BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STERLING ROBINSON, Claimant, v. MJK FARMS LLC and RICHARD DAN DAVIES, Employer, Defendant.	**IC 2014-029512** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed March 16, 2016

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. Matthew Romrell represented Claimant. Employer ("MJK Farms") failed to answer Claimant's Complaint. Default was entered. At a hearing conducted on November 9, 2015 in Idaho Falls, Claimant presented testimony and documentation. Richard "Dan" Davies, principal owner of MJK Farms, appeared at hearing and was allowed to attempt to present good cause for Employer's failure to answer the complaint timely. Good cause was not shown. Claimant filed a post-hearing brief. The case came under advisement on January 21, 2016 and is ready for decision.

CLAIMANT'S CONTENTIONS

Claimant contends that, as a result of an industrial injury which he suffered on September 23, 2014, he is entitled to the following benefits:

1. Reimbursement for medical costs of $11,647.58;
2. Future medical care to ameliorate the scar on Claimant's neck;
3. Temporary total disability benefits from September 23, 2014 through his MMI date of April 1, 2015 in the amount of $9,601.20;
4. Open opportunity to establish partial permanent impairment and disability for loss of motion to the IP joint of Claimant's thumb;

5. Statutory penalty under Idaho Code § 72-210 for Employer's failure to secure workers' compensation insurance in the amount of $2,124.88 plus attorney fees in the amount of $7,012.10 plus $90.00 in costs; and

6. "Pierce the corporate veil" of MJK Farms, LLC, to establish liability personally upon Richard "Dan" Davies or alternatively, accept Claimant's proffered Amended Complaint which names Mr. Davies as a defendant for purposes of this default action.

EVIDENCE CONSIDERED

The record in this matter consists of:

1. The testimony of Claimant presented at the hearing; and

2. Claimant's Exhibits 1 through 4 admitted at the hearing.

After the hearing, Mr. Davies attempted *ex parte* conversation with the Referee apparently to allege that Claimant's testimony was not factual. Having terminated the conversation before Mr. Davies could allege anything specific, the Referee disregards any *ex parte* allegation. Had Mr. Davies wished to substantively testify, he should have filed a timely Answer to the Complaint and/or Amended Complaint.

Having fully considered all of the evidence of record, the Referee submits the following findings of fact and conclusions of law for review by the Commission and recommends it approve the same.

FINDINGS OF FACT

Default

1. Dan Davies and MJK Farms, LLC, were named as defendants and served Claimant's Complaint. After due time had passed, Claimant moved for Entry of Default. Upon investigation pursuant to Idaho Code § 72-714(3) the Referee denied this motion, in an abundance of caution, where service was performed on Dan Davies at 4490 W. 6000 N., Rexburg, Idaho. The Referee noted the official address of MJK Farms, LLC was 4440 W. 6000 N., Rexburg, Idaho and that an additional residential address for Mr. Davies was 3804 W.

2000 N., Rexburg, Idaho. Claimant filed an Amended Complaint and again served MJK Farms, LLC and Dan Davies at all three addresses. The Complaint and Amended Complaint named both MJK Farms and Dan Davies as Defendants. After this second round of service due time again passed without Answer. Claimant again moved for Entry of Default. Default was granted.

2. On the initiative of the Referee, Mr. Davies was allowed at hearing to offer testimony about why he failed to file an Answer and to determine whether good cause existed to set aside the default. Mr. Davies testified but gave no cognizable basis upon which good cause could be found. Mr. Davies did not deny that he had actually received both the Complaint and Amended Complaint. (Although the hearing transcript is unrevealing on the following point, at page 17, line 17, Mr. Davies paused for sufficient length and indicated by gesture that he had nothing more to add. Only thereafter did the Referee resume as indicated on line 18.)

3. Both the 4490 and 4440 addresses are for real property under the control of Mr. Davies. Mr. Davies is the registered agent and sole member of MJK Farms, LLC. The record shows that Richard Dan Davies and Dan Davies is the same person who received actual service. Service was proper upon both Defendants, MJK Farms, LLC and Richard Dan Davies. Both had actual knowledge of Claimant's claim and complaint.

4. Due to inadvertent error, at some point after service was completed, the identification of Mr. Davies as a defendant was dropped from the caption in this matter. Neither any motion by Claimant nor *sua sponte* action by the Commission removed Mr. Davies from being a defendant in this matter.

5. At hearing, Clamant produced evidence to "pierce the veil" to extend liability of MJK Farms, LLC to Mr. Davies personally. Alternatively, at hearing, Claimant offered a

second amended complaint which named Mr. Davies as a Defendant along with MJK Farms, LLC in this matter. The proffered second amended complaint is not necessary. If shown to be Claimant's Employer, Mr. Davies has been named a Defendant and duly served. If MJK Farms and not Mr. Davies is Claimant's Employer, Mr. Davies' personal liability must be reached by piercing the veil equitably or by operation of Idaho Code §72-319(2).

The Accident

6. Claimant worked for MJK Farms beginning August 2014. He was hired as an employee by Mr. Davies of behalf of MJK Farms. At some point later, Mr. Davies discussed changing Claimant's status to independent contractor to avoid Employer's liability for Workers' compensation premium payments and other tax consequences. Claimant received a 1099 rather than a W-2 for his 2014 employment.

7. On September 23, 2014 Claimant was using an angle grinder on Employer's premises. He slipped. The grinder cut his left forearm, thumb, and face. Claimant sought immediate medical treatment.

8. Fall River Urgent Care noted a consistent description of the accident without mention of whether Claimant was at work or not. The primary insurer is identified as "self pay." The physician sutured the laceration to Claimant's face, jaw and neck. Photographs of the wounds are included in the medical record. Claimant was referred to Madison Memorial Hospital in Rexburg for treatment of his forearm and thumb wounds. Michael Larson, M.D., repaired cut tendons as well as the full thickness skin lacerations. Madison Memorial also coded "self pay." A Madison Memorial Patient Abstract dated September 29, 2014 coded a diagnosis "E849.3 ACC ON INDUSTR PREMISES." This represents the earliest written date on which a physician recorded receipt of information or indicated that the accident was work related.

That document still identifies Claimant as "self pay."

9. Physical therapy began November 25, 2014 for reduced left thumb motion.

10. Follow-up visits with Dr. Larson show recovery continued.

11. On a March 16, 2015 "Work Restriction Form" Dr. Larson noted Claimant had been released to return to full work on December 3, 2014. He held open the possibility that limited IP flexion of the thumb might result in permanent impairment, but did not undertake to rate it on that date. (This document appears to be a form sent from the office of Claimant's attorney; It does not appear that Claimant was present for examination and rating on that date.)

12. On April 1, 2015 Dr. Larson released Claimant from care and opined no further treatment was planned or deemed necessary. He imposed no restrictions. He opined Claimant suffered no permanent impairment.

13. Despite Mr. Davies' initial representation to Claimant that he would pay the medical bills, neither Mr. Davies nor MJK Farms, LLC paid any part of them. Later, Mr. Davies asserted to Claimant that he had been a "subcontractor" and that no workers' compensation insurance was available.

14. Claimant's health insurance, "DMBA Student Health" or "Deseret Mutual" paid some. Madison Memorial continued to bill Claimant for the balance.

15. During the course of employment, in installments of two-week intervals, MJK Farms LLC paid Claimant $3,691.20. Claimant worked full time, at or more than 40 hours per week, for a wage of $12 per hour. Excess hours were paid at straight time, not time-and-one-half for overtime. The first paycheck reflects pay of $966.00 or 40.5 hours of work; the second, $1,080.84 or 90.07; the third, $1,118.04 or 93.17; and the fourth, necessarily shortened by the occurrence of the accident, $526.32 or 43.86. It is unknown whether

these figures represent hyperawareness of minutes worked or deductions from gross pay for unknown obligations.

16. Mr. Davies told Claimant when to report to work each day and directed his activity.

17. MJK Farms provided the tools and paid Claimant's wages.

DISCUSSION AND FURTHER FINDINGS

Accident and Causation

18. 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).

19. 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).

20. 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).

21. 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).

22. Claimant's testimony, his medical records relating to his accident and subsequent symptoms, and physicians' opinions are unrefuted and credible. An ambiguity arises concerning whether the accident arose out of and in the course of employment. All evidence of record is considered to determine whether Claimant's use of the angle grinder occurred as a part of his employment. Claimant's testimony appears arguably inconsistent with the notations in medical records. The absence of unequivocal medical entries further suggests an ambiguity. Nevertheless, to resolve these ambiguities for or against Claimant would require speculation. Claimant's specific, credible testimony about this point is not ambiguous. It outweighs the ambiguities of medical records which were generated for purposes of treatment and were not generated specifically to answer this question.

23. Claimant has met his burden of proving he suffered injury as a result of an accident arising out of and in the course of his employment on September 24, 2014.

24. The question of causation is well and clearly answered in the affirmative by the evidence of record. Treatment was for the acute lacerations caused by the grinder accident.

Employee Versus Independent Contractor and/or Casual Employment

25. Idaho Workers' Compensation Law covers employees. Independent contractors are not covered unless an employer specifically includes them in its insurance policy. Idaho Code § 72-204. These are statutorily defined terms. Idaho Code § 72-102(12) and (17). A four-factor test is applied to determine this issue. *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985); *Ledesma v. Bergeson,* 99 Idaho 555, 585 P.2d 965 (1978). Moreover, casual employment is not covered. Idaho Code § 72-212(2).

26. The court has considered the 1099 and the fact that Claimant's health care coverage results from his status as a student, respectively, as evidence that Employer considered Claimant an independent contractor and that Claimant may have been employed in casual employment.

27. Claimant's testimony establishes that the preponderance of the evidence supports Claimant's status as an employee and not an independent contractor. Mr. Davies directed Claimant's arrival and time of work, the location of work, and the tasks to perform. Mr. Davies provided the tools and equipment used by Claimant. Claimant worked only for Employer and did not generally hold himself out to be available for contract to other potential clients. Claimant and Employer terminated the relationship without apparent reference to any agreement or liability which might suggest the relationship was other than "at will." To the extent the record evinces Employer's right to control Claimant's work activity, the preponderance supports a finding that Claimant was an employee and not an independent contractor.

28. The preponderance of the evidence supports Claimant's claim for benefits. Among other things, Claimant understood that Employer made a belated attempt to change Claimant's status from employee to independent contractor, and Claimant's work extended beyond any likely summer break in education. These facts suggest that Claimant's testimony carries greater weight. Claimant was neither an independent contractor nor employed as casual labor. He was an Employee, eligible for statutory coverage under the Idaho Workers' Compensation Law.

Medical Care Benefits

29. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following

an injury and for a reasonable time thereafter.

30. Claimant has met his burden of proving, pursuant to Idaho Code § 72-432, that the medical care he received was reasonable and necessary to treat his industrial injuries.

31. Claimant seeks reimbursement for the full invoiced amount. *Neel v. Western Construction,* 147 Idaho 146, 206 P.3d 852 (2009), provides that a claimant is entitled to reimbursement of the full invoiced amount for medical costs incurred following a denial of payment for treatment. *Neel* is premised on the assumption that an injured worker who must obtain medical care outside the worker's compensation system has, or may have, exposure to pay the full invoiced amount of medical bills incurred for his treatment.

32. Here, Defendants have failed or refused to pay any medical care. Having ignored Claimant's Complaint, Defendants have failed or refused to provide any basis or reason why. The record shows that Defendants have failed or refused to obtain workers' compensation insurance as required by Title 72, Idaho Code.

33. Consistent with *Neel*, Claimant is entitled to payment of the full invoiced amount of his medical expenses related to treatment of his September 24, 2014 industrial injury.

34. The evidence supports eligibility for medical care in the amount of $11,647.58.

35. On April 1 Dr. Larson recorded, "No further treatment is planned []or deemed necessary. No restrictions in activity or work limitations. There is no applicable permanent impairment."

36. The record fails to show a medical opinion requiring or anticipating a scar revision or other procedure upon which future medical care benefits might be awarded. Dr. Larson's April 1 note opines to the contrary.

Temporary Disability

37. Idaho Code § 72-408 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 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).

38. Claimant requests TTDs from September 24, 2014, the date of his industrial injury, through April 1, 2015, the date on which Claimant admits he reached medical stability and was released from medical care. The evidence shows Claimant reached maximum medical improvement on April 1, 2015 and, thus, was thereafter no longer in a period of recovery. Claimant is entitled to temporary disability benefits for that period.

39. Claimant worked for a relatively short time in August and September 2014. Claimant calculates his average weekly wage and temporary disability benefits due him using two methods. Both are reasonable and within statutory parameters. Of these two methods, the second more nearly reflects the wages, including overtime paid at straight time, which Claimant actually received.

40. Claimant is entitled to TPD of $9,601.20.

Permanent Impairment and Disability

41. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation,

elevation, traveling, and on specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

42. Claimant asked at hearing to reserve the issues of permanent impairment and disability. This is deemed a motion to bifurcate issues. The request was based upon Claimant's assertion that he still has some subjective pain and loss of motion in his thumb and that he anticipates additional medical care, possibly including additional surgery, to correct it. He asserted that the treating physician told him to anticipate these possibilities.

43. The evidence shows that on March 16 Dr. Larson anticipated a possibility of additional medical care for limited IP joint flexion and declined to assess permanent impairment. However, Dr. Larson's April 1 note shows he changed his opinion after further examination of Claimant's conditions.

44. The record does not show any opinion contrary to Dr. Larson's. His April 1 note closed the door on any basis for reserving permanent impairment and disability as unresolved issues. The record does not support a likely basis for leaving open questions of future medical care, permanent impairment or disability. Claimant's motion to bifurcate issues and reserve permanent impairment and disability is denied.

45. The record fails to show a preponderance of evidence in favor of any permanent partial impairment or disability arising from the injuries.

Attorney Fees and Statutory Penalty

46. Idaho Code § 72-210 applies here.

47. Claimant's calculations for fees, costs and penalties are consistent with

the statute—penalty $2,124.88, costs $90.00, attorney fee $7,012.10. Claimant is entitled to these amounts.

Piercing the Veil

48. Claimant testified that Mr. Davies hired him for and in behalf of MLK Farms, LLC. MLK Farms, LLC is wholly owned by Mr. Davies. MLK Farms, LLC failed to obtain workers' compensation insurance as required by law. It disbanded operations while Claimant was still in his recovery period from this accident and ceased to exist entirely shortly thereafter.

49. Claimant cites a recent case as primary authority for piercing the veil in order to extend liability to Mr. Davies personally. *Wandering Trails, LLC, v. Big Bite Excavation, Inc.*, 156 Idaho 586, 329 P.3d 368 (2014).

50. Idaho Code § 72-319(1) applies to "any . . . manager or employee of a limited liability company who had authority to secure payment of compensation on behalf of the . . . limited liability company and failed to do so." Idaho Code § 72-319(2) further states:

> 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 an employee of such corporation or limited liability company while it shall so fail to secure the payment of compensation.

51. The specific statute, Idaho Code § 72-319(2), provides a specific exception to the general liability protections afforded owners of a limited liability company under Idaho Code § 30-6-101 *et. seq.* The applicability of *Wandering Trails* or of any fact, beyond Mr. Davies connection to MLK Farms, LLC and his or its failure to obtain workers' compensation insurance, is irrelevant.

52. Richard Dan Davies is liable, jointly and severally, with MLK Farms, LLC for compensation due Claimant arising from this workers' compensation claim.

CONCLUSIONS OF LAW

1. Claimant has established a *prima facie* case of eligibility for benefits;

2. Claimant is entitled to medical care benefits in the amount of $11,647.58;

3. Claimant is entitled to temporary disability benefits in the amount of $9,601.20;

4. Under Idaho Code § 72-210 Claimant is entitled to penalty, costs, and attorney fees in the amount of $9,226.90;

5. Claimant failed to show he is entitled to future medical benefits; and

6. Claimant failed to show a likely basis for reserving issues of permanent impairment and/or disability or that he is entitled to such benefits.

RECOMMENDATION

Based on 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 4th day of MARCH, 2016.

INDUSTRIAL COMMISSION

__/s/_____
Douglas A. Donohue, Referee

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2016, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MATTHEW D. ROMRELL 1495 EAST 17TH STREET IDAHO FALLS, ID 83404-6236	RICHARD DAN DAVIES MJK FARMS 4490 WEST 6000 NORTH REXBURG, ID 83440	RICHARD DAN DAVIES 3804 WEST 2000 NORTH REXBURG, ID 83440

dkb

__/s/_____