Eric S. Bailey of Boise represented Defendants. At issue in the 2003 hearing was whether Defendants were obligated to pay travel costs incidental to Claimant’s medical care and whether Defendants’ refusal to pay such costs entitled Claimant to an award of attorney’s fees. In an Order dated January 16, 2004, the Commission ordered Defendants to pay Claimant’s incidental travel costs and awarded attorney’s fees incurred in seeking the emergency hearing.

On July 23, 2004, Claimant requested a second emergency hearing. At issue was \$728.80 in unreimbursed costs for medical equipment and travel expenses for Claimant’s

treatment, an issue of whether Claimant's temporary total disability benefits had been wrongfully terminated, and, again, the issue of attorney's fees. The Referee declined to grant Claimant's request for an expedited hearing. The matter came on for regular hearing on September 24, 2004. There were no post-hearing depositions, and by agreement of the parties, concurrent briefs were filed. The matter came under advisement on December 14, 2004 and is now ready for decision.

### **ISSUES**

By agreement of the parties at hearing, the issues to be decided were:

1. Whether and to what extent Claimant is entitled to reimbursement for travel costs related to his ankle fusion;
2. Whether and to what extent Claimant is entitled to additional temporary total disability (TTD) benefits; and
3. Whether Claimant is entitled to attorney's fees pursuant to Idaho Code § 72-804.

Subsequent to the hearing, Defendants reimbursed Claimant \$728.80 for unpaid mileage, meals, and medical equipment. In addition, Defendants paid TTDs from June 15, 2004 through June 20, 2004 and from July 17, 2004 through August 23, 2004. Defendants concede that the delay in reimbursing funds due and owing Claimant for incidental medical expenses was inexcusable and grounds for an award of attorney's fees on that issue.

Therefore, the issues to be decided by the Commission at this time are limited to:

1. Whether Defendants owe additional TTD benefits from June 21, 2004 through July 16, 2004 and from August 24, 2004 until Claimant is released to full duty; and
2. Whether Claimant is entitled to an award of attorney's fees under Idaho Code § 72-804.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that following his release to light-duty by Michael J. Coughlin, M.D., on May 11, 2004, he did not receive a legitimate light-duty work offer, so his refusal to return to his regular work should not have resulted in the termination of his TTD benefits. Claimant further contends that the work restrictions imposed by Dr. Coughlin are still in place, so his entitlement to TTD benefits continues until he is released without restrictions. Claimant asserts that he is entitled to attorney's fees for having to seek a second emergency hearing to obtain the medical reimbursements and income benefits to which he claims entitlement.

Defendants concede they were dilatory in making reimbursement to Claimant for his medical equipment and incidental travel expenses, and that some award of attorney's fees on that issue is appropriate. Defendants dispute Claimant's claim for additional TTD benefits, arguing first that Claimant's current employer (Basic American Foods, a successor in interest to Employer, "BAF") made a legitimate offer of light-duty work that was consistent with the work restrictions imposed on Claimant by Dr. Coughlin. Further, Defendants argue that Claimant reached maximum medical improvement either June 21, 2004 or August 23, 2004 and Defendants' obligation to pay income benefits ceased when Claimant was declared medically stable. Finally, Defendants argue that they should not be assessed attorney's fees for failure to pay TTD benefits they did not owe.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, Mercy Sotelo, Susan L. Pharis, and Kenneth L. Carroll taken at hearing;

2. Claimant's Exhibits 1 through 4, including supplemental pages 7 through 13 of Exhibit 1;

3. The Industrial Commission legal file, including the record of the emergency hearing held in October 2003.

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

### **FINDINGS OF FACT**

#### ***REIMBURSEMENT OF MEDICAL EXPENSES***

1. On January 16, 2004, the Commission ordered Defendants to pay Claimant's medically related incidental travel costs, including mileage, meals and lodging for surgical fusion of his left ankle, and all follow-up on the fusion.

2. Claimant submitted reimbursement requests totaling \$728.80 to Defendants in April and May of 2004. At the hearing September 24, 2004, counsel for Defendants admitted that these reimbursement requests had not yet been paid.

3. On or about October 4, 2004, Defendants issued a check in the amount of \$728.80, reimbursing Claimant for medical expenses, including incidental travel.

#### ***TTDs***

4. Dr. Coughlin performed a left ankle fusion on Claimant on November 19, 2003. On his final follow-up visit May 11, 2004, Dr. Coughlin recommended that Claimant begin some "work hardening" activity. Dr. Coughlin was concerned that returning Claimant to full duty work immediately would be setting Claimant up for a return-to-work failure, so Dr. Coughlin recommended that Claimant work for two hours per day for two weeks, then four hours per day for two weeks, then six hours per day for two weeks. During this "work hardening," Claimant

would be restricted to lifting no more than 20 pounds, stair climbing was limited to getting to and from work, and Claimant was permanently prohibited from using ladders. On May 13, Dr. Coughlin faxed these restrictions to Dan Wolford, the Industrial Commission Rehabilitation Division (ICRD) consultant who was assisting Claimant with return-to-work issues. Copies were also sent to Surety, BAF, Claimant, and Claimant's counsel.

5. Claimant provided his restrictions to Ken Carroll, human resources manager for BAF. Initially, Mr. Carroll advised Claimant that he could not return to work until he had a full release. It was BAF's position that this was Pillsbury's claim and BAF did not wish to take on any liabilities inherent in returning Claimant to work at less than full duty.

6. Dan Wolford contacted BAF sometime thereafter and encouraged BAF to allow Claimant to return to light-duty work on the graduated hourly schedule suggested by Dr. Coughlin. BAF eventually agreed to allow Claimant to return to work and put him on the schedule for the week of June 19, 2004.

7. Claimant, Mercy Sotelo, and Mr. Carroll met on June 14<sup>1</sup> to discuss Claimant's return to work. Two very different accounts came to light following the meeting. Defendants assert that BAF offered to allow Claimant to assist an individual who was performing Claimant's regular job, under Dr. Coughlin's graduated schedule, and within Dr. Coughlin's restrictions. Claimant and Mercy Sotelo assert that BAF offered Claimant the opportunity to return to his regular job, with all its regular duties, on Dr. Coughlin's graduated schedule. It is not really disputed that Claimant's regular job as a drum attendant and the regular duties associated with

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<sup>1</sup> There is much confusion in the record regarding the date of this meeting. The Referee takes note that June 13, 2004 was a Sunday. Mr. Carroll testified that he did not work on Sundays. The Referee finds that the meeting in question was held on June 14.

the position of drum attendant, were not within his restrictions at that time. Claimant declined BAF's return-to-work offer, understanding it to be outside his work restrictions.

8. Defendants interpreted Claimant's refusal of what they believed to be a legitimate offer of light-duty work as a sufficient basis for termination of Claimant's TTD benefits, and terminated Claimant's TTDs the following day (June 15).

9. A second meeting regarding Claimant's return to work was held on August 6. Present at that meeting were Mr. Carroll, Melanie Rydalch (another BAF human resources employee), Susan Pharis (a union representative), Mercy Sotelo, and Claimant. At that meeting, Mr. Carroll acknowledged that there had been some misunderstanding regarding the June return-to-work offer, but stated that as of August 6, there was no light-duty work available for Claimant and he could return when he had a full release.

10. By letter dated October 4, 2004, Defendants tendered Claimant a payment of \$306.66 representing TTD benefits from June 15 through June 20, 2004. In the same letter, Defendants stated that Claimant would also be receiving a check in the amount of \$1,891.12, representing TTD benefits from July 17 through August 23, 2004.<sup>2</sup>

### ***IMEs***

11. On May 24, 2004 Claimant sought the opinion of Leisure Yu, M.D. regarding his condition. Apparently Claimant was seeking an IME, but Dr. Yu lacked the necessary medical records and declined to give Claimant an impairment rating. Dr. Yu did examine Claimant, suggested some restrictions and offered some recommendations and discharged Claimant.

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<sup>2</sup> It is not clear from the record why TTD benefits were not paid for the period of June 20 to July 17 but were paid from July 17 through August 23.

12. On June 21, 2004, Michael T. Phillips, M.D., saw Claimant at Defendants' request for the purpose of rendering an impairment rating. In his report, issued the same date, Dr. Phillips opined that Claimant was medically stable relative to his industrial injury.

13. Claimant returned to Dr. Yu on August 23 for an IME. In his report, issued the same date, Dr. Yu opined that Claimant was medically stable relative to his industrial injury.

## **DISCUSSION AND FURTHER FINDINGS**

### ***TTDs***

14. There are two statutory provisions that bear on the issue of Claimant's entitlement to additional TTD benefits. Idaho Code § 72-403 provides that if an injured worker is offered suitable light-duty work during his period of recovery, and the worker refuses the light-duty offer, the worker's temporary total disability payments shall terminate. Thus, under Idaho Code § 72-403, the question of whether Claimant received a suitable offer of light-duty work from BAF could be pivotal.

15. But Idaho Code § 72-403 must be read in conjunction with Idaho Code § 72-408 which limits the availability of TTD benefits to a claimant's period of recovery. Once a claimant is medically stable, he is no longer in the period of recovery, and the total temporary benefits cease. See, *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001); *Loya v. J.R. Simplot Co.*, 120 Idaho 62, 813 P.2d 873 (1991); *Harrison v. Osco Drug, Inc.*, 116 Idaho 470, 776 P.2d 1189 (1989); *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979). An injured worker can reach medical stability with regard to his industrial injury yet remain

under restrictions that preclude a full release to the time of injury employment. Such may be the case with Claimant.<sup>3</sup>

16. Dr. Phillips, who Claimant saw at Defendants' request, declared Claimant medically stable on June 21, 2004. Claimant's own IME physician determined that he was medically stable on August 23, 2004. If Claimant was medically stable on June 21, then any issues about the validity of BAF's light-duty offer and Claimant's entitlement to TTDs from June 21, 2004 through July 16, 2004 and from August 24, 2004 forward are moot.

17. The Referee finds that Claimant was medically stable on June 21, 2004. A careful review of the medical records of Dr. Yu shows that there was no change in Claimant's condition between May 24, 2004, when Dr. Yu first examined him, and August 23, 2004 when Dr. Yu conducted his IME. Dr. Yu's records demonstrate that there was confusion between Claimant, his counsel, and Dr. Yu as to the real purpose of the May 24 visit. Had Dr. Yu been prepared to conduct an IME on May 24, a second visit in August would not have even been necessary. Dr. Phillips' findings from his June 21 examination of Claimant, with the exception of impairment ratings not at issue here, are remarkably consistent with those of Dr. Yu in May and again in August of 2004. Taken together, these factors convince the Referee that Claimant was medically stable and no longer in a period of recovery, on and after June 21, 2004.

18. Because Claimant was no longer in a period of recovery on and after June 21, 2004, his TTD benefits were properly terminated at that time. The issue as to whether Claimant received a suitable offer of light-duty work is, therefore, moot.

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<sup>3</sup> The issues of permanent impairment and disability, and thus evidence regarding Claimant's permanent restrictions, are not before the Commission at this time.

## **ATTORNEY'S FEES**

19. Attorney's fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides:

Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, *or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law*, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney's fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission. (Emphasis added.)

The decision that grounds exist for awarding a claimant attorney's fees is a factual determination that rests with the commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

Here, Claimant is entitled to attorney's fees on the issue of Defendants' admittedly unreasonable delay in paying medical benefits that had been ordered paid in the January 2004 Order. Requests for reimbursement were submitted in April and May of 2004, and even though the amounts requested were undisputed, they were not paid until October 4, 2004, after the second hearing.

Defendants were not unreasonable in disputing the payment of TTDs from June 21, 2004 onward and no attorney's fees are awarded to Claimant on this issue.

Defendants are also assessed interest on the unpaid medical reimbursements pursuant to the Commission's January 16, 2004 Order. Idaho Code § 72-734 provides that once a decision has been entered by the Commission awarding compensation of any kind to a claimant, such

award:

shall accrue and the employer shall become liable for, and shall pay, interest thereon from the date of such decision pursuant to the rates established and existing as of the date of such decision . . .

The section goes on to state that the interest accrues on all compensation then due and payable and *on all compensation that becomes due thereafter* regardless of whether an appeal of the award is taken. The statutory interest rate in effect from July 2003 through June 30, 2004 was 6.0%. Defendants shall pay interest at the statutory rate on the sum of \$282.85 from May 7, 2004 through October 4, 2004; on the sum of \$286.86 from June 12, 2004 through October 4, 2004; and on the sum of \$158.99 from June 19, 2004 through October 4, 2004.

#### **CONCLUSIONS OF LAW**

1. Claimant was medically stable on and after June 21, 2004 and no TTDs are owed Claimant after that date.
2. Claimant is entitled to attorney's fees incurred in seeking, preparing for, and participating in a hearing on September 24, 2004 on the issue of unpaid medical reimbursements. The issue of additional TTD payments was not unreasonably contested and no attorney's fees are awarded on that issue.
3. Defendants shall pay interest at the statutory rate on the \$728.80 in medical reimbursements that were not paid in a timely manner.

**RECOMMENDATION**

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

DATED this 5 day of January, 2005.

INDUSTRIAL COMMISSION

/s/\_\_\_\_\_

Rinda Just, Referee

ATTEST:

/s/\_\_\_\_\_

Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19 day of January, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DENNIS R PETERSEN  
PO BOX 1645  
IDAHO FALLS ID 83403-1645

ERIC S BAILEY  
PO BOX 1007  
BOISE ID 83701-1007

djb

/s/\_\_\_\_\_



The issue of additional TTD payments was not unreasonably contested and no attorney's fees are awarded on that issue.

Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney's fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney's fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a response. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney's fees.

3. Defendants shall pay interest at the statutory rate on the \$728.80 in medical reimbursements that were not paid in a timely manner.

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

DATED this 19 day of January, 2005.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Thomas E. Limbaugh, Chairman

/s/ \_\_\_\_\_  
James F. Kile, Commissioner

/s/\_\_\_\_\_  
R.D. Maynard, Commissioner

ATTEST:

/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_ day of January, 2005 a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DENNIS R PETERSEN  
PO BOX 1645  
IDAHO FALLS ID 83403-1645

ERIC S BAILEY  
PO BOX 1007  
BOISE ID 83701-1007

djb

\_\_\_\_\_