

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES HUMPHREYS,)
)
 Claimant,)
)
 v.)
)
 DAN WICKLAND, dba DAN'S)
 QUALITY ROOFING,)
)
 Employer,)
)
 Defendant.)
 _____)

IC 2008-033192

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

Filed March 23, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on February 20, 2009. Claimant was present and represented by Daniel J. Luker of Boise. Defendant uninsured Employer (Dan) did not appear either personally or through counsel. 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 March 3, 2009, and is now ready for decision.

ISSUE

The sole issue to be decided is whether Claimant has established a *prima facie* case supporting his entitlement to the following benefits:

1. Medical;
2. Temporary partial and/or temporary total disability (TPD/TTD); and
3. Penalties pursuant to Idaho Code § 72-210 for Dan's failing to obtain workers'

compensation coverage.

RECOMMENDATION - 1

EVIDENCE CONSIDERED

The record in the instant matter consists of the following:

1. The Industrial Commission legal file.
2. Claimant's Exhibits A-H admitted at the 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.

PROCEDURAL HISTORY

Claimant filed his Workers' Compensation Complaint on November 6, 2008, alleging an injury resulting from a fall from a roof on September 29, 2008. The Complaint was served by regular US mail on both Dan's Quality Roofing and its owner, Dan Wickland. Claimant served discovery requests on November 7. When no Answer to Claimant's Complaint was forthcoming, Claimant notified Dan by letter that unless an Answer was promptly filed, he would be seeking a default judgment. Dan then hired counsel.¹ Claimant granted defense counsel three extensions of time within which to answer the Complaint and provide discovery responses. *See*, Memorandum in Support of Claimant's Motion for Default and supporting affidavit of counsel. Due to the serious nature of Claimant's injuries added to the fact that Dan had no workers' compensation insurance, Claimant's counsel, on December 16, 2008, filed his Motion for Default and Request for Default Hearing and properly served Dan's counsel. No response was received by the Commission to Claimant's motion. On January 7, 2009, the Commission filed its Order Entering Default.

FINDINGS OF FACT

1. Claimant was 26 years of age and resided in Boise at the time of the hearing.

¹ Although the record contains a letter of representation to Claimant's counsel from Dan's counsel, no appearance by counsel or any other correspondence or pleading was ever received by the Industrial Commission from Dan's counsel.

2. Dan is in the roofing business. Claimant worked for Dan as a roofer. Dan would bid the jobs and supply all the major items of equipment necessary to repair and replace roofs. He would also provide employees with the manner in which he wanted each job performed.

3. On September 29, 2008, Claimant fell through an awning he was tearing off and landed on a concrete pad below. He immediately felt pain in his left wrist and lower back. Claimant called Dan who met him at the accident scene. Dan informed Claimant that because he did not carry workers' compensation insurance, Claimant should tell health care personnel that he injured himself in a fall at home, rather than at work. Dan took Claimant to St. Luke's Meridian Medical Center Emergency Department where Dan informed the treating physician that Claimant fell off a ladder at his home and a neighbor (Dan) found him and brought him to St. Luke's. Claimant was complaining of low back and left wrist pain. X-rays were taken and pain medications administered. He was diagnosed with a T-12 burst fracture and a sprained left wrist. He was prescribed a rigid back brace and referred to Thomas C. Manning, M.D., a neurosurgeon. He was also referred to Troy Watkins, M.D., an orthopedic surgeon, for his wrist problem.²

4. Claimant first saw Dr. Manning on October 1, 2008. Dr. Manning believed Claimant's T-12 burst fracture could be managed by constantly wearing his Jewitt (rigid) brace, even while showering and sleeping. He took Claimant off work for four weeks.³ By November 3, 2008, Claimant was still experiencing pain, causing Dr. Manning to order MRI and CT scans. In a post-scan follow-up on November 14, Dr. Manning noted that the aforementioned scans did not reveal any spinal cord compression. Even so, Dr. Manning recommended a second opinion regarding Claimant's intermittent numbness and tingling in his legs, as well as surgical options

² Claimant testified that he did not follow-up for treatment for his wrist problem due to lack of funds.

³ Nothing in Dr. Manning's records indicate he ever released Claimant to return to work after the four-week period.

including a fusion and vertebroplasty (a procedure whereby a cement substance is injected into the affected vertebra to strengthen them).

5. Claimant next saw Dr. Manning on November 25, 2008. He had seen Michael Henbest, M.D., also a neurosurgeon, for a second opinion. Dr. Henbest agreed that a T-12 vertebroplasty might be Claimant's best solution regarding pain relief and restoring function. The procedure was performed sometime in November with good results. In a December 23, 2008, office note, Dr. Manning indicated that return to work issues could be addressed after Claimant participated in physical therapy. On January 12, 2009, Dr. Manning referred Claimant to the Elk's physical therapy and work hardening programs. There is nothing of record indicating that Claimant ever attended the Elk's programs.

6. Claimant was an employee of Dan on the date of his accident, as opposed to an independent contractor.

7. Dan was uninsured for workers' compensation purposes on September 29, 2008. *See*, Claimant's Exhibit H.

DISCUSSION AND FURTHER FINDINGS

An accident is defined as 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. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. 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). 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, 751, 918 P.2d 1192, 1196 (1996).

8. Claimant has proven that he suffered an accident causing an injury arising out of and in the course of his employment on September 29, 2008.

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. The Referee finds that the medical treatment received by Claimant following his accident and injury was required by his physicians and was reasonable. The medical bills incurred by Claimant are contained within Claimant's Exhibit G and total \$44, 894.10. Dan and Dan's Quality Roofing are jointly and severally liable for that amount.

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).

10. The Referee finds that Claimant is entitled to TTD benefits from the date he was taken off work by Dr. Manning on October 1, 2008, until he is released to return to work. Per Claimant's Complaint, he was earning \$650.00 a week at the time of his injury. As of the date of the hearing, February 20, 2009, Claimant was owed \$8,896.64 in TTD benefits (October 1, 2008 to February 20, 2009 = 20 weeks and 3 days at \$435.50 a week = \$8,896.54).

RECOMMENDATION - 5

Idaho Code § 72-210 provides for a penalty of 10% of the total compensation awarded as well as attorney fees for failing to secure workers' compensation coverage.

11. Claimant is entitled to \$5379.07 as a penalty and attorney fees in the amount of \$13,447.68 ($\$53,790.07 \times .25 = \$13,447.68$).

12. Claimant is entitled to a total award of \$67,237.75.

CONCLUSIONS OF LAW

1. Claimant has established a *prima facie* case supporting the following conclusions of law:

(a). Claimant suffered an accident causing an injury arising out of and in the course of his employment on September 29, 2008.

2. Claimant has established a *prima facie* case supporting an award of the following benefits:

(b). Medical in the amount of \$ 44,894.10.

(c). TTD as of the time of the hearing in the amount of \$8,896.64.

(d). Statutory penalty pursuant to Idaho Code § 72-210 in the amount of \$5,379.07.

(e). Attorney fees in the amount of \$13,447.68.

3. Dan Wickland and Dan's Quality Roofing are jointly and severally liable to Claimant in the amount of \$67,237.75.

4. The Industrial Commission will retain jurisdiction in the event additional benefits are sought once Claimant reaches medical stability.

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 __13th__ day of March, 2009.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

(d). Statutory penalty pursuant to Idaho Code § 72-210 in the amount of \$5,379.07.

(e). Attorney fees in the amount of \$13,447.68.

3. Dan Wickland and Dan's Quality Roofing are jointly and severally liable to Claimant in the amount of \$67,237.75.

4. The Industrial Commission will retain jurisdiction in the event additional benefits are sought once Claimant reaches medical stability.

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

DATED this __23rd__ day of March, 2009.

INDUSTRIAL COMMISSION

_____/s/_____
R.D. Maynard, Chairman

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __23rd__ day of March, 2009, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

DANIEL J LUKER
PO BOX 6190
BOISE ID 83707-6190

DAN WICKLAND
DBA DAN'S QUALITY ROOFING
1810 W STATE ST
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Gina Espinosa