

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL D. BERRY,

Claimant,

v.

KONA GRILL, INC.,

Employer,

and

LIBERTY MUTUAL FIRE
INSURANCE COMPANY,

Surety,
Defendants.

IC 2014-007634

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

Filed September 25, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on May 20, 2015. Todd Joyner represented Claimant. Lea Kear represented Defendants Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on August 25, 2015. This matter is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided according to the Notice of Hearing are as follows:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether and to what extent Claimant is entitled to benefits for:
 - (a) Temporary disability (TTD/TPD), and
 - (b) Medical care.

Other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends that he injured his right hand at work. He suffered a fracture of the fifth metacarpal when he caught it in an iron gate. He incurred medical expenses and lost work.

Defendants contend that Claimant did not suffer a compensable accident. He broke his hand when he punched a wall. Claimant had previously given notice that he would be quitting. Credibility is an issue.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, and telephonic testimony of Claimant's supervisor Phonephakhanh Loma Xayalinh ("Loma");
2. Claimant's exhibits 1 through 16 admitted at hearing; and
3. Defendants' exhibits A through M, admitted at hearing.

FINDINGS OF FACT

1. Claimant worked for Employer beginning about October 2013. He cooked and did prep work. He worked essentially full time, 40 hours per week more or less. His wage was \$10 per hour.

2. In early to mid March 2014 Claimant gave an oral two-week notice of his intention to quit employment. He intended to begin work for a fitness company.

3. On March 23, 2014 Claimant had a disagreement with a coworker. Claimant had previously paid the coworker in marijuana to take the second part of a double shift. About 30 minutes before the later shift began, the coworker refused to work it. Claimant's supervisor, Loma, required Claimant to work as scheduled. Also, Claimant's shoe had come apart. He was working with only one shoe on. Loma sent Claimant to his car to get another pair of shoes.

4. Between the kitchen and Claimant's car is an iron gate. It has a spring closure and will mechanically close on its own unless physically held open in some manner. To reach his car Claimant would have to push it open. Its hinges would be on Claimant's left as he went out.

5. When he returned with his shoes Claimant had injured his hand. He broke the fifth metacarpal of his right hand. Claimant is right-hand dominant. He reported the injury, tried to work, could not, and sought medical attention at St. Al's ER that same evening.

6. Claimant's supervisor Loma recalled that, upon returning from getting his shoes, Claimant said that he caught it in the gate. Upon observation of Claimant's hand, he thought it was broken. Loma thought it looked like Claimant had hit something rather than been caught in a door. The knuckles were swollen, bruised and abraded; the fourth knuckle was "pushed back."

7. The next day Claimant returned to Employer's premises. He spoke with a supervisor. They decided together that since he had previously given notice to quit, he would sign a letter of resignation effective immediately. He did not again work for Employer.

8. Loma's understanding of Claimant's termination differs. He understood that Claimant had been fired for bringing an illegal substance onto Employer's premises. In testimony, Claimant denied having done so.

9. Claimant began working for another employer in early July 2014 by passing out promotional flyers for its new business. He worked five days per week, five or six hours per day. This work was unpaid, except that the employer paid certain education-related costs. It was considered an "internship," because Claimant intended to pursue certification as a personal trainer. Claimant believes his hand had healed by "late July to early August."

His official start date with the new employer occurred on August 13, 2014 which is the date that employer formed as an LLC.

Medical Care

10. Claimant sought medical treatment that evening. An X-ray confirmed the fracture. The fracture was reduced, and a splint was provided. Claimant was referred to Dominic Gross, M.D., for surgery.

11. On March 26 Dr. Gross noted, “He does not have any abrasions on the knuckles to indicate that his story is not accurate.” He released Claimant to one-handed work. He performed surgery on March 27.

12. Claimant was recovering as expected. On May 29 Dr. Gross removed the splint and ordered physical therapy. Claimant attended four sessions, but no-showed at four more.

13. Medical bills totalling \$23,966.95 appear to be reasonable and related to the injury.

DISCUSSION AND FURTHER FINDINGS OF FACT

14. The provisions of the Idaho Workers’ 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).

Accident

15. 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 not compensable if caused by an employee’s willful intention to injure himself. Idaho Code § 72-208(1). The burden of proving willful intention rests

with an employer. *Seamans v. Maaco Auto Painting and Bodyworks*, 128 Idaho 747, 918 P.2d 1192 (1996).

16. At hearing Claimant testified that he hurried through the gate and pushed it open with his left hand. As it closed, he pushed it with his left elbow to assist its closure. His right hand was “trailing” and got caught between the gate and its frame, breaking his hand.

17. In deposition, Claimant testified his hand caught in a “fire door.” The photographs of the gate make it difficult to see how it might be considered a “fire door.” There is significant open space above and below the door. However, testimony elicited was insufficient to find this an inconsistency. Similarly, medical records recounting Claimant’s history of the accident, although ambiguous, do not show a frank inconsistency. It is somewhat incongruent that Claimant could push back with his left elbow with sufficient force to accelerate closure of the heavy gate and not have a contralateral forward motion of his right shoulder and upper extremity which naturally would draw his hand forward. Nevertheless, one cannot find Claimant’s description of the accident inherently implausible.

18. Both a St. Al’s ER record and an X-ray report described the fracture as a boxer’s fracture. The record does not reflect that the only way such a fracture can occur is by punching a person or other object. Claimant’s Exhibit 4, p. 11.

19. Defendants’ provide a plausible alternate theory—that Claimant, angry about the situation, intentionally struck a wall. There is an absence of direct evidence to support that theory. Without testimony and an opportunity for cross-examination, written statements of supervisors carry little, if any, weight. The most relevant medical note states Claimant’s description of the accident is consistent with the injury. The opinions of supervisors about how the hand looked do not carry greater weight than a physician’s. Even if one were to

find that Claimant intentionally struck a wall, it does not follow that he willfully intended to injure himself.

20. In summary, Claimant offered credible testimony tending to support the occurrence of an accident arising out of and in the course of his employment. This testimony is corroborated by the medical evidence. Defendants failed to satisfy their burden of demonstrating that the Claimant's injuries were the result of his willful intention to injure himself. *See* Idaho Code § 72-208.

Medical Care

21. Claimant is entitled to the payment of medical bills incurred to date in the amount of \$23,966.95, for care reasonably required as the result of the compensable accident.

Temporary Disability

22. Eligibility for and computation of temporary disability benefits are provided by statute. Idaho Code §72-408, *et. seq.* Upon medical stability, eligibility for temporary disability benefits does not continue. *Jarvis v. Rexburg Nursing*, 136 Idaho 579, 38 P.3d 617 (2001). An injured worker who is unable to work while in a period of recovery is entitled to temporary disability benefits under the statutes until he has been medically released for work and Employer offers reasonable work within the terms of the medical release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217, (1986).

23. Claimant argues that he is entitled to TTD benefits from March 24, 2014 until July 1, 2014. Defendants' basis for denying TTDs following surgery is that Claimant's incident was not compensable, a position rejected by the Commission in this decision.

24. On March 24, 2014, Claimant received emergency care for his hand injury. (Exhibit 4, p. 6.) That same day, at Employer's direction, Claimant submitted a resignation notice because his injury left him unable to complete his job duties. (Exhibit 11, p. 8; HT, p. 28.)

On March 27, 2014, Dr. Gross performed surgical repair. In the weeks following surgery, Dr. Gross restricted Claimant from lifting, pulling or pushing. (Exhibit 6, p. 6.) St. Luke's Elk's Rehab provided Claimant with occupational therapy. (Exhibit 7.) Although the record does not show a "full release" to work, Claimant's condition slowly improved in the weeks after surgery. (Exhibit 6, p. 3.) By May 20, 2014, Claimant's occupational therapist set the goal for Claimant to regain functional range of motion and strength throughout the right hand and resume work activities within 6 weeks. (Exhibit 7, p. 6.) On July 1, 2014, Claimant returned to work with a new employer. From March 24, 2014 through July 1, 2014, Employer did not make a reasonable offer of employment to Claimant following his industrial accident, and Defendants have not made any showing that employment within Claimant's restrictions was available to him. Claimant has proven his entitlement to temporary disability benefits from March 24, 2014 until July 1, 2014.

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered a compensable accident which caused a fracture of his right fifth metacarpal.
2. Claimant is entitled to reasonable medical care. Medical bills totalling \$23,966.95 appear to be reasonable and related to the injury.
3. Claimant has proven his entitlement to temporary disability benefits from March 24, 2014 until July 1, 2014.

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

DATED this 25th day of September, 2015.

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 25th day of September, 2015, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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/s/