

CONTENTIONS OF THE PARTIES

Claimant contends he was injured as a result of being struck by a vehicle while directing traffic out of Employer's parking lot.

Defendant contends Employer did not personally witness the accident and that Claimant was not a full-time employee.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, Rigoberto Espinoza d/b/a Las Palmas Dance Club, and Clark Archer;
2. Claimant's Exhibits A—F; and
3. Claimant's additional exhibit, hereinafter "G", submitted pursuant to the Referee's order holding the record open for receipt of these documents. (Claimant submitted exhibit G with a "motion to present additional evidence." Such motion was unnecessary under the Referee's order.)

Defendant offered no exhibits. After examining the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Beginning March 2005, Claimant worked as a security guard for Rigoberto Espinoza, doing business as Las Palmas Dance Club, on weekends. He was paid \$50.00 – cash – per shift. Work included directing traffic at the end of an event. Claimant wore a uniform shirt. Around closing time on September 18, 2005, Claimant observed a Ford Explorer "cutting cookies" in the parking lot. He began directing the vehicle off the premises. The vehicle veered toward Claimant, struck him, ran over his legs, and drove off. Police and an ambulance were called. The police report confirms the accident and describes tire marks across Claimant's pants.

2. Mr. Espinoza testified he gave Claimant two free beers on the night in question. Although Claimant was wearing his uniform, Mr. Espinoza testified that he believed Claimant was not working that night. The police report following the accident does not indicate Claimant was intoxicated.

3. Mr. Espinoza testified that Claimant's employment and the security work were handled by Sixto Zamarripa. He admitted Mr. Zamarripa is an employee.

4. Mr. Espinoza testified that he is not the owner of Las Palmas Dance Club; his mother, Maria Espinoza is, and Mr. Espinoza is merely "in charge" of the business.

5. Claimant sought medical care. On September 18, 2005, Dr. Michael Gustavel, M.D., tested Claimant for a potential compartment syndrome to both legs as a result of the accident and planned for surgery if testing was positive. Testing required general anesthesia. The test showed negative for compartment syndrome. Claimant continued to have right knee pain. Dr. Gustavel treated Claimant with conservative measures and opined Claimant suffered some ligament damage to the right knee. An MRI on October 6 showed ligament damage and a nondepressed osteochondral fracture. The record shows Claimant was charged \$1,887.00 for Dr. Gustavel's treatment.

6. Dr. Vincent Serio, M.D., opined Claimant suffered injuries related to the accident. He recommended treatment, including surgery on Claimant's right knee ligaments, which Claimant was unable to afford. Claimant seeks the corrective surgery on his right knee. The estimates for this surgery add to \$15,592.40.

DISCUSSION AND FURTHER FINDINGS OF FACT

7. **Credibility – Claimant.** Claimant's demeanor appeared forthright. Employer's did not.

8. **Accident and Injury.** Accident and injury are defined by Idaho Code § 72-102(18). Claimant established a *prima facie* case which proved he was injured in an accident suffered within the course and scope of his work. Employer's attempts to recast Claimant as not an employee or as not on duty are not persuasive. Claimant was an employee of Mr. Espinoza. He was on duty when the injury occurred. Similarly, Mr. Zamarripa was an employee of Mr. Espinoza. Mr. Zamarripa's role was that of a shift leader, not an independent contractor. (Assuming *arguendo*, Mr. Zamarripa had been an independent contractor to Mr. Espinoza, Mr. Espinoza would have been the general contractor and statutory employer under Idaho Code § 72-216. Mr. Espinoza would have remained liable under Idaho Worker's Compensation Law for Claimant's injuries.)

9. **Causation.** A claimant must provide medical opinion that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Claimant submitted medical records sufficient to support the legal standard for establishing causation. Two doctors have opined through their medical records that Claimant's right knee condition was caused by the accident. Therefore, he is entitled to medical benefits for initial treatment of both legs and for continuing treatment of his right knee, including future surgery. The record establishes medical bills past and future in an amount not less than \$17,479.00. Further, Employer remains additionally liable for related medical bills Claimant has incurred and for future related medical bills in excess of the estimates of record.

10. **Failure to Insure.** Claimant showed Employer failed to carry worker's

compensation insurance as required by Idaho Worker's Compensation Law. Pursuant to Idaho Code § 72-210, Employer is obligated to pay a 10% penalty. In this instance, the penalty amounts to at least \$1,747.90. If Claimant's medical bills related to the accident are greater, the 10% penalty applies to those bills as well. Further, section 72-210 allows for reasonable attorney fees. Claimant represented himself, *pro se*, before the Industrial Commission and thus has incurred no attorney fees yet. If he obtains an attorney to assist him in the Third Judicial District to obtain a judgment and to collect this award, the statute applies to reasonable attorney fees for that purpose as well.

11. **Sanctions.** Employer filed an Answer but did not respond to discovery. Employer did not appear at the pretrial conference ordered by the Referee.

12. At hearing, Employer attempted to confuse the Commission as to who owned the dance club, by claiming it was owned by his mother and he was merely "in charge." This facile evasion is unpersuasive. Mr. Espinoza interviewed Claimant and hired him. Mr. Espinoza sometimes handed out the cash wages to Mr. Zamarripa to distribute to his shift workers and sometimes handed it out the workers personally. Mr. Espinoza appeared by personally signing the Answer filed with the Industrial Commission. By signing the Answer, Mr. Espinoza acknowledged his ownership of Employer. Mr. Espinoza appeared personally at hearing to represent Las Palmas Dance Club.

13. The Referee finds that Rigoberto Espinoza, d/b/a Las Palmas Dance Club, is personally liable for all awards made herein.

14. A sanction of \$1,000.00 is appropriate as a result of Employer's failure or refusal to meaningfully participate between the date of the Answer and the date of hearing.

CONCLUSIONS OF LAW

1. Claimant suffered a compensable accident in the course and scope of his work for Rigoberto Espinoza, d/b/a Las Palmas Dance Club;
2. Claimant’s injuries caused by the accident required medical care, past and future in an amount not less than \$17,479.00;
3. Mr. Espinoza is liable for penalties under Idaho Code § 72-210 in an amount not less than \$1,747.90, plus attorney fees, if any, incurred to secure and enforce a judgment for Mr. Espinoza’s liability; and
4. Mr. Espinoza is liable for a sanction of \$1,000.00, payable to Claimant for Mr. Espinoza’s failure and refusal to respond to discovery and the order of the Referee in this matter.

RECOMMENDATION

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

DATED this 15TH day of December, 2009.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUSSELL WOLFF,)
)
 Claimant,) **IC 2005-011267**
 v.)
)
 LAS PALMAS DANCE CLUB,) **ORDER**
)
 Employer,) FILED DECEMBER 18 2009
 Defendant.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended 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 suffered a compensable accident in the course and scope of his work for Rigoberto Espinoza, d/b/a Las Palmas Dance Club.
2. Claimant’s injuries caused by the accident required medical care, past and future in an amount not less than \$17,479.00.
3. Mr. Espinoza is liable for penalties under Idaho Code § 72-210 in an amount not less than \$1,747.90, plus attorney fees, if any, incurred to secure and enforce a judgment for Mr. Espinoza’s liability.

4. Mr. Espinoza is liable for a sanction of \$1,000.00, payable to Claimant for Mr. Espinoza's failure and refusal to respond to discovery and the order of the Referee in this matter.

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

DATED this 18TH day of DECEMBER, 2009.

INDUSTRIAL COMMISSION

/S/ _____
R. D. Maynard, Chairman

/S/ _____
Thomas E. Limbaugh, Commissioner

/S/ _____
Thomas P. Baskin, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18TH day of DECEMBER, 2009, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Russell Wolff
1915 South Elder
Nampa, ID 83686

Rigoberto Espinoza
909 West Roberts Avenue
Nampa, ID 83651

db

/S/ _____