

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK MINGO,)
)
 Claimant,)
)
 v.)
)
 STEVE COOL, dba COOL’S CUSTOM)
 PAINTING,)
)
 Employer,)
)
 Defendant.)
 _____)

IC 04-008901

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

Filed November 17, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a default hearing on October 17, 2006, in Boise. Claimant was present and represented by Bret A. Walther of Boise. Employer did not appear or participate. Oral and documentary evidence was presented. No post-hearing depositions were taken and no post-hearing briefs were submitted. This matter came under advisement on October 18, 2006.

ISSUE

The sole issue to be decided as a result of the hearing is whether Claimant has established a *prima facie* case for his entitlement to Title 72, Idaho Code, benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant taken at the hearing; and
3. Claimant’s Exhibits A-D admitted at the hearing.

Procedural history:

Claimant filed his Complaint on September 15, 2004. Employer filed his Answer to Complaint on October 1, 2004, through his then-counsel. On December 23, 2005, the Commission filed its Order Allowing Withdrawal of Attorney of Record and allowed Employer 21 days within which to retain another attorney or give written notice to the Commission that he would be representing himself. Because nothing further was submitted on Employer's behalf, Claimant filed his Motion for Entry of Default and supporting affidavit on May 11, 2006. On June 23, 2006, the Commission filed an Order Entering Default.

FINDINGS OF FACT

1. Claimant was 48 years of age at the time of the hearing and resided in Boise. He was working as a forklift driver earning \$10.00 an hour.

2. Claimant worked as a painter for Employer who would line up the work and tell Claimant where to go to do the actual painting. Claimant earned \$9.00 an hour. Employer supplied all the major items of equipment such as ladders and paint.

3. On July 8, 2004, Claimant was carrying a smaller extension ladder up a larger extension ladder when he lost his balance and the weight of the ladder he was carrying caused him to fall approximately 25 feet, hitting the ground on his back.

“And when I hit, I went to get up to see how bad I was hurt and it was hard walking, it was hard to breathe, my head hurt, my back hurt, and my hand and wrist hurt.”

Hearing Transcript, p. 11. Employer was present and had immediate notice of Claimant's accident and injuries. A co-worker drove Claimant to a local hospital where he was diagnosed with: 1. Traumatic brain injury with a relatively small left temporal hematoma without significant compromise of his neurologic status. 2. Nondisplaced intraarticular fracture

involving the left distal radius. 3. Minimal compression fracture of the right anterior plate of L4. Exhibit A. Claimant was discharged three days later.

4. Eventually Claimant came under the care of David M. Lamey, M.D., an orthopedic surgeon, for treatment of his fractured left wrist. He was initially casted and prescribed physical therapy. On September 28, 2004, Dr. Lamey diagnosed traumatic left carpal tunnel syndrome as well as a tendon rupture; he recommended surgery, which was accomplished on October 19, 2004. He was released to return to work without restrictions on November 30, 2004.

5. On April 8, 2005, Dr. Lamey rated Claimant at 5% whole person permanent partial impairment (PPI) and again released him to return to work without restrictions.

6. On July 8, 2004, Employer was uninsured for workers' compensation purposes. *See*, Complaint and Answer.

7. Claimant was an employee of Employer at the time of the accident and Employer was subject to the provisions of the Idaho Workers' Compensation Law.

8. Employer is liable for the penalties set forth in Idaho Code § 72-210 for failing to insure liability.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

9. Claimant has incurred \$27,951.02 in medical bills directly related to the reasonable treatment he received as the result of his accident. *See*, Affidavit of David M. Lamey, M.D., in Support of Claimant's Application for Damages and Affidavit of Counsel in Support of Claimant's Damages, p. 2. Employer is responsible for payment of those bills.

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion 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, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

10. Dr. Lamey released Claimant to return to work without restrictions on November 30, 2004, and there is no further indication in the record that any other physician released Claimant from work thereafter. Therefore, Claimant is entitled to TTD benefits from July 8, 2004, through November 30, 2004, in the amount of \$5,030.74. ($\$360.00 \text{ AWW} \times 67\% = \$241.20 \times 20 \text{ weeks } 6 \text{ days} = \5030.74).

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-

specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

11. Dr. Lamey assigned Claimant a 5% whole person PPI rating for his fractured left wrist. This equates to a PPI award of \$7,342.50. (55% ASW in 2004 of \$293.70 x 25 weeks = \$7,342.50).

Idaho Code § 72-210 provides that an uninsured employer is liable for, in addition to compensation, an amount equal to 10% of the total amount of compensation together with costs, if any, and reasonable attorney's fees.

12. The total amount of compensation due Claimant by Employer is \$40,324.26. As a result, Claimant is entitled to reasonable attorney's fees of \$12,097.28. (30% x \$40,324.26 = \$12,097.28).

13. Claimant has incurred costs in the amount of \$76.58. Claimant is entitled to receive \$76.58. Therefore, Claimant is entitled to \$12,173.86 in costs and attorney's fees.

14. Claimant's total award equals \$52,498.12. Claimant is entitled to the additional 10% penalty of \$5,249.81.

15. Claimant has proven his *prima facie* case in support of an award against Employer individually in the total amount of \$57,747.93.

CONCLUSIONS OF LAW

1. Claimant was an employee of Employer at the time of his accident and injury.
2. Employer was subject to the Idaho Workers' Compensation Law.
3. Employer was uninsured for workers' compensation purposes on July 8, 2004.

4. Claimant suffered an injury caused by an accident arising out of and in the course of his employment with Employer on July 8, 2004.

5. Claimant has established a *prima facie* case entitling him to the following benefits:

- (a) Medical in the amount of \$27,951.02;
- (b) TTD in the amount of \$5,030.74;
- (c) PPI in the amount of \$7,342.50;
- (d) Penalty for Employer's failure to insure in the amount of \$5,249.81.
- (e) Attorney's fees and costs in the amount of \$12,173.86.

6. Claimant is entitled to a total award against Employer individually in the amount of \$57,747.93.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __9th__ day of __November__, 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRET A WALTHER
671 E RIVERPARK LN STE 130
BOISE ID 83706

STEVE COOL
213 WOODVINE ST
BOISE ID 83706

_____/s/_____

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK MINGO,)
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 Claimant,) **IC 04-008901**
)
 v.)
) **ORDER**
 STEVE COOL, dba COOL'S CUSTOM)
 PAINTING,) Filed November 17, 2006
)
 Defendant.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 was an employee of Employer at the time of his accident and injury.
2. Employer was subject to the Idaho Workers' Compensation Law.
3. Employer was uninsured for workers' compensation purposes on July 8, 2004.
4. Claimant suffered an injury caused by an accident arising out of and in the course of his employment with Employer on July 8, 2004.
5. Claimant has established a *prima facie* case entitling him to the following benefits:
 - (a) Medical in the amount of \$27,951.02;
 - (b) Total temporary disability benefits in the amount of \$5,030.74;
 - (c) Permanent partial impairment in the amount of \$7,342.50
 - (d) Penalty for Employer's failure to insure in the amount of \$5,249.81;

(e). Attorney's fees and costs in the amount of \$12,173.86.

6. Claimant is entitled to a total award against Employer individually in the amount of \$57,747.93.

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

DATED this __17th __ day of __November____, 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 __17th __ day of __November____, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

BRET A WALTHER
671 E RIVERPARK LN STE 130
BOISE ID 83706

STEVE COOL
213 WOODVINE ST
BOISE ID 83607

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____/s/_____