

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RYAN JORGENSEN,)	
)	
Claimant,)	IC 2006-009841
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
MOORE MASONRY, INC.,)	AND RECOMMENDATION
)	
Employer,)	Filed: December 15, 2008
Defendant)	
_____)	

INTRODUCTION AND PROCEDURAL HISTORY

Claimant, by and through his attorney of record, John M. Ohman of Idaho Falls, filed a workers’ compensation Complaint with the Idaho Industrial Commission (Commission) on February 1, 2007. The Complaint identified the Defendant Employer as “Ron Moore,” and included a certificate of service stating that Claimant served Mr. Moore through counsel, identified as Dale Thompson, Esq., of Rexburg. Defendant did not file an answer with the Commission.

On July 2, 2007, Claimant filed a Notice Of Intent To Take Default (Notice of Intent). The caption identified Defendant as “Ron Moore dba Moore Masonry.” According to the Certificate of Service, Claimant mailed the Notice of Intent to Joshua W. Garner of Thompson Law Offices, Rexburg, via certified mail. Heather Sundberg signed for the letter on July 2, 2007.

Defendant did not file a response to the Notice of Intent, and on August 20, 2007, Claimant filed his Motion for Default, again listing the Defendant as “Ron Moore dba Moore Masonry.” On December 10, 2007, Ronnie C. Moore filed an Answer to the Complaint asserting that Claimant was not an employee of Defendant, Ron Moore, but rather of Moore Masonry,

Inc., an Idaho Corporation. Claimant served discovery requests on Ron Moore,¹ and received responses.

On March 5, 2008, Claimant filed a Motion to Substitute Real Party in Interest together with an Affidavit in Support. The Motion sought to substitute Moore Masonry, Inc., for Ron Moore dba Moore Masonry. Defendant did not file a response to the Motion, and on April 4, 2008, the Referee filed her Order granting the motion to substitute Moore Masonry, Inc., as the real party in interest in this proceeding.²

On April 11, 2008, Claimant filed his Motion to Disqualify Acting Counsel. Claimant noted that the attorneys representing Ron Moore had withdrawn from the case, and since Ron Moore was not a licensed attorney, he could not act as a representative of Moore Masonry, Inc., pursuant to Rule 2(B), J.R.P.³ Defendant did not file a response, and on May 8, 2008, the Referee issued her Order granting Claimant's motion. The Order further mandated that Moore Masonry, Inc., designate an attorney to represent its interests and file an Answer to the Complaint within twenty-one days of the date of the Order or be subject to entry of a default judgment. The Order was sent via certified mail to Moore Masonry, Inc., ATTN: Ron Moore, 1263 W 4000 N, Rexburg, ID 83440. This is the same address that appears on the corporate

¹ Included in the discovery requests were requests for admission, which are not allowed under the Commission's Judicial Rules of Procedure (J.R.P.). Defendant did not object to the Request for Admissions on the basis of the J.R.P., but did object and refuse to answer on the grounds that they were ambiguous, vague, and were not addressed to the proper party in interest.

² The Referee takes judicial notice of the corporate filings maintained by the Idaho Secretary of State that show Moore Masonry, Inc., as a corporation in good standing, with offices in Rexburg, Idaho, and whose registered agent and sole corporate officer is Ronnie C. Moore of Rexburg, Idaho.

³ While any "person" may appear *pro se* before the Commission, all other parties, including corporate entities, must appear through a licensed attorney. Rule 2(B), J.R.P. Ron Moore had authority to answer the original Complaint, but cannot file an answer on behalf of the corporation.

filings on record with the Secretary of State.

No attorney filed an appearance or an answer to the Complaint on behalf of Moore Masonry, Inc. Thereafter, on October 23, 2008, the Referee filed her Order Entering Default against Moore Masonry, Inc., in the above-entitled action.

Following entry of default, Claimant filed and served his Memorandum in Support of Application for Judgment (Memorandum), together with supporting affidavits and documentary evidence. Defendant did not file a response.

ISSUE

The sole issue to be decided is whether Claimant has established a *prima facie* case in support of his Application for Judgment pursuant to Rule 6(B), J.R.P.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Exhibits 1 through 8 referenced in the Memorandum in Support of Application for Judgment; and
2. Affidavit in Support of [Application] for Judgment, signed by Claimant.

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

ACCIDENT

1. Defendant employed Claimant as a hod carrier. On June 20, 2006, Defendant had Claimant working at a jobsite in Rexburg, Idaho.
2. Defendant Moore Masonry, Inc., is a corporation in good standing in the state of Idaho. Ronnie C. Moore is the sole shareholder and officer of the corporation. Defendant did

RECOMMENDATION - 3

not have a workers' compensation policy in effect on June 20, 2006.

3. On the afternoon of June 20, 2006, a plank of scaffolding fell to the ground and shattered, sending a sliver of wood into Claimant's right forearm.

MEDICAL CARE

4. Ron Moore, the sole shareholder and officer of Defendant corporation, was on-site when the accident occurred. He took Claimant to Ronald G. Mills, M.D., Rexburg, for treatment. The wound was both deep and long, and required that Dr. Mills excise the wound into the muscle tissue with a three-centimeter-long incision, and then spread the incision to remove the wood fragments. He then packed and sutured the wound.

5. Dr. Mills followed Claimant's condition closely. An infection developed, necessitating surgical intervention in the form of a right forearm irrigation and debridement. Dr. Mills continued to monitor the open wound post-surgery, and planned a wound closure procedure once he was certain the wound was clean. When Claimant returned on August 4 for follow up, the wound appeared to be infected. Dr. Mills recommended additional treatment and follow up before closing the wound. Claimant saw Dr. Mills on nine occasions: 7/20/06, 7/21/06, 7/23/06, 7/24/06, 7/25/06, 7/27/06, 7/27/06, 7/31/06, and 8/4/06. Claimant asserts that he traveled to Rexburg to see Dr. Mills on February 12, 2007. The evidence submitted in support of the Application for Judgment does not include any medical records of a visit to Dr. Mills on February 12, 2007.

6. On August 4, Claimant presented at the emergency room at Eastern Idaho Regional Medical Center (EIRMC). He was concerned that his arm wound was getting worse, not better. He was treated and released. William P. Wilson, M.D., took over Claimant's care once he began treating at EIRMC.

RECOMMENDATION - 4

7. On August 11, Dr. Wilson performed a debridement of Claimant's right radial forearm wound with an advancement flap closure of approximately ten cm. by twenty cm.

8. As a result of the June 20 accident, Claimant sustained some damage to the underlying muscles in his right forearm that affects his use of the arm. There is also a substantial scar on his right forearm.

9. Claimant resides in Idaho Falls, Idaho, a twenty-six mile drive to Rexburg, where he received the initial treatment for his injury.

10. Claimant incurred substantial medical bills as a result of his industrial injury. To the best of Claimant's knowledge, Defendant has paid none of these bills. The record supports medical expenses consisting of:

EIRMC	\$ 6,109.10 (Exhibit 5)
Dr. Mills	\$ 1,246.00 (Exhibit 6)
Madison Memorial Hospital	\$ 5,110.65 (Exhibit 7)
Dr. Wilson	\$ 2,119.00 (Exhibit 8)
TOTAL	\$14,584.75

AVERAGE WEEKLY WAGE

11. Claimant provided wage data for the period of May 20, 2006 through August 25, 2006. In the 61 days from May 20 through July 19, the last full day before his injury, Claimant earned \$2,905.65 or an average daily wage of \$47.63 ($2905.65 \div 61 = 47.63$). This converts to an average weekly wage of \$333.44 ($47.63 \times 7 = 333.44$).

TPD/TTD

12. Claimant asserts that he was off work as a result of the industrial injury from July 21 through September 13, 2006, a total of 7 weeks and 6 days. The Referee finds no record of any doctor taking Claimant off work. Neither is there any evidence that caregivers imposed work restrictions upon Claimant that Defendant was unable to accommodate.

RECOMMENDATION - 5

PPI

13. Claimant asserts, and there is no evidence to the contrary, that he has a scar and muscle weakness as a result of the size and depth of his forearm wound. Based on these factors, Claimant claims he is entitled to a whole person PPI rating of 3%.

PPD

14. Claimant asserts that he is entitled to disability in excess of his impairment of 15%, with 5% apportioned to medical factors and 10% apportioned to non-medical factors.

PENALTY

15. Claimant asserts entitlement to the statutory penalty and attorney fees of \$5,595.82 by virtue of Defendant's failure to secure workers' compensation insurance.

DISCUSSION AND FURTHER FINDINGS

ACCIDENT/INJURY

16. A claimant in a workers' 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).

17. Claimant has established by undisputed testimony and related medical records that he sustained an injury on July 20, 2006, when a piece of scaffolding shattered, embedding a fragment of the wooden scaffold in his right forearm. Claimant has also established that at the time of the accident and injury, he was an employee of Defendant.

RECOMMENDATION - 6

MEDICAL CARE

18. Having established that he sustained an injury as a result of an accident arising out of his employment, Claimant is entitled to reasonably necessary medical care as provided for by Idaho Code § 72-432. The record supports Claimant’s entitlement to medical reimbursement of \$14,584.75, as set out in Paragraph 10, *supra*. However, in his Memorandum, Claimant asserted medical expenses from EIRMC totaling \$9,687.98. The billing documents from EIRMC (Exhibit 5) detail the following billings related to Claimant’s injury and are identical to the amounts detailed in Claimant’s Memorandum at Section II, Paragraph A:

Date	Service	Billed
8/4/06	ER, Supplies, Pharm, P.T.	\$1221.55
	Adjustment	\$ (181.28)
	NET	\$1,040.27
8/5/06– 8/10/06	Supplies, Pharm, P.T	\$1118.56
	Adjustment	\$ (141.27)
	NET	\$ 977.29
8/5/06- 8/6/06	IV Therapy, Meds	\$1,024.48
	Adjustment	\$ (129.39)
	NET	\$ 895.09
8/11/06	Supplies, IV Therapy, Pharm, OR, Anesth, Recovery, Drugs	\$4,985.89
	Adjustment	\$(1,789.44)
	NET	\$3,196.45
NET TOTAL		\$6,109.10

Claimant’s assertion that his bills from EIRMC totaled in excess of \$9,000 can only be the result of a mathematical error in his calculations. The Referee finds that Claimant is entitled to the \$6,109.10 documented herein.

19. Additionally, Claimant asserted entitlement to reimbursement for medical expenses owed to Mountain Valley Imaging in the total amount of \$34.00 for services on July

23, 2006. There is no information in the billing (Exhibit 9) regarding the services rendered, so there is no way of determining whether the services were related in any way to Claimant's industrial injury. Radiological charges do appear with specificity on the billings from the hospitals, but none of those services occurred on July 23, 2006, the date of service for the billing from Mountain Valley Imaging. While the charges were incurred just days following the industrial accident, without itemized billings it is impossible to determine with any certainty whether the charge was actually related to his industrial injury.

20. In addition to the documented medical expenses, Claimant asserts that he is entitled to \$218.25 for mileage, based on 450 miles at \$.485 per mile. Idaho Code § 72-432 provides that the reimbursement of mileage for use of a private vehicle shall be:

. . . the mileage rate allowed by the state board of examiners for state employees; provided however, that the employee shall not be reimbursed for the first fifteen (15) miles of any round trip, nor for traveling any round trip of fifteen (15) miles or less.

According to the official Idaho highway map, the one-way distance from Idaho Falls to Rexburg is 26 miles for a round trip total of 52 miles. The statute excludes from reimbursement the first 15 miles of each round trip, so Claimant can claim reimbursement for 9 trips of 37 miles or 333 miles. The state employee mileage rate in 2006 was \$.445 per mile. Therefore, Claimant is entitled to \$148.18 to reimburse his travel from Idaho Falls to Rexburg ($37 \times 9 \times .445 = 148.185$).

21. Finally, in his Affidavit, Claimant asserts that he incurred additional medical expenses, including:

Madison Physician's Services	\$ 164.00
Intermountain Anesthesia	200.00
Madison Anesthesia	200.00
Prescriptions	100.00

Claimant submitted no documentation regarding these four additional billings. Absent evidence that the Claimant incurred the charges during treatment of his industrial injury, the Referee cannot make the findings necessary to award reimbursement for the listed items.

TPD/TTD

22. Claimant asserts that he was off work as a result of the injury from July 21 through September 13, 2006, a total of 7 weeks and 6 days. There is no record that any physician ever took Claimant off work during the claimed period, and payroll records indicate that Claimant received pay at least through August 25, 2006 (Exhibit 10). Additionally, it appears that Claimant received an additional \$853.76 by way of cashier's checks dated September 7 and September 14, although Exhibit 10 provides no information regarding hours worked during that period of time or whether the cashier's checks constituted payment for wages.

Undoubtedly, Claimant was unable to work on July 24 and August 11, the days upon which he was in hospital for surgical procedures. Following the August 11 surgery, the doctor ordered Claimant to keep his arm elevated, which could reasonably have precluded him from working for several days. However, August 11, 2006 was a Friday, and there is no evidence that Claimant would have worked on August 12 or 13 regardless of his physical limitations.

23. Idaho Code § 72-402 provides that an injured employee must be off work for five days before any TTD or TPD benefits are payable. If the Claimant is off work for more than fourteen days, then all time loss, including the initial waiting period, is compensable.

24. Claimant has failed to prove that he was taken off work by any of his caregivers, and even granting that he could not work when he was in the hospital, he has failed to establish that he was off work for more than the five-day waiting period.

PPI

25. “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).

26. Claimant provides no medical opinion regarding the extent of his permanent impairment, if any. While the Commission is the ultimate evaluator of impairment, the Commission cannot evaluate impairment without some medical appraisal of the nature and extent of Claimant’s injury and how it affects his activities of daily living. It is not clear if or how the scar on Claimant’s forearm might affect his daily living activities. Certainly muscle weakness, if it is permanent, and depending upon its severity, could constitute some impairment. However, Claimant has failed to provide any evidence that his muscle weakness is permanent or affects his daily life. The Referee conducted a review of the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Ed. (See pp. 507-510) to see if it was possible to calculate an impairment rating based on the information available in the record. However, without a clinical evaluation of Claimant’s strength including results of manual muscle testing, it is not possible to determine an impairment rating for Claimant.

PPD

27. The definition of “disability” under the Idaho workers’ compensation law is:

. . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). A permanent disability results:

. . . when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

Idaho Code § 72-423. Without permanent impairment, there can be no permanent disability.

Urry, 115 Idaho 750, 769 P.2d 1122 (1989).

PENALTY

28. Idaho Code § 72-210 provides for the imposition of a penalty of 10% of the compensation awarded together with costs and attorney fees for failure to secure workers’ compensation coverage. Claimant has proven his entitlement to compensation of \$14,732.93, which includes reimbursement of \$14,584.75 for medical care, together with mileage costs of \$148.18. Ten percent of \$14,732.93 is \$1,473.29.

ATTORNEY FEES

29. Counsel for Claimant is entitled to attorney fees and costs pursuant to Idaho Code § 72-210. However, counsel did not provide a copy of his fee agreement or an itemized billing statement to support his stated claim in the amount of \$5,595.82 for fees and \$290.97 for costs. Attorney fees in workers’ compensation cases are limited by statute and absent supporting documentation, the Referee cannot approve the claimed amount. However, by way of the Order accompanying these Recommendations, counsel for Claimant will have an opportunity to provide documentation in support of his claim for fees and costs.

CONCLUSIONS OF LAW

1. On July 20, 2006, while in the course of his employment with Defendant, Claimant sustained an injury to his right forearm.
2. Claimant incurred documented medical expenses of \$14,732.93, which includes allowable mileage costs of \$148.18.
3. Claimant failed to carry his burden of proving his entitlement to temporary partial or temporary total disability benefits.
4. Claimant failed to carry his burden of proving his entitlement to permanent partial impairment.
5. Claimant failed to carry his burden of proving entitlement to disability in excess of impairment.
6. Claimant is entitled to the sum of \$1, 473.29, as well as attorney fees and costs, as a penalty against Defendant for failure to secure workers' compensation insurance.

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 9 day of December, 2008.

INDUSTRIAL COMMISSION

Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RYAN JORGENSEN,)	
)	
Claimant,)	IC 2006-009841
)	
v.)	
)	ORDER
MOORE MASONRY, INC.,)	
)	Filed: December, 2008
Employer,)	
Defendant)	
_____)	

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. On July 20, 2006, while in the course of his employment by Defendant, Claimant sustained an injury to his right forearm.
2. Claimant incurred documented medical expenses of \$14,732.93, which includes allowable mileage costs of \$148.18.
3. Claimant failed to carry his burden of proving his entitlement to temporary partial or temporary total disability benefits.
4. Claimant failed to carry his burden of proving his entitlement to permanent partial impairment.

5. Claimant failed to carry his burden of proving entitlement to disability in excess of impairment.

6. Claimant is entitled to the sum of \$1, 473.29 against Defendant for failure to secure workers' compensation insurance.

7. Claimant is entitled to attorney fees and costs incurred in the prosecution of this proceeding. 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 fees and costs 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 fees and costs in this matter. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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

DATED this 15 day of December, 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 15 day of December, 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:

JOHN M OHMAN
PO BOX 51600
IDAHO FALLS ID 83405

MOORE MASONRY INC
ATTN: RON MOORE
1263 W 4000 N
REXBURG ID 83440-3265

djb

/s/ _____