

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID EDWARDS,

Claimant,

v.

GREGG TURNER,

Uninsured Employer,
Defendant.

IC 2007-013147

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

FILED 06/15/2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor. Claimant filed his Complaint pro se on April 19, 2007. On May 29, 2007, Claimant filed his Amended Complaint through Darin Monroe of Boise. On November 17, 2010, Claimant filed his Amended Notice of Intent to Take Default. On July 22, 2011, Claimant filed his Motion for Entry of Default. Defendant Gregg Turner did not respond at any time. On August 10, 2011, the Commission entered default against Gregg Turner.

On January 13, 2012, the referee conducted a hearing in Boise. Claimant, David Edwards, was present in person and represented by Darin Monroe. Defendant Employer Gregg Turner was not present nor represented by counsel. Claimant presented oral and documentary evidence. No post-hearing depositions were taken. Claimant filed a brief and the matter came under advisement on March 14, 2012.

ISSUES

The issues to be decided are:

1. Claimant's entitlement to medical care;
2. Claimant's entitlement to temporary partial and/or temporary total disability benefits;
3. Claimant's entitlement to permanent partial impairment benefits; and
4. Claimant's entitlement to penalties against Gregg Turner pursuant to Idaho Code § 72-210.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

5. The Industrial Commission legal file;
6. The testimony of Claimant and his mother, Theresa Edwards, taken at the January 13, 2012 hearing; and
7. Claimant's Exhibits 1 through 5 admitted at the 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 1979 and resided in Mountain Home at the time of the hearing.
2. On September 7, 2006, Claimant was asked by Gregg Turner to help re-roof a cabin owned by another individual in the Pine/Featherville area. Turner offered to pay Claimant \$200.00 for working on the cabin roof over the weekend. Turner expected the re-roofing project to take 16-20 hours. Claimant agreed. Later that same day, Turner drove Claimant to the cabin site. Both stayed in the cabin that night.

3. On September 8, 2006, Turner and Claimant began replacing metal sheeting on the cabin roof. Turner had made arrangements for the metal sheeting. Turner provided all air tools and other power tools necessary for the project. Claimant provided his own hand tools including a hammer, tape measure, and framing square. Turner could have fired Claimant.

4. While working on September 8, 2006, Claimant fell approximately 18 feet from the cabin roof and fractured his left tibia and fibula and his right heel. Turner was present and was immediately aware that Claimant had fallen and was injured.

5. Claimant was driven to Pine and taken via Life-Flight helicopter from Pine to a Boise hospital. On September 8, 2006, orthopedic surgeon Michael Bustavel, M.D., irrigated and debrided Claimant's open left tibial pilon fracture and performed open reduction and internal fixation of his left fibula fracture. On September 14, 2006, Greg Schweiger, M.D., performed open reduction and internal fixation of Claimant's right calcaneus fracture. Claimant was hospitalized for an extended period. On September 28, 2006, Dr. Schweiger performed open reduction and internal fixation of Claimant's left tibial pilon fracture. Claimant's treatment and progress was assisted by a number of additional medical care providers.

6. By June 15, 2007, Dr. Schweiger found Claimant's wound completely healed and noted he was tolerating full weight-bearing quite well. By October 2007, Claimant was stocking shelves for a grocer in Mountain Home and tolerating his work well.

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

DISCUSSION AND FURTHER FINDINGS

8. 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).

9. **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).

10. As a result of his September 8, 2006, industrial accident, Claimant incurred reasonable and necessary medical expenses in the total amount of \$87,518.72, as documented in Exhibit 5. He also incurred mileage expenses for necessary medical treatment in 2006 reimbursable in the amount of \$319.60, and in 2007 reimbursable in the amount of \$154.81.

11. The total amount due and owing to Claimant from Gregg Turner for medical benefits pursuant to Idaho Code § 72-432 is \$87,993.13.

12. **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).

13. In the present case, Claimant has demonstrated an average weekly wage of \$400.00 which equates to a total temporary disability benefit weekly rate of \$268.00, and a daily rate of \$38.29. Claimant was in a period of recovery from his industrial accident and is entitled to total temporary disability benefits from September 8, 2006, through June 15, 2007, a period of 281 days in the total amount of \$10,759.49.

14. The total amount due and owing to Claimant from Gregg Turner for temporary disability benefits pursuant to Idaho Code § 72-408 is \$10,759.49.

15. **Permanent partial impairment.** Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss is considered stable at the time of evaluation. Idaho Code § 72-422. 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).

16. In the present case, permanent partial impairment was an issue noticed for hearing; however, Claimant has presented no impairment rating and makes no argument in his brief for permanent impairment benefits. Claimant has not established his entitlement to any permanent impairment benefits.

17. **Idaho Code S 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, Gregg Turner had failed to insure his liability under the Idaho Workers' Compensation Laws.

18. 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.

19. 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 owing pursuant to Idaho Code §§ 72-432 and 408:

Medical expenses	\$ 87,993.13
<u>Temporary disability benefits</u>	<u>\$ 10,759.49</u>
Total	\$ 98,752.62

Amounts owing pursuant to Idaho Code § 72-210:

10% penalty	\$ 9,875.26
<u>Attorney fees and costs</u>	<u>\$ 29,625.79</u>
Total	\$ 39,501.05

20. The total amount due and owing to Claimant from Gregg Turner pursuant to Idaho Code § 72-210 is \$39,501.05.

21. **Total compensation, attorney fees, and penalties.** The total amount of workers' compensation benefits, attorney fees, and penalties due and owing to Claimant from Gregg Turner is \$138,253.67.

CONCLUSIONS OF LAW

1. Claimant has proven he is entitled to reasonable medical benefits for his September 8, 2006 industrial injury in the amount of \$87,993.13.
2. Claimant has proven he is entitled to temporary total disability benefits due to his September 8, 2006 industrial accident in the amount of \$10,759.49.
3. Claimant has not proven his entitlement to any permanent impairment benefits.
4. Claimant has proven he is entitled to attorney fees and a 10% penalty pursuant to Idaho Code § 72-210 in the amount of \$39,501.05.
5. The total amount of workers' compensation benefits, attorney fees, and penalties due and owing to Claimant from Gregg Turner is \$138,253.67.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 8th day of June, 2012.

INDUSTRIAL COMMISSION

_____/S/_____
Alan Reed Taylor, Referee

ATTEST:

_____/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2012, 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:

DARIN G MONROE
PO BOX 50313
BOISE ID 83705-0966

GREGG TURNER
1112 MAPLE DR
MOUNTAIN HOME ID 83647-2026

sb

_____/S/_____

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ORDER

FILED 06/15/2012

Pursuant to Idaho Code § 72-717, Referee Alan Reed 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 entitled to reasonable medical benefits for his September 8, 2006 industrial injury in the amount of \$87,993.13.
2. Claimant has proven he is entitled to temporary total disability benefits due to his September 8, 2006 industrial accident in the amount of \$10,759.49.
3. Claimant has not proven his entitlement to any permanent impairment benefits.
4. Claimant has proven he is entitled to attorney fees and a 10% penalty pursuant to Idaho Code § 72-210 in the amount of \$39,501.05.

5. The total amount of workers' compensation benefits, attorney fees, and penalties due and owing to Claimant from Gregg Turner is \$138,253.67.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 15th day of June, 2012.

INDUSTRIAL COMMISSION

/S/
Thomas E. Limbaugh, Chairman

/S/
Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

/S/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DARIN G MONROE
PO BOX 50313
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