

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERIC BENTON,

Claimant,

v.

GABE'S PAINTING, LLC a/k/a GABE'S
PAINTING & PROPERTY RESTORATION,
LLC, GABRIEL REYES and YOLANDA
GARCIA REYES,

Employer,
Defendants.

IC 2015-017100

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

Filed May 18, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on January 15, 2016. Claimant, Eric Benton, was present in person and represented by Bryan S. Storer, of Boise. Defendant Employer, Gabe's Painting, LLC a/k/a Gabe's Painting & Property Restoration, LLC, (Gabe's Painting) was not represented by counsel.¹ Defendants Gabriel Reyes and Yolanda Garcia Reyes were represented pro se. The parties presented oral and documentary evidence. No post-hearing depositions were taken and Claimant later submitted briefs. None of the Defendants submitted a brief. The matter came under advisement on March 10, 2016.²

ISSUES

The issues to be decided are:

¹ Notice of hearing was duly served upon Defendant Gabe's Painting, LLC, and Gabe's Painting and Property Restoration, LLC, by certified mail to Gabriel Reyes and Yolanda Garcia Reyes, Gabe's Painting members. Gabriel Reyes acknowledged that he was informed well prior to hearing that Commission rules required attorney representation of Gabe's Painting. See JRP 2(2) and Transcript, pp. 5, 93.

² After hearing, Claimant moved for default against Gabe's Painting, LLC, and Gabe's Painting and Property Restoration, LLC. An order entering default against both entities was issued on May 12, 2016, as mandated by JRP 6(A). However, the need to establish a prima facie case to support a default judgment or for further default proceedings pursuant to JRP 6(C) is rendered moot by the decision herein.

1. Claimant's entitlement to medical care due to his industrial accident;
2. Claimant's entitlement to temporary disability benefits due to his industrial accident;
3. Defendants' liability to Claimant for the penalties set forth in Idaho Code § 72-210 for failing to insure liability; and
4. Whether Gabriel Reyes and/or Yolanda Garcia Reyes are personally liable for any compensation due Claimant pursuant to Idaho Code § 72-319.
5. All other issues are reserved.³

CONTENTIONS OF THE PARTIES

Claimant asserts he suffered an industrial accident on June 23, 2015, when he fell from a ladder while working for Gabe's Painting. He asserts Gabe's Painting was not insured at the time of his accident and seeks medical and time loss benefits together with statutory penalties. Defendants Gabriel Reyes and Yolanda Garcia Reyes acknowledge Claimant's industrial accident but assert he fell while painting from a ladder that he was instructed not to use.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, Gabriel Reyes, and Yolanda Garcia Reyes taken at the hearing; and
3. Claimant's Exhibits 1-11 admitted at the hearing.⁴

³ Claimant's Opening Brief, p. 10, requests that the Commission "enjoin defendants from transferring, selling, encumbering, assigning, or in any manner disposing of, concealing, secreting or destroying any property or records belonging to Defendants pursuant to I.C. 72-319(3)." Hearing on this issue was not requested by Claimant nor noticed by the Commission. Idaho Code § 72-713 requires "the commission shall give at least ten (10) days' written notice of the time and place of hearing and of the issues to be heard," thereby precluding consideration of this issue herein.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1975 and resided in the Caldwell area at the time of the hearing. He is right hand dominant.

2. Gabe's Painting is an Idaho limited liability company per filings by Gabriel Reyes with the Idaho Secretary of State.⁵ Gabriel Reyes was the initial manager of Gabe's Painting. Gabe's Painting employs from approximately four to eight workers and performs residential and commercial painting and repairs. Gabriel Reyes and Yolanda Garcia Reyes are husband and wife. At all relevant times Gabriel Reyes and Yolanda Garcia Reyes were registered members of Gabe's Painting per filings with the Idaho Secretary of State.

3. Claimant worked for Gabe's Painting from time to time commencing in 2008. In March 2015, Claimant resumed working for Gabe's Painting. By June 1, 2015, Claimant was working full-time for Gabe's Painting earning \$11.00 per hour.

4. Gabe's Painting carried worker's compensation insurance coverage from time to time after commencing operation in 2005. Gabe's Painting was insured by Federated Mutual Insurance Company from approximately March 5, 2015, until June 6, 2015.⁶ However, from June 7 through 28, 2015, neither Gabe's Painting, Gabriel Reyes nor Yolanda Garcia Reyes had worker's compensation insurance coverage. Gabriel Reyes acknowledged there was no worker's compensation insurance coverage in place on June 23, 2015. Transcript, p. 61.

⁴ Defendants' Exhibits A-C were offered at hearing but denied admission because they were never previously disclosed as required by JRP 10 and Claimant's pre-hearing discovery requests.

⁵ Gabriel Reyes acknowledged that Gabe's Painting and Gabe's Painting and Property Restoration are essentially the same business entity. Transcript, p. 63, ll. 9-12.

⁶ Federated Mutual Insurance Company was originally named as a defendant herein, but was dismissed by order of the Commission on December 30, 2015.

5. **Industrial accident and treatment.** On June 23, 2015, Claimant was painting a private residence for Gabe's Painting, LLC. Claimant stood on a ladder provided by Gabe's Painting which Miguel, a Gabe's Painting employee and Claimant's supervisor on the painting job, had instructed Claimant to use or at least acquiesced in Claimant using. Miguel was painting from another ladder nearby. Claimant was painting approximately 15 to 18 feet from the ground when his ladder fell and Claimant landed upon a concrete driveway sustaining severe injuries. Mr. Reyes arrived at the scene very shortly after Claimant's fall, provided assistance, and summoned an ambulance. At Claimant's request a coworker applied a shirt as a tourniquet to control bleeding from Claimant's obviously fractured right arm until paramedics arrived.

6. Claimant was taken by Ada County Paramedics via ambulance to the emergency room of St. Alphonsus Regional Medical Center in Boise where he was found to have blunt chest trauma, head injury, rib fractures, contused liver and spleen, severely comminuted displaced right arm fracture with distal ulna and radius protruding through the skin and ulna dislocated from the carpal bones, extensor tendon entrapment and laceration, jaw fracture and dislocation, multiple fractured and dislodged teeth, nasal fracture, open jaw laceration extending to the bone, concussion, and right external auditory canal fracture with displaced bone fragment and bleeding from the ear. He was taken to surgery urgently and hospitalized commencing June 23, 2015. Claimant remained hospitalized for approximately two weeks and was treated with multiple diagnostic scans, medications, sutures, operative intervention with external fixation of his upper right extremity, and his jaw was wired shut.

7. After his discharge from the hospital, Claimant received substantial ongoing medical treatment. His jaw remained wired shut for approximately two and one-half months and his right forearm remained immobilized by multiple pins connected to an external fixator for at

least four months. Claimant underwent additional right forearm surgery including bone marrow grafting in an effort to reconstruct his right wrist.

8. Claimant has not worked from the time of his fall through the date of the hearing.

9. Gabriel Reyes visited Claimant at the hospital and offered encouragement. However, none of the Defendants have paid any benefits to Claimant or to his medical providers for their treatment of Claimant's industrial injuries.

10. Claimant retained attorney Bryan Storer to represent him and Mr. Storer has actively prosecuted Claimant's case from filing of the Complaint herein through hearing and post-hearing briefing.

11. At the time of hearing, Claimant continued to receive periodic medical treatment for his right forearm and jaw. He wore a right arm sling and noted ongoing right arm and hand pain and limitations, jaw pain, and migraine headaches. He anticipated additional medical treatment including but not limited to further forearm and dental surgery and physical therapy.

12. **Credibility.** Having observed Claimant, Gabriel Reyes and Yolanda Garcia Reyes at hearing, and compared their testimony with other evidence in the record, the Referee finds that all are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

13. The provisions of the Worker's Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

14. **Medical care.** Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

15. As a result of his June 23, 2015, industrial accident, Claimant has incurred reasonable and necessary medical expenses for medical treatment as follows:

Ada County Paramedics	\$1,389.50
St. Alphonsus RMC	\$80,288.99
Gem State Radiology	\$1,224.30
Saltzer Medical Group	\$5,044.00
Idaho Hand Center	\$6,317.00
Altitude Physical Therapy	\$2,095.00
Lighthouse Dental	\$380.00
Total	\$96,738.79

16. The total amount due and owing to Claimant for medical benefits pursuant to Idaho Code § 72-432 is \$96,738.79, plus accruing interest. Claimant anticipates additional medical and dental treatment and expenses due to his industrial accident.

17. **Temporary disability.** Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as 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 for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical 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, 605 P.2d 939 (1980).

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

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

18. In the present case, Claimant was unable to work due to his industrial accident commencing on June 23, 2015. He was not paid wages for the day of his accident. John Kloss, M.D., surgically treated Claimant’s right upper extremity fractures and subsequently restricted him from any lifting, pulling, or grasping with his right upper extremity. There is no indication Claimant has been medically released for work. Claimant was in a period of recovery from his industrial accident and is entitled to total temporary disability benefits from June 23, 2015, through the time of hearing, January 15, 2016.

19. Claimant was earning \$11.00 per hour at the time of his accident. He asserted that he worked an average of 40 hours per week. Gabriel Reyes suggested Claimant may have

worked between 30 and 40 hours per week, but provided no supporting documentation. The Referee finds Claimant's average weekly wage at the time of his accident was \$440.00.

20. Idaho Code § 72-408(1) generally establishes Claimant's total temporary disability benefits at 67% of his average weekly wage, which equates to \$294.80. However, Claimant's temporary disability benefits are subject to a 90% maximum and 45% minimum of the currently applicable average weekly state wage pursuant to Idaho Code § 72-409. The average weekly state wage for 2015 and 2016 is \$689.00 and \$721.00 respectively; 45% of which is \$310.05 and \$324.45 respectively. Pursuant to Idaho Code § 72-409(1), because Claimant's average weekly rate of \$294.80 is less than 45% of the applicable average weekly state wage, Claimant is entitled to total temporary disability benefits of \$310.05 per week in 2015 and \$324.45 per week in 2016.

21. Claimant is entitled to total temporary disability benefits from June 23, 2015, through December 31, 2015, a period of 27 weeks and three days in the amount of \$8,504.23. Claimant is also entitled to total temporary disability benefits from January 1, 2016, through January 15, 2016, a period of two weeks and one day in the amount of \$695.25. Pursuant to Idaho Code §§ 72-408 and 409, the total amount of temporary disability benefits presently due and owing to Claimant because of his industrial accident is \$9,199.48. Temporary disability benefits will continue to accrue while Claimant is recovering until Defendants offer him suitable work within his restrictions or show that suitable work is available within his general labor market.

22. **Idaho Code § 72-210 penalties.** Idaho Code § 72-210 allows Claimant to collect reasonable attorney fees, costs, and a statutory penalty equal to 10% of the compensation awarded from an uninsured employer. At the time of Claimant's industrial accident, Gabe's

Painting, Gabriel Reyes, and Yolanda Garcia Reyes had failed to insure their liability under the Idaho Worker's Compensation Laws.

23. Claimant is entitled to attorney fees and costs pursuant to Idaho Code § 72-210. In briefing, Claimant's counsel requests attorney fees of \$8,250.00 (for 33 hours x \$250.00 per hour) and costs of \$61.17. See Claimant's Opening Brief, p. 9. Claimant was represented by attorney Bryan Storer from the commencement of this action through the time of hearing; however, the record contains no evidence of any fee agreement or number of hours worked to quantify Mr. Storer's efforts in the case. Thus a determination of the attorney fees and costs to which Claimant is entitled would be premature at present. To assist the Commission in discharging its responsibility to determine reasonable attorney fees and costs in this matter, Claimant's counsel should be required to file with the Commission a memorandum of attorney fees and costs incurred in counsel's representation of Claimant in connection with these benefits, plus an affidavit in support thereof, and discuss the factors set forth by the Idaho Supreme Court in Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2d 990 (1984). The Commission should then review the matter and issue an order determining attorney fees and costs.

24. The record establishes worker's compensation benefits owing to Claimant and the 10% penalty owing pursuant to Idaho Code § 72-210 are as set forth below.

Amounts presently owing pursuant to Idaho Code §§ 72-432, 408 and 409:

Medical expenses	\$ 96,738.79
Temporary disability benefits	\$ 9,199.48
Total	\$ 105,938.27

Amounts owing pursuant to Idaho Code § 72-210:

10% penalty	\$ 10,593.83
Attorney fees and costs	to be determined

The amount presently due and owing to Claimant from Gabe's Painting pursuant to Idaho Code § 72-210 is \$10,593.83 plus reasonable attorney fees and costs in an amount to be determined hereafter.

25. **Personal liability pursuant to Idaho Code § 72-319.** Idaho Code § 72-319 provides in pertinent part:

(1) Any employer required to secure the payment of compensation under this law who fails to secure the payment thereof shall be guilty of a misdemeanor. In any case where the employer is a corporation or a limited liability company, any officer or employee of the corporation or manager or employee of a limited liability company who had authority to secure payment of compensation on behalf of the corporation or limited liability company and failed to do so shall individually be guilty of a misdemeanor.

(2) Such officer, employee or manager shall be personally liable jointly and severally with such corporation or limited liability company for any compensation which may accrue under this law in respect to any injury or occupational disease suffered by any employee of such corporation or limited liability company while it shall so fail to secure the payment of compensation.

26. In the present case, Gabriel Reyes and Yolanda Garcia Reyes were members of Gabe's Painting, the entity for whom Claimant was working at the time of his accident. Gabriel Reyes acknowledged that he had authority and responsibility to secure payment of compensation on behalf of Gabe's Painting but failed to do so. Transcript, p. 75. Yolanda Garcia Reyes also acknowledged responsibility for payment of Claimant's bills. Transcript, p. 103. Gabriel Reyes and Yolanda Garcia Reyes are each personally liable jointly and severally with Gabe's Painting in respect to benefits owed to Claimant for his industrial accident of June 23, 2015.

27. **Total compensation and penalties presently due.** The total amount of worker's compensation benefits and penalties presently due and owing to Claimant from Gabe's Painting and Property, LLC, Gabe's Painting, LLC, Gabriel Reyes, and Yolanda Garcia Reyes jointly and severally in respect to benefits owed to Claimant for his industrial accident of June 23, 2015, is

\$116,532.10 plus an additional amount for reasonable attorney fees and costs to be determined hereafter.

CONCLUSIONS OF LAW

1. Claimant has proven he is presently entitled to reasonable medical benefits due to his June 23, 2015 industrial injury in the amount of \$96,738.79, plus accruing interest.

2. Claimant has proven he is presently entitled to temporary total disability benefits due to his June 23, 2015 industrial accident in the amount of \$9,199.48

3. Claimant has proven he is presently entitled to a 10% penalty pursuant to Idaho Code § 72-210 in the amount of \$10,593.83.

4. Claimant has also proven he is entitled to reasonable attorney fees and costs pursuant to Idaho Code § 72-210. To assist the Commission in discharging its responsibility to determine reasonable attorney fees and costs in this matter, Claimant's counsel should be required to file with the Commission a memorandum of attorney fees and costs incurred in counsel's representation of Claimant in connection with these benefits, plus an affidavit in support thereof, and discuss the factors set forth in Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2d 990 (1984). The Commission may then review the matter and issue an order determining attorney fees and costs.

5. Claimant has proven Gabriel Reyes and Yolanda Garcia Reyes are each personally liable jointly and severally with Gabe's Painting, LLC, and Gabe's Painting and Property Restoration, LLC, in respect to benefits owed to Claimant for his industrial accident of June 23, 2015.

6. The total amount of worker's compensation benefits and penalties presently due and owing to Claimant from Gabe's Painting, LLC, Gabe's Painting and Property, LLC, Gabriel

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRYAN S STORER
4850 N ROSEPOINT WAY
BOISE ID 83713

GABE'S PAINTING & PROPERTY RESTORATION, LLC
PO BOX 1475
CALDWELL ID 73606

GABRIEL REYES
PO BOX 1475
CALDWELL ID 83606

YOLANDA GARCIA REYES
PO BOX 1475
CALDWELL ID 83606

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERIC BENTON,

Claimant,

v.

GABE'S PAINTING, LLC, aka GABE'S
PAINTING & RESTORATION, LLC,
GABRIEL REYES and YOLANDA GARCIA
REYES,

Un-Insured
Employer,
Defendants.

IC 2015-017100

ORDER

Filed May 18, 2016

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 has proven he is presently entitled to reasonable medical benefits due to his June 23, 2015 industrial injury in the amount of \$96,738.79, plus accruing interest.
2. Claimant has proven he is presently entitled to temporary total disability benefits due to his June 23, 2015 industrial accident in the amount of \$9,199.48
3. Claimant has proven he is presently entitled to a 10% penalty pursuant to Idaho Code § 72-210 in the amount of \$10,593.83.
4. Claimant has also proven he is entitled to reasonable attorney fees and costs pursuant to Idaho Code § 72-210. To assist the Commission in discharging its responsibility to

/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 May, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

BRYAN S STORER
4850 N ROSEPOINT WAY
BOISE ID 83713

GABE'S PAINTING & PROPERTY RESTORATION, LLC
PO BOX 1475
CALDWELL ID 73606

GABRIEL REYES
PO BOX 1475
CALDWELL ID 83606

YOLANDA GARCIA REYES
PO BOX 1475
CALDWELL ID 83606

sc

/s/