

3. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

4. Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;

b. Temporary partial and/or temporary total disability benefits (TPD/TTD);

and

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

CONTENTIONS OF THE PARTIES

Claimant asserts that he sustained rib contusions on September 7, 2005, when he fell at work and landed on a two-by-four. Claimant seeks compensation for medical care that he received as a result of the accident, time loss benefits, and statutory penalties against Defendant, who did not have workers' compensation insurance on the date of the injury.

Defendant acknowledges that he did not have workers' compensation insurance at the time of Claimant's alleged accident, but believed he was not required to maintain workers' compensation insurance due to the nature of his business. He further asserts that Claimant could not have been injured at work, but even if Claimant had sustained work-related injuries, Defendant is only liable for three days of temporary total disability benefits, and two medical visits—September 8, 2005 and October 14, 2005.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Jerry Scott taken at hearing; and
2. Defendant's Exhibits 1 through 12 admitted at hearing.

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

FINDINGS OF FACT

DEFENDANT

1. Defendant J & S Construction Company (J & S) is an Idaho corporation in good standing operating out of Rigby, Idaho. Jerry Scott (Scott) is the President of the corporation, and Susan Scott is Secretary/Treasurer.¹ J & S is a contractor engaged in various construction activities including new construction and remodeling. As a principal of the corporation, Scott hired laborers to work on various construction projects. Scott concedes that J & S did not have workers' compensation insurance prior to, or at the time of Claimant's alleged accident.

2. In 2004, J & S was working on a project on River Road, near Blackfoot, and hired Claimant as a laborer. Claimant worked for J & S for about four weeks and then quit. Scott testified that about three days before quitting, Claimant alleged that he had fallen and injured his ribs while on the job. Scott took Claimant to the hospital for x-rays, which were negative. Claimant was advised to take a couple days off work and never returned to the River Road project.²

3. In 2005, Scott was contacted on several occasions by an individual of his acquaintance, Ken Phelps, asking Scott to hire Claimant because he was in need of a job. At the time that Mr. Phelps last contacted Scott, he needed someone to help on a job that J & S was doing for Mr. and Mrs. Cullimore in Blackfoot, so Scott hired Claimant as a temporary laborer.

¹ The Referee takes judicial notice of the 2008 corporate annual report on file with the Idaho Secretary of State.

² At hearing, Claimant denied having a prior work injury while in the employ of Defendant. (Tr., p. 81). He also testified that the owner of the River Road property where they were working was so pleased with Claimant's work that he made Defendant fire all of the crew excepting Claimant and one other laborer.

4. The job for the Cullimores was expected to last two or three weeks and involved digging a basement and installing a sidewalk and driveway. Claimant worked twenty-six and three-quarters hours, Tuesday through Friday of his first week with J & S. The second week Claimant worked twenty-seven and one-half hours during the five-day period, and did not work on Thursday. Claimant took \$100.00 in advances on his pay that same week. The third week that Claimant worked for J & S on the Cullimore job, he did not work on Monday, but worked eight hours each on Tuesday, September 6 and Wednesday, September 7. When asked why he kept Claimant on, despite his hit-and-miss work attendance, Scott replied that he owed Ken Phelps a favor or two, and it was a relatively short project.

ACCIDENT/INJURY

5. Claimant testified that he was alone at the Cullimore residence at the end of the workday on Wednesday, September 7. He testified that Scott had left the job site, and then the two other laborers, Jesse Breen and Raymond Villanueva, had also left the site. Claimant was picking up equipment and putting it away when he asserts that he fell into the basement, landing on a two-by-four. Claimant testified that he crawled out of the basement and knocked on the Cullimore's door, but no one was home, so he walked home with his bike because he was too injured to ride.

6. Claimant had difficulty describing the accident itself as well as recalling or describing the conditions in the basement and stairway. He first described falling from the left side of the entry into the basement, then later described falling from the right side of the entry. He was unable to describe whether the concrete side walls for the stairs were formed and braced with two-by-fours, or whether the steps were framed up at the time. Claimant could not recall whether the two-by-four he landed on was part of the bracing or a form for the steps, and

whether or not he crawled over or under bracing to get out of the basement.

7. Scott testified that on September 7, he left the job site briefly about 4:00 p.m., but returned shortly after 5:00 p.m. When he returned to the job site, Claimant was gone, but Breen and Villanueva were still there. Scott testified that the side walls for the stairs into the basement had been poured the previous day, and so the forms were still in place and the walls were cross-braced with a number of two-by-fours the entire length and height of the side walls.

MEDICAL CARE

8. It is undisputed that Claimant reached Scott by phone the morning of September 8 and reported that he had injured his ribs at work the previous day. Claimant asserted that he had called Scott the evening of September 7, on both his cell and his home phone, but there was no voice mail so he did not leave messages. Scott testified that his home telephone has an answering machine and that no message was received from Claimant on the evening of the seventh.

9. On September 8, Scott picked up Claimant at his home and took him to the emergency department at Bingham Memorial Hospital. On the way to the hospital, Claimant told Scott that he had returned to the job site after he had left “because he got to thinking maybe he ought to go back and clean up. He fell and got hurt after he had gone back.” Tr., p. 92.

10. At the hospital, Claimant was seen by R. M. Kirsch, M.D. Claimant presented with left side/back pain, which he stated was caused by “falling yesterday at work.” Ex. 12, p 2. Claimant complained that deep respiration was painful. X-rays showed evidence of old fractures of ribs five through nine on the left side, but no evidence of acute fracture. The x-rays also showed a retrocardiac mass, which was not a new finding. The medical records do not include any notation regarding visible contusions or bruising in the area where Claimant reportedly

struck the two-by-four. Scott testified that when Claimant raised his shirt for examination, there was no visible bruising or other indication of a fall such as that described by Claimant.

11. Dr. Kirsch diagnosed Claimant with a rib contusion and released him with prescriptions for hydrocodone, ibuprofen, and Skelaxin, and instructions to ice his ribs and use an incentive spirometer to prevent pneumonia. She placed Claimant on light duty for three days with a 15-pound lifting restriction, after which Claimant could slowly increase his lifting capacity as tolerated. Dr. Kirsch was concerned about the retrocardiac mass and scheduled Claimant for a CT scan.

12. Claimant testified that he understood that the x-rays showed that he had fractured his ribs. When asked to read the chart note that indicated evidence of old fractures but no acute injury, he recalled that there were no fractures. Claimant testified that he was released from work for three days, and then given light-duty restrictions with a 15-pound lifting restriction. When shown the chart note on work restrictions, he recalled that he had never been taken off work, but had been given light duty for three days.

13. Scott advised Claimant that he had no light-duty work available, but to contact him when the lifting restriction was lifted and they would discuss his return to work. Claimant did not return to work for J & S, although he contacted Scott on several occasions asking him to sign paperwork for various social services, which Scott declined to do.

14. Claimant saw Jeffrey Liles, M.D., on September 15, as follow-up on the retrocardiac mass, and a CT scan was scheduled for September 29. Claimant returned to Dr. Liles on October 6 to discuss the results of the CT scan. Dr. Liles noted that the mass was unchanged from prior evaluations and was not likely a malignancy. At that visit, Claimant complained of continuing pain on his left side, including pain associated with deep respiration.

He was not taking any of the prescribed medication or any OTC medication. Dr. Liles opined that Claimant had slow-healing rib contusions, and proposed to treat him for pleurisy with a Medrol dose pack and Advil. Dr. Liles advised Claimant to return to the clinic for referral for pain management if he was not better in three to four days.

15. On October 14, Claimant saw Marc Porot, M.D., at the pain management clinic of the Bingham Community Health Clinic. He was continuing to complain of pain in his left side. Dr. Porot recommended, and Claimant agreed to try, an intercostal block in the vicinity of Claimant's 7th and 11th ribs. Dr. Porot's chart note indicates Claimant received complete relief of his rib pain as a result of the block. At hearing, Claimant testified that he received some relief initially, but within a day or two he was hurting worse, and called Dr. Porot and said he didn't want any more shots.

16. Claimant received no further medical care for his injuries, and testified that eventually his rib pain resolved. Claimant testified that he did not feel that he could return to work for quite some time following the accident.³ At the time of hearing, Claimant was working for a potato processing facility in Shelley, Idaho.

17. Claimant was not a credible witness. While he presents as affable and sincere, his testimony was often inconsistent. Claimant exhibited a clear recollection of some aspects of his accident, but when pressed for clarification or additional information about the events, he claimed it had been too long ago to remember. When confronted with written documentation of certain facts, his memory returned with alacrity. Claimant endeavored to present himself as a reliable, hard-working employee, while painting everyone else in a bad light. For example,

³ At hearing, Claimant first asserted that he felt well enough to seek work within three weeks of the accident (Tr., p. 66, ls. 23-25, p. 67, ls. 1-3). Moments later, he testified that it was six weeks to two months before he felt well enough to seek work (Tr., p. 67, ls. 11-14).

Claimant testified that he worked 60 to 70 hours per week, that all of the other workers were slackers, that Scott was never around—arriving at the job site late and leaving early, that clients wanted to fire Scott and hire Claimant, or have Scott fire all of his crew except Claimant. Such assertions about Claimant’s work ethic are not borne out by the record, and were in direct contradiction to the testimony of Scott, and the testimony of the Cullimores offered as evidence via affidavits.

18. Recognizing that Scott had much at stake in this proceeding, and considering the diametrically opposed testimony of the two parties, the Referee did have some reservations about the veracity of his testimony. However, on the whole, Scott was a more credible witness than Claimant, and at least some of his testimony is corroborated by the record. Further, although Claimant continued to assert that he was injured at work, he did not directly challenge Scott’s testimony.

DISCUSSION AND FURTHER FINDINGS

APPLICABILITY OF WORKERS’ COMPENSATION LAWS

19. Defendant admits that he did not have workers’ compensation coverage either before or after the date of Claimant’s alleged accident. Defendant presented no evidence or argument that he would be exempt from coverage pursuant to any section or subsection of Idaho Code § 72-212. The Referee finds that Defendant was subject to the provisions of Idaho workers’ compensation law.

INJURY/ACCIDENT

20. A claimant in a worker's compensation case has the burden of proving that he is entitled to benefits. The claimant must prove not only that he was injured, but also that his injury was the result of an accident arising out of and in the course of his employment. His proof must

establish a probable not merely a possible connection between cause and effect to support his contention that he suffered an accident. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985).

21. Claimant has failed to carry his burden of proving that his rib injury was the result of an accident at work. Claimant described an accident that had him falling several feet vertically, landing with some force across a two-by-four on his left side, and inflicting an injury that took a minimum of three weeks to heal. Yet, the medical record lacks any indication that Claimant had any visible bruise, scrape, or mark in the area, and Jerry Scott testified that he saw no visible mark when Claimant raised his shirt to allow Dr. Kirsch to examine him.

22. While Claimant may indeed have sustained an injury to his ribs somehow, the record suggests that it is unlikely that the injury occurred at work. Claimant testified that he was alone at the work site after Scott had left to bid a job and the other workers had taken the opportunity to vamoose. Scott testified that he left the job site at about 4:00 p.m., returning shortly after 5:00 p.m. to find Claimant gone, but the other two laborers at the site. When Scott was driving Claimant to the hospital the following morning, Claimant told him that he had returned to the site after everyone had gone because he thought maybe he should have helped clean up. These two versions of events are mutually exclusive.

23. The owners of the property being worked on, the Cullimores, told Scott that they had been at home when Scott and the other workers left, and that Claimant had not returned to the premises. In fact, they had let their six dogs out into the area as soon as Scott and the other laborers departed, as was their habit. The Cullimores further averred that Claimant came to see them several days *after* the accident and told them he had been working after hours when he was injured. Both Mr. and Mrs. Cullimore described Claimant as being intoxicated during this visit.

They stated that he left the premises then returned several hours later, still intoxicated, with another individual and asked the Cullimores to fire J & S and hire Claimant and his companion to finish the work. The Cullimores declined the offer.

24. Taken together, the more credible testimony does not support Claimant's assertion that he fell and was injured at work.

REMAINING ISSUES

25. Having failed to carry his burden of proving that he sustained an injury from an accident at work, the issues of Claimant's entitlement to medical care and income benefits are moot.

CONCLUSIONS OF LAW

1. Defendant was uninsured prior to, on the day of, and subsequent to Claimant's alleged industrial injury.

2. Claimant has failed to carry his burden of proving that he sustained an injury from an accident arising out of and in the course of his employment.

3. All other issues are moot.

RECOMMENDATION

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

DATED this 18 day of September, 2008.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JESSE SALAS,)
)
 Claimant,)
)
 v.)
)
J & S CONSTRUCTION COMPANY, INC.,)
)
 Employer,)
 Defendant.)
_____)

IC 2005-520887

ORDER

Filed: September 26, 2008

Pursuant to Idaho Code § 72-717, Referee Rinda Just 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 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. Defendant was uninsured prior to, on the day of, and subsequent to Claimant's alleged industrial injury.
2. Claimant has failed to carry his burden of proving that he sustained an injury from an accident arising out of and in the course of his employment.
3. All other issues are moot.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 26 day of September, 2008.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ _____
R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of September, 2008, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

JESSE SALAS
366 N SHILLING APT 4
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JUSTIN B OLESON
PO BOX 1047
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djb

/s/ _____