

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DUNCAN BOLLINGER,)
)
 Claimant,)
)
 v.)
)
 DAX POND, dba PSL EXCAVATION,)
)
 Employer,)
)
 Defendant.)
 _____)

IC 05-001791

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

filed April 21, 2006

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Lora Rainey Breen, who conducted a default hearing in Idaho Falls on January 26, 2006¹. Michael R. McBride of Idaho Falls represented Claimant. Defendant Employer was neither present nor represented. Claimant presented oral and documentary evidence at hearing, took no post-hearing depositions, and filed a post-hearing brief. The matter came under advisement on March 3, 2006.

ISSUES

As clarified at hearing, the issues to be decided at this time are:

1. Whether Claimant has established a *prima facie* case to support his application for a default judgment.
2. Whether Claimant sustained an injury from an accident arising out of and in the course of employment.
3. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.

¹ At the hearing, the Referee determined Claimant had yet to file a Motion for Entry of Default. Claimant did so on February 3, 2006, and the Referee issued an Order Entering Default on February 22, 2006.

4. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care; and,
 - b. Temporary partial and/or temporary total disability benefits (TPD/TTD).
5. Whether and to what extent Claimant is entitled to attorney fees.

At hearing, Claimant withdrew and reserved for future proceedings the issues related to permanent impairment and permanent disability because they were not yet ripe for adjudication. In post-hearing briefing, he requested the Commission address the issue of penalties set forth in Idaho Code § 72-210.

EVIDENCE CONSIDERED

1. Claimant's hearing testimony; and,
2. Claimant's Exhibits 1 through 4 admitted at hearing.

FINDINGS OF FACT

1. Claimant began working for Employer Dax Pond, dba PSL Excavation, a sprinkler, landscaping, and excavation business, in March 2004. He drove truck and operated heavy equipment.

2. On July 15, 2004, Claimant was hauling rock for Employer in Sandy, Utah, when he stepped out of his truck, slipped off the running board, and fell three to four feet to the ground. He fell backwards onto a rock, striking his low back and right hip. The impact took his breath away and he felt a sharp pain radiating over his hip joint down his right leg to his ankle.

3. Claimant notified Mr. Pond of the accident in person at the job site approximately 30 minutes after the fall. He asked Mr. Pond if there was a doctor he could see, and Mr. Pond indicated they should wait a couple days and see how Claimant felt. Claimant drove for Employer one more day, Friday, July 16, in significant pain. That weekend, he called Mr. Pond

and told him would not be coming to the work site the following week because he could hardly move. He also informed Mr. Pond he would have his medical condition checked out at the VA Hospital² (hereinafter, "VA") and he requested a workers' compensation report form. Mr. Pond declined to give Claimant a form until after the VA appointment.

4. On August 2, 2004, Claimant presented to the VA and described his fall from the truck with continued hip and lumbar pain radiating to the right buttocks and posterior thigh. He underwent hip and lumbar spine x-rays and received a physical therapy consultation. On August 4, VA personnel noted Claimant's lumbar and hip films were within normal limits, he was receiving physical therapy on site, and his pain remained at a level of 7 out of 10. With the exception of some physical therapy he received in his hometown of Ashton, Idaho, all of Claimant's subsequent medical treatment occurred at the VA.

5. On January 10, 2005, Claimant underwent a lumbar spine MRI due to continuing radicular symptoms and the noted history of his fall from a truck in July 2004. As interpreted by Gregory Katzman, MD, the MRI showed a congenitally narrowed canal and associated mild diffuse disc bulge resulting in mild central canal stenosis at L4-5.

6. On February 4, 2005, Claimant saw John Bradford, PA, with continuing symptoms. PA Bradford recorded: "PT displays [*sic*] obvious discomfort with passive ROM on R side, and is unable to lift his right leg w/o assistance while laying down. Upon palpation of medial R hip pt again is in obvious distress." Exhibit 4. PA Bradford prescribed Motrin, a medrol dose pack, additional physical therapy, and a cane for ambulation. He also requested a neurosurgical consultation.

7. On March 17, 2005, Claimant underwent a lumbar myelogram and CT scan.

² Claimant already had a routine medical appointment scheduled at the VA Hospital in Salt Lake City, Utah, for August 2, 2004.

Akshay Gupta, MD, interpreted the results as showing severe central canal stenosis at L4-5 and L5-S1 secondary to mild diffuse disc bulge, epidural lipomatosis, and ligamentum flavum laxity. Electrodiagnostic studies done on April 28, 2005, were also abnormal and consistent with a chronic right L4-5, L5-S1 lumbar radiculopathy.

8. By June 14, 2005, Claimant described his back and right leg pain as debilitating, such that he could not stand up to do the dishes. On that date, neurosurgeon David Petruska, MD, noted, "Patient has classical signs of L5 radiculopathy with positive straight leg raising on both sides. He has breakaway strength with ankle dorsi flexors and can hardly walk." Exhibit 4. He reviewed the prior studies and emphasized the significance of the right L4-5 disc herniation with resulting stenosis. He did not appreciate stenosis at the L5-S1 level.

9. On June 22, 2005, Claimant underwent a right L4-5 discectomy performed by Dr. Petruska. On July 19, 2005, Dr. Petruska recommended physical therapy and noted Claimant could not yet return to work. The most recent physical therapy notes, dated January 18, 2006, described progress, but with continuing pain and weakness, and that Claimant was not yet back to work. The notes indicated Claimant needed three to four more weeks of physical therapy to reach optimum function.

10. At the time of injury, Claimant was earning \$1,080.00 every two weeks. He has not worked since July 16, 2004.

11. Claimant spoke with Mr. Pond on at least two more occasions, in December 2004 and January 2005, and requested "papers for workman's comp," but Employer did not send anything. No surety has appeared in this case and Employer has not provided surety information or workers' compensation documents to Claimant, despite several requests. The Referee finds Employer was uninsured for purposes of workers' compensation coverage.

12. Claimant retained the services of Michael McBride, attorney at law, to assist in prosecuting his workers' compensation claim.

DISCUSSION AND FURTHER FINDINGS

Claimant seeks to establish a *prima facie* case to support his application for default award. He requests that judgment be entered against Dax Pond, dba, PSL Excavation, for medical expenses, temporary disability benefits, and attorney fees and penalties that have accrued thus far. Claimant reserved the issue of future benefits that may accrue.

A *prima facie* case is defined as “(s)uch as will prevail until contradicted and overcome by other evidence.” Black’s Law Dictionary, Sixth Edition, 1990, p. 1189. A claimant’s burden of establishing a *prima facie* case by probable, not merely possible evidence should not be disregarded simply because the uninsured employer was defaulted by order of the Commission. *See, State v. Adams*, 22 Idaho 485, 126 P. 401 (1912).

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

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).

The provisions of the Workers' Compensation law are to be liberally construed in favor of the employee. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

Claimant's testimony relating to his accident and subsequent symptoms is unrefuted and credible. It indicates he experienced an acute onset of lumbar, hip, and right leg symptoms when he fell from a truck while working for Employer on July 15, 2004; the symptoms persisted from that date forward. Claimant testified he had not previously sustained any other back injuries. Furthermore, the medical records support that, more likely than not, the accident caused injury to Claimant's low back and hip, including an L4-5 disc herniation with radicular symptoms.

2. **Medical Benefits.** An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1).

Claimant is entitled to medical benefits related to his industrial injury. Exhibit 2 sets out the bills for which Claimant seeks reimbursement; they total \$17,260.28. The Referee finds Claimant entitled to payment of those bills, with the following exceptions: \$1,590.38 for a brain MRI on August 2, 2004; and, \$205.58 in lab/chemistry and lab/urology charges on August 2, 2004, and April 28, 2005. The evidence does not support that the above-mentioned services

related to Claimant's industrial injury. However, the Referee also finds that Claimant is entitled to an additional \$213.89 for services provided on June 14, 2005. Claimant received two bills on that date, one in the amount of \$213.89 for consultation with Toni Roberts, DO, and one in the amount of \$213.89 for consultation with Dr. Petruska. Claimant's total only includes one of the bills. The amount due and owing from Employer for medical benefits is \$15,678.21.

3. **Temporary Disability Benefits (TTD/TPD).** Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

Claimant requests TTDs from August 2, 2004, through the date of hearing. Claimant testified that, during his VA appointment on August 2, 2004, medical personnel told him he could not return to work. However, the medical records themselves do not support that a physician took Claimant off work until his neurosurgical consultation on June 14, 2005, when Dr. Petruska assessed, "the patient can no longer tolerate the problem and can no longer work." Exhibit 4. Shortly thereafter, Claimant underwent surgery. It does not appear that Claimant has been released to return to work. The Referee finds Claimant entitled to TTD benefits from June 14, 2005, through the date of hearing, January 26, 2006. The amount due and owing from Employer for TTD benefits is \$11,732.66 (32 weeks and three days at \$361.80 per week).

4. **Attorney's Fees and Penalties.** Pursuant to Idaho Code § 72-210, Claimant is entitled to recover from the uninsured Employer reasonable costs, if any, attorney fees, and a statutory penalty equal to 10% of the compensation awarded. Claimant did not submit any costs. Attorney for Claimant prosecuted the claim through hearing and is entitled to reasonable attorney

fees in the amount of \$8,223.26, which is equivalent to 30% of the total compensation awarded herein (\$27,410.87). In addition, Claimant is entitled to a statutory penalty of 10% of the compensation awarded, or \$2,741.09.

CONCLUSIONS OF LAW

1. Claimant met his burden and has proven he sustained injury to his low back and right hip, including an L4-5 disc herniation with radicular symptoms, caused by an accident arising out of and in the course of employment on July 15, 2004.

2. At the time of the industrial accident, Dax Pond, dba PSL Excavation, was Claimant's uninsured employer. Dax Pond is personally liable for the workers' compensation benefits and penalties due and owing in this case, as set forth below.

3. Claimant is entitled to recover from Dax Pond medical expenses in the amount of \$15,678.21.

4. Claimant is entitled to recover from Dax Pond total temporary disability benefits in the amount of \$11,732.66.

6. Pursuant to Idaho Code § 72-210, Claimant is entitled to recover from Dax Pond attorney fees in the amount of \$8,223.26, as well as a statutory penalty in the amount of \$2,741.09.

7. Jurisdiction is retained for five years from the date of the accident to adjudicate further issues.

RECOMMENDATION

The Referee recommends the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED at Boise, Idaho, this 5th day of April 2006.

INDUSTRIAL COMMISSION

/s/ Lora Rainey Breen, Referee

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21__ day of _April_ 2006, a true and correct copy of the foregoing **Findings of Fact, Conclusions of Law and Recommendation** was served by regular United States Mail upon each of the following persons:

MICHAEL R McBRIDE
1495 E 17TH ST
IDAHO FALLS ID 83404

DAX POND dba PSL EXCAVATION
10895 NORTH 85TH EAST
IDAHO FALLS ID 83401

jkc

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DUNCAN BOLLINGER,)	
)	
Claimant,)	IC 05-001791
)	
v.)	
)	
DAX POND, dba PSL EXCAVATION,)	<u>ORDER</u>
)	
Employer,)	filed April 21, 2006
)	
Defendant.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Lora Rainey Breen submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant met his burden and has proven he sustained injury to his low back and right hip, including an L4-5 disc herniation with radicular symptoms, caused by an accident arising out of and in the course of employment on July 15, 2004.
2. At the time of the industrial accident, Dax Pond, dba PSL Excavation, was Claimant's uninsured employer. Dax Pond is personally liable for the workers' compensation benefits and penalties due and owing in this case, as set forth below.
3. Claimant is entitled to recover from Dax Pond medical expenses in the amount of \$15,678.21.

4. Claimant is entitled to recover from Dax Pond total temporary disability benefits in the amount of \$11,732.66.

6. Pursuant to Idaho Code § 72-210, Claimant is entitled to recover from Dax Pond attorney fees in the amount of \$8,223.26, as well as a statutory penalty in the amount of \$2,741.09.

7. Jurisdiction is retained for five years from the date of the accident to adjudicate further issues.

8. Pursuant to Idaho Code § 72-734, all compensation due and payable pursuant to this decision shall accrue interest from the date of the Commission's Order at the statutory rate of 8.375% as set by the State Treasurer effective July 1, 2005.

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

DATED this ___21 day of ___April_____, 2006.

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 21 day of April , 2006, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

MICHAEL R McBRIDE
1495 E 17TH ST
IDAHO FALLS ID 83404

DAX POND dba PSL EXCAVATION
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/s/ _____