

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

ROY D. SMITH,

Claimant,

v.

EMPTY HAND COMBAT,

Employer,  
Defendant.

**IC 2011-022370**

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

May 24, 2012

---

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee LaDawn Marsters, who entered an Order Entering Default herein on March 20, 2012. On April 4, 2012, Cosmo Zimik, on behalf of Empty Hand Combat, Employer, filed a letter with the Commission seeking to set aside the default order. Roy D. Smith, *pro se* Claimant, did not respond.

On April 10, 2012, Claimant filed an application for judgment against Empty Hand Combat, to which medical records and bills were appended. Claimant has not requested a hearing. This matter became ready for decision and was taken under advisement on May 4, 2012.

**ISSUES**

Claimant's issues to be decided at this time are:

1. Whether Employer's Motion to Set Aside Default should be granted and, if not:
2. Whether Claimant has established a *prima facie* case to support his application for a default judgment;

3. Whether Claimant sustained an injury from an accident arising out of and in the course of employment;
4. Whether the condition for which Claimant seeks benefits was caused by the industrial accident; and
5. Whether and to what extent Claimant is entitled to benefits.

#### **EVIDENCE CONSIDERED**

##### **(Mr. Zimik's Motion to Set Aside Default)**

1. Information posted to the website of the Secretary of State of Idaho; and
2. Information posted to the website of the Idaho State Bar.

#### **EVIDENCE CONSIDERED**

##### **(Claimant's Application for Default Judgment)**

3. Claimant's Exhibits consisting of medical records and bills appended to his April 10, 2012 application for judgment; and
4. Claimant's allegations contained in his Complaint.

#### **FINDINGS OF FACT**

1. Judicial notice is taken of the following facts concerning Empty Hand Combat and Cosmo Zimik:
  - a. Empty Hand Combat has been continuously registered as a limited liability company with the Idaho Secretary of State since August 2009; and
  - b. Cosmo Zimik is not listed on the roster of attorneys licensed in the State of Idaho.

2. Claimant incurred medical bills for treatment related to a left inguinal hernia including emergent care and surgical repair.

3. Claimant's Complaint asserts that he was employed by Empty Hand Combat, which "paid" him room and board and a total of \$70 during the time he stayed there, in exchange for his assistance in teaching some fighting classes. He submitted no evidence to support his claim that he was employed by Empty Hand Combat.

4. Claimant's Complaint asserts that he incurred his left inguinal hernia when he was punched in his left testicle while teaching a student at Empty Hand Combat how to throw an uppercut punch.

## **DISCUSSION AND FURTHER FINDINGS**

### ***MR. ZIMIK'S MOTION TO SET ASIDE DEFAULT***

5. Rule 6.C. of the Judicial Rules of Practice and Procedure Under the Idaho Workers' Compensation Law allows a default order to be set aside "[f]or good cause shown and on written motion filed within 21 days of entry of default." However, the law in Idaho is settled that limited liability companies may not be represented in administrative proceedings by non-lawyers. "In sum, the law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before an administrative body or a judicial body." *Kyle v. Beco*, 109 Idaho 267 (1985). That prohibition is set forth in J.R.P. Rule 2.B.:

#### **B. Parties Other Than Persons.**

Except as otherwise set forth in these rules, all parties other than persons must be represented by an attorney who is licensed to practice law in the State of Idaho or who is associated with an attorney licensed to practice law in the State of Idaho. This requirement includes, but is not limited to, the filing of any document in any matter in which a complaint has been filed and participating in any proceeding before the Commission.

6. Mr. Zimik's written motion was timely filed under J.R.P. Rule 6.C.; however, it was improperly filed because, as a non-lawyer, he is not authorized to file motions on behalf of Empty Hand Combat, a limited liability company. Therefore, Mr. Zimik's motion is stricken from the record. No alternative motion was filed within the time period provided under J.R.P. Rule 6.C.; therefore, the entry of default is final. Empty Hand Combat may not offer evidence in defense against Claimant's instant claims.

***CLAIMANT'S APPLICATION FOR ENTRY OF DEFAULT JUDGMENT***

7. Claimant's medical records and bills consist of:

*APRIL 23, 2011- SAINT ALPHONSUS MEDICAL CENTER (SARMC) IN NAMPA*

a. An Emergency Record identifying his home address (503 Constitution Way in Nampa), his employer (Denny's, located at 607 Nampa Boulevard), his payment method (out-of-pocket) and his reason for visit (blood in stool, possible hernia);

b. An Emergency Physician Record which states Claimant was reporting "still present" bloody diarrhea for which he had recently been seen in the emergency department (on April 22, 2011), confusion, past history of hernia and other symptoms which led the physician to order a CT scan of Claimant's abdomen, and which indicates Claimant was admitted for further treatment;

c. An abdominal CT scan report which confirmed a left inguinal hernia, among other conditions;

d. A billing statement related to his hospital treatment on April 23, 2011;

*APRIL 26, 2011 – MRI MOBILE OF BOISE*

e. A bill for a brain MRI and a head angiography;

*SEPTEMBER 23, 2011 THROUGH MARCH 12, 2012*

f. Various billing statements;

*JANUARY 11, 2012 – RICHARD BALLANTYNE, D.O.*

g. Chart note in which surgical repair of Claimant's hernia is scheduled and Dr. Ballantyne notes concern about Claimant's mental state: "Schedule for Laparoscopic Inguinal Hernia repair with mesh. R&B discussed at length. I am still concerned about the patients [*sic*] psychological state. He will be staying with family after the surgery so he will have someone to help care for him";

*JANUARY 27, 2012 – HERNIA REPAIR – SARMC IN NAMPA*

h. An Operative Report confirms Dr. Ballantyne performed a laparoscopic incarcerated left inguinal hernia repair with mesh;

i. An admission record ("Same Day Care Record") indicates Claimant is unemployed, that an insurance company ("PCIP") should be billed and in place of a home address, a post office box address is identified for Claimant (P.O. Box 895, Nampa);

*FEBRUARY 13, 2012 – SAINT ALPHONSUS MEDICAL GROUP*

j. A chart note prepared by a physician's assistant lists Claimant has a past medical history of depression and schizophrenia, among other conditions, and states that Claimant was healing well from his surgery; and

*MARCH 5, 2012 – SAINT ALPHONSUS MEDICAL GROUP*

k. A chart note prepared by a physician's assistant confirms that Claimant is healing well and satisfied with his recovery.

## DISCUSSION AND FURTHER FINDINGS

8. Claimant seeks to establish a *prima facie* case to support his application for default award. He requests that judgment be entered against Empty Hand Combat for medical expenses, and all other benefits to which he may be entitled.

9. A *prima facie* case is defined as “(s)uch as will prevail until contradicted and overcome by other evidence.” *Black’s Law Dictionary*, Sixth Edition, 1990, p. 1189. A claimant’s burden of establishing a *prima facie* case by probable, not merely possible evidence, should not be disregarded simply because the uninsured employer was defaulted by order of the Commission. *See, State v. Adams*, 22 Idaho 485, 126 P. 401 (1912).

### **Accident/injury and causation.**

10. An “accident” is 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(18)(b). 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(18)(c).

11. 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, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

12. The provisions of the Worker's Compensation law are to be liberally construed in favor of the employee. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

13. Claimant's Complaint alleges that his groin injury at Empty Hand Combat occurred on or about June 24, 2011; however, in his application for judgment, he alleges (and his medical records confirm) that he incurred his hernia on or around April 22 or 23, 2011. Either way, for the following reasons, Claimant has failed to prove he is entitled to benefits.

14. Claimant's medical records indicate that he was working at Denny's on April 23, 2011 and living at 503 Constitution Way when he was first diagnosed with a hernia. The Referee finds the medical records more persuasive than Claimant's inconsistent statements regarding the onset of his hernia. Claimant has failed to prove that he was employed at Empty Hand Combat when he was diagnosed with a hernia on April 23, 2011.

15. Claimant has also failed to prove that his alleged accident in June 2011 affected his need for medical treatment such as to merit a judgment for benefits. Specifically, Claimant has not come forward with a medical opinion that his alleged accident aggravated his preexisting hernia condition.

16. Regardless of the alleged accident date, none of Claimant's medical records state any facts relevant to the etiology of his hernia. For instance, there are no records of Claimant's reports to physicians, except that Claimant was confused and disoriented on April 23, 2011, and no physician opinions on this issue.

17. There are no relevant medical or employment records to support Claimant's contentions that he was employed at Empty Hand Combat or that he was injured, at work or elsewhere, on June 24, 2011.

18. The Referee finds Claimant has failed to meet his burden of proving he suffered his hernia as a result of an accident arising out of and in the course of employment with Empty Hand Combat on or about June 24, 2011.

19. The Referee recommends dismissal of Claimant's Complaint.

### CONCLUSIONS OF LAW

1. Claimant has failed to establish a *prima facie* case to support his application for a default judgment.

2. Claimant's Complaint should be dismissed.

### RECOMMENDATION

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

DATED at Boise, Idaho, this 15<sup>th</sup> day of May, 2012.

INDUSTRIAL COMMISSION

/s/  
LaDawn Marsters, Referee

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of May, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATION** was served by regular United States Mail upon each of the following persons:

ROY D SMITH  
PO BOX 895  
NAMPA ID 83653

COSMO ZIMIK  
C/O EMPTY HAND COMBAT  
9, 11 AVENUE SOUTH  
NAMPA ID 83651

sjw

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

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

ROY D. SMITH,

Claimant,

v.

EMPTY HAND COMBAT,

Employer,  
Defendant.

**IC 2011-022370**

**ORDER**

May 24, 2012

---

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 has failed to establish a *prima facie* case to support his application for a default judgment.
2. Claimant's Complaint should be dismissed.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 24<sup>th</sup> day of May, 2012.

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 24<sup>th</sup> day of May, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

ROY D SMITH  
PO BOX 895  
NAMPA ID 83653

COSMO ZIMIK  
C/O EMPTY HAND COMBAT  
9, 11 AVENUE SOUTH  
NAMPA ID 83651

sjw

/s/