

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROBIN J. MATTOS,	)	
	)	<b>IC 2007-032587</b>
Claimant,	)	
	)	
v.	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
MOUNTAIN MULTI SERVICES, LLC,	)	<b>AND RECOMMENDATION</b>
	)	
Employer,	)	Filed: November 8, 2011
	)	
Defendant.	)	
_____	)	

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a default hearing in Coeur d’Alene on April 27, 2010. Claimant was present and represented by Darin G. Monroe of Boise. An entry of default against Employer was granted on June 2, 2011. Oral and documentary evidence was presented at the default hearing. Upon the receipt of Claimant’s Opening Brief, this matter came under advisement on May 18, 2010.

**PRELIMINARY MATTERS**

Claimant filed his Complaint on August 21, 2008. When no Answer was forthcoming, Claimant filed his Notice of Intent to Take Default on September 16, 2008. On May 10, 2010, Claimant filed his Motion for Entry of Default for Failure to Plead or Otherwise Defend with supporting affidavit. An Order Entering Default was filed on June 2, 2010. All pleadings and notices were sent to Employer’s address and that of Employer’s registered agent; all were returned as undeliverable.

## **ISSUES**

As discussed at hearing, the issues to be decided are:

1. Whether Claimant suffered an accident arising out and in the course of his employment;
2. Whether and to what extent Claimant is entitled to the following benefits:
  - (a) Medical care; and
  - (b) Temporary partial and/or temporary total disability (TPD/TTD);
3. Whether Employer is liable to Claimant for the penalties set forth in Idaho Code § 72-210 for failing to insure liability; and
4. Whether the Commission should retain jurisdiction beyond the applicable statutes of limitation.

## **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 1-5 admitted at the hearing.

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

## **FINDINGS OF FACT**

1. Claimant was 55 years of age and resided in Coeur d'Alene at the time of the hearing. At the time of his September 11, 2007 accident and injury, Claimant was working for Employer in McCall. He was earning \$17.00 an hour and worked 40 hours a week. Claimant's

job duties at the time of his accident were scraping paint and cleaning windows on newly constructed housing.

2. On September 11, 2007, Claimant was standing on a ladder approximately 15 feet above the ground when the ladder slipped and Claimant fell straight to the ground, landing primarily on his right foot.

3. Claimant immediately presented to McCall Memorial Hospital with the chief complaint of right ankle pain. He was examined and x-rays were taken. Claimant was diagnosed with a comminuted right calcaneal fracture. He was splinted, given crutches and instructed to bear no weight on his right ankle. An appointment was made with Ronald Kristensen, M.D., an orthopedic surgeon in Boise. Claimant was given Norco and taken off work.

4. Claimant first saw Dr. Kristensen on September 17. Because Claimant is a smoker, and because his calcaneus fracture was just 2mm displaced with little varus or widening, a conservative approach to Claimant's care was agreed upon. He was taken off work for at least eight weeks and given a non-weight bearing splint. Claimant was to ice and elevate his right ankle and return in three weeks to begin range-of-motion exercises.

5. By November 5, 2007, Claimant was doing well generally, but Dr. Kristensen wanted him to work on physical therapy, both on his own and with a physical therapist. Dr. Kristensen released Claimant to sedentary work. On December 13, 2007, Dr. Kristensen elevated Claimant's return-to-work status to light duty with no climbing, no ladders, and no heights over three feet. On February 8, 2008, Dr. Kristensen pronounced Claimant at MMI and released him to return to work without restrictions.

6. Claimant never returned to work for Employer after his accident and injury.

7. Employer failed to carry workers' compensation insurance on the date of Claimant's accident. *See* Surety correspondence dated October 11, 2007.

## **DISCUSSION AND FURTHER FINDINGS**

### **Accident/injury**

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).

8. Claimant's testimony and the medical records in evidence establish that he suffered an accident arising out of and in the course of his employment with Employer causing an injury on September 11, 2007.

### **Medical benefits**

Idaho Code § 72-432 obligates an employer to provide reasonable medical care immediately following an industrial accident and for a reasonable time thereafter. If the employer fails to provide such care, the employee may do so at employer's expense.

9. Claimant's accident required him to seek medical care and the care he received was reasonable. Employer is liable for the cost of that care. Claimant's Exhibit 4 reveals that Claimant has incurred medical bills in the amount of **\$4,823.89**. Employer is liable to Claimant for that amount.

Idaho Code § 72-432(13) provides for reimbursement of expenses for necessary travel in obtaining medical care.

10. Claimant was required to travel from his home in McCall to Boise to treat with Dr. Kristensen. Claimant traveled 213.56 miles to see Dr. Kristensen five times in 2007. After subtracting the first 15 miles per statute, Claimant is entitled to reimbursement equaling 198.56 miles per trip which equals 992.8 miles (5 x 198.56 = 992.8). At 48.5 cents per mile,<sup>1</sup> Claimant is entitled to mileage reimbursement in the amount of \$481.51 (992.8 x .485 = \$481.51) One trip required Claimant to spend the night in Boise. He is entitled to reimbursement for his lodging in the amount of \$68.81 (Claimant's Exhibit 5) and \$30.00 for meals for a total of \$98.81. In 2008, Claimant traveled once to Boise, entitling him to mileage reimbursement of \$100.25 (198.5 x 50.5 = \$100.27). Claimant is entitled to a total of **\$680.59** for travel reimbursement.

#### **TTD benefits**

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).

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<sup>1</sup> The mileage rate allowed by the state board of examiners for state employees at the time the travel occurred, as required by Idaho Code § 72-432(13).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light-duty work release and which employment is likely to continue throughout his or her period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light-duty work release. *Malueg, Id.*

11. Claimant was taken off work from the date of his accident, September 11, 2007, until he was released to sedentary work by Dr. Kristensen on December 14, 2007. Because Claimant was offered no work under *Malueg*, Employer is responsible for continued TTD payments until Claimant was released to return to work without restrictions on February 8, 2008. Claimant was earning \$17.00 an hour for a 40-hour week for an average weekly wage of \$680.00. Claimant's TTD rate is then \$455.60 per week (67% of \$680). Claimant was off work 21 weeks and 4 days. Therefore, Claimant is entitled to TTD benefits of **\$9,827.94** ( $455.60 \times 21.571428 = 9,827.94$ ).

### **Penalty**

12. Idaho Code § 72-210 provides for a penalty of 10% of the total amount of compensation awarded against employers who fail to insure their workers' compensation liability.

13. The total amount of compensation awarded Claimant equals \$15,332.42 (Medicals = \$4,823.89 + Travel = \$680.59 + TTDs = \$9,827.94). Claimant is entitled to a penalty equaling \$1,533.24 ( $\$15,332.42 \times .10 = \$1,533.24$ ).

14. Idaho Code § 72-210 states that Claimant shall also be awarded costs, if any, and reasonable attorney fees if he has retained counsel. In *Shae v. Bader*, 102 Idaho 697 (1981), the Court found that Claimant's attorney fees under Idaho Code § 72-210 should be based on what would be a reasonable fee on a contingent basis, including the factors set forth in *Clark v. Sage*, 102 Idaho 261 (1981). The Court reiterated the importance of the *Clark* factors in *Hogaboom v. Economy Mattress*, 107 Idaho 13 (1984). While generally applied to Idaho Code § 72-804 attorney fee cases, the Referee finds the *Hogaboom* factors and procedure relevant to Claimant's request for Idaho Code §72-210 fees.

Generally, the Commission urges the parties to come to an agreement on appropriate attorney fees or asks Claimant to submit an affidavit and/or brief in support of his request for fees with appropriate elaboration on the *Hogaboom* factors. As this is a default case, Employer has forfeited his opportunity to further participate in the matter. Claimant shall, within twenty (20) days of the date of this recommendation and order, submit an affidavit and/or brief to the Commission on his benefits secured, in accordance with *Hogaboom v. Economy Mattress*, 107 Idaho 13 (1984).

### **Retention of Jurisdiction**

15. Whether or not to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. Where a claimant's medical condition has not stabilized or where a claimant's physical disability is progressive, it is appropriate for the Commission to retain jurisdiction. *Reynolds v. Browning Ferris Industries*, 113 Idaho 965, 969, 751 P.2d 113, 117

(1988). Retention of jurisdiction may also be appropriate in cases where there is a probable need for future temporary disability benefits associated with surgery. *Elmore v. Floyd Smith, Jr. Trucking*, 86 IWCD 100, p. 1278. The Referee finds it appropriate to recommend that the Commission retain jurisdiction in this matter beyond the applicable statutes of limitation as the issues of whether and to what extent Claimant has incurred permanent partial impairment and permanent partial disability above impairment.

### CONCLUSIONS OF LAW

1. Claimant suffered an accident arising out of and in the course of his employment with Employer causing an injury on September 11, 2007.
2. Claimant is entitled to medical benefits in the amount of \$4,823.89.
3. Claimant is entitled to \$680.59 in travel reimbursement.
4. Claimant is entitled to \$9,827.94 in TTD benefits.
5. Claimant is entitled to attorney fees. Claimant shall file within twenty (20) days an affidavit and/or brief in support of his request for attorney fees, with appropriate elaboration on *Hogaboom v. Economy Mattress*, 107 Idaho 13 (1984).
6. Claimant is entitled to \$1,533.24 in penalties.
7. Claimant's total award is \$15,533.24 in compensation.
8. The Commission will retain jurisdiction beyond the applicable statutes of limitation.

## **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 19 day of October, 2011.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Rinda Just, Referee

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROBIN J. MATTOS,

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**IC 2007-032587**

Claimant,

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v.

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**ORDER**

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MOUNTAIN MULTI SERVICES, LLC,

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Filed: November 8, 2011

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Employer,

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Defendant.

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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. Claimant suffered an accident arising out of and in the course of his employment with Employer causing an injury on September 11, 2007.

**ORDER - 1**

2. Claimant is entitled to medical benefits in the amount of \$4,823.89.

3. Claimant is entitled to \$680.59 in travel reimbursement.

4. Claimant is entitled to \$9,827.94 in TTD benefits.

5. Claimant is entitled to attorney fees. Claimant shall file within twenty (20) days, an affidavit and/or brief in support of his request for attorney fees, with appropriate elaboration on *Hogaboom v. Economy Mattress*, 107 Idaho 13 (1984).

6. Claimant is entitled to \$1,533.24 in penalties.

7. Claimant's total award is \$15,533.24 in compensation.

8. The Commission will retain jurisdiction beyond the applicable statutes of limitation.

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

DATED this 8 day of November, 2011.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_

Thomas E. Limbaugh, Chairman

/s/ \_\_\_\_\_

Thomas P. Baskin, Commissioner

/s/ \_\_\_\_\_

R.D. Maynard, Commissioner

ATTEST:

/s/\_\_\_\_\_

Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 8 day of November, 2011, 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:

DARIN G MONROE

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MCCALL ID 83638-4479

JAMES T HORN

REGISTERED AGENT

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djb

/s/\_\_\_\_\_