

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NICHOLAS FRANCIS LEWIS,

Claimant,

v.

SEAN CORD dba STONEHENGE MARBLE &
GRANITE,

Employer,
Defendant.

IC 2012-024663

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

1/13/2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor. Claimant filed his Complaint on September 28, 2012, through Starr Kelso of Coeur d'Alene. On February 7, 2013, Claimant filed his Notice of Intent to Take Default. On July 24, 2013, Claimant filed his Motion for Entry of Default. Defendant Sean Cord did not respond at any time. On August 29, 2013, the Commission entered default against Mr. Cord.

On September 12, 2013, the Referee conducted a hearing from Boise, Idaho via videoconference. Claimant, Nicholas Lewis, and his counsel, Starr Kelso, were present in person at the Commission's Coeur d'Alene office and participated via videoconference. Defendant Employer, Sean Cord dba Stonehenge Marble & Granite, was not present nor represented by counsel. Claimant presented oral and documentary evidence. No post-hearing depositions were taken. Mr. Kelso offered closing argument on the record in lieu of a written brief and the matter was deemed under advisement on October 1, 2013, after receipt of the hearing transcript.

ISSUES

The noticed issue to be decided is whether Claimant is entitled to benefits from Defendant pursuant to Idaho Code Title 72 and the amount thereof.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits 1-5, admitted at the hearing; and
3. The testimony of Claimant taken at the September 12, 2013 hearing.

After having considered the above evidence and Claimant's arguments, 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 1983 and resided in Spokane at the time of the hearing.
2. Stonehenge Marble & Granite is an assumed business name of Sean Cord, residing, or formerly residing, at 723 E. Linden #104, Coeur d'Alene, Idaho per filings by Mr. Cord with the Idaho Secretary of State.
3. In February 2010, Claimant began working for Sean Cord dba Stonehenge Marble & Granite at the rate of \$15.00 per hour. Claimant's average weekly rate of pay was \$600.00.
4. On March 12, 2012, Claimant was working for Mr. Cord, helping pull a sheet of granite when an A-frame rack, partially loaded with granite slabs, overturned on Claimant. Claimant was pinned between a work table and the ground by approximately 3,000 pounds of granite slabs. The work table prevented the granite slabs from falling completely to the ground and supported the slabs sufficiently to prevent Claimant from being severely crushed. Mr. Cord was able to pull off the granite slabs one by one until Claimant was free. Mr. Cord then drove

Claimant to the emergency room of the Kootenai Medical Center. On the way to the emergency room, Mr. Cord instructed Claimant to tell medical providers that Claimant was self-employed. Mr. Cord indicated he would pay Claimant's medical bills and lost wages due to the accident.

5. On March 12, 2012, Claimant was examined by Robin Shaw, M.D., who assessed acute left shoulder strain with acromioclavicular separation and possible rotator cuff injury, right ankle sprain, and acute abrasions involving Claimant's left ear, face, left shoulder, scapular region, and left forearm. Claimant told Dr. Shaw that he was self-employed. Dr. Shaw recommended followup with Douglas McInnis, M.D., for orthopedic evaluation. Claimant's Exhibit 1, p. 2. Dr. Shaw recorded that Claimant did not need a work excuse because he was self-employed.

6. On April 1, 2012, Mr. Cord paid Claimant \$1,000.00 by check for "INJURY/LOST WORK." Claimant's Exhibit 5. This amount represented unpaid wages owing prior to his accident and two days of lost wages after his accident. Mr. Cord advised Claimant that he did not have workers' compensation insurance coverage and later notified Claimant that he would not pay Claimant's medical bills or any further lost wages.

7. Claimant was unable to afford an orthopedic evaluation and was unable to work from March 12, 2012, through July 31, 2012, due to the left shoulder injury resulting from his industrial accident.

8. On August 1, 2012, Claimant began working for himself, performing remodeling and constructing patio covers and decks. This work was much less strenuous than the marble and granite work he did for Mr. Cord. The building materials were relatively light and Claimant was able to work at his own pace.

9. Claimant retained Starr Kelso to represent him and agreed to attorney fees of 25% of any amounts recovered without necessity of a hearing and 30% of any amounts recovered or awarded by the Commission after hearing.

10. At the time of hearing, Claimant continued to work and experienced popping, pain, and limited strength and range of motion in his left shoulder. He has no funds to obtain an orthopedic evaluation by Dr. McInnis, as Dr. Shaw recommended.

11. The Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

12. The provisions of the 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). 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).

13. **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).

14. As a result of his March 12, 2012, industrial accident, Claimant incurred reasonable and necessary medical expenses for emergency medical treatment on March 12, 2012, in the total amount of at least \$1,200.00. This amount is now in collection and an undetermined amount of interest has been added thereto.

15. The total amount due and owing to Claimant from Sean Cord for medical benefits pursuant to Idaho Code § 72-432 is at least \$1,200.00, plus accruing interest.

16. In addition, Claimant requests further medical treatment, including but not limited to orthopedic evaluation by Dr. McInnis, as recommended by Dr. Shaw. Pursuant to Idaho Code § 72-432, Claimant is entitled to receive, and Sean Cord is liable for the cost of, an orthopedic evaluation by Dr. McInnis, as recommended by Dr. Shaw. Claimant appropriately requests that the Commission order Sean Cord to pay the reasonable cost of Claimant's forthcoming orthopedic evaluation by Dr. McInnis.

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's average weekly wage at the time of his accident was \$600.00, which equates to a total temporary disability benefit weekly rate of \$402.00, and a daily rate of \$57.43. Claimant was in a period of recovery from his industrial accident and is entitled to total temporary disability benefits from March 13, 2012, through July 31, 2012, a period of 20 weeks.

19. After the accident, Mr. Cord paid Claimant \$1,000.00 for back wages due prior to his industrial accident and two days of lost wages after his accident. Claimant thus requests temporary disability benefits from March 15, 2012, through July 31, 2012, a period of 19 weeks and five days. The total amount presently due and owing to Claimant from Sean Cord for temporary disability benefits pursuant to Idaho Code § 72-408 is \$7,925.15.

20. **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, Sean Cord had failed to insure his liability under the Idaho Workers' Compensation Laws.

21. Pursuant to IDAPA 17.02.08.033 et seq., Claimant's counsel requests attorney fees of 25% of any amounts recovered without necessity of a hearing and 30% of any amounts recovered or awarded by the Commission after hearing. In the present case, this request is

reasonable as evaluated by the factors enumerated in Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2 990 (1984), given the anticipated time, effort, and issues involved in proceeding against an uninsured employer, the fees customarily charged for workers' compensation matters, the possible recovery, the time constraints imposed, the length of the attorney-client relationship, Claimant's counsel's extensive experience, Claimant's limited ability to pay for legal services, and the risk of no recovery given an uninsured employer.

22. The record herein establishes workers' compensation benefits owing to Claimant, the 10% penalty, and attorney fees and costs owing pursuant to Idaho Code § 72-210 are as set forth below.

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

Medical expenses	\$ 1,200.00
<u>Temporary disability benefits</u>	<u>\$ 7,925.15</u>
Total	\$ 9,125.15

Amounts owing pursuant to Idaho Code § 72-210:

10% penalty	\$ 912.52
<u>Attorney fees and costs</u>	<u>\$ 2,737.55</u>
Total	\$ 3,650.07

23. The total amount presently due and owing to Claimant from Sean Cord pursuant to Idaho Code § 72-210 is \$3,650.07.

24. **Total compensation, attorney fees, and penalties presently due.** The total amount of workers' compensation benefits, attorney fees, and penalties presently due and owing to Claimant from Sean Cord is \$12,775.22.

CONCLUSIONS OF LAW

1. Claimant has proven he is presently entitled to reasonable medical benefits for his March 12, 2012 industrial injury in the amount of at least \$1,200.00, plus accruing interest.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2014, 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:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

SEAN CORD
DBA STONEHENGE MARBLE & GRANITE
723 E LINDEN #104
COEUR D'ALENE ID 83814

mg

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NICHOLAS FRANCIS LEWIS ,

Claimant,

v.

SEAN CORD dba STONEHENGE MARBLE &
GRANITE,

Employer,
Defendant.

IC 2012-024663

ORDER

1/13/2014

Pursuant to Idaho Code § 72-717, Referee Alan R. 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 for his March 12, 2012 industrial injury in the amount of at least \$1,200.00, plus accruing interest.
2. Claimant has proven he is presently entitled to temporary total disability benefits due to his March 12, 2012 industrial accident in the amount of \$7,925.15.
3. Claimant has proven he is presently entitled to attorney fees and a 10% penalty pursuant to Idaho Code § 72-210 in the amount of \$3,650.07.
4. The total amount of workers' compensation benefits, attorney fees, and penalties presently due and owing to Claimant from Sean Cord is \$12,775.22.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

SEAN CORD
DBA STONEHENGE MARBLE & GRANITE
723 E LINDEN #104
COEUR D'ALENE ID 83814

mg

_____/s/_____
