

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRENT D. HIBBERT,)	
)	IC 2008-019040
Claimant,)	
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
PATRICIA D. REYNOLDS/REYSON)	AND RECOMMENDATION
CUSTOM STONE AND TILE,)	
)	
Employer(s),)	Filed: August 24, 2010
)	
Defendant(s).)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls, Idaho, on April 13, 2010. Paul B. Rippel of Idaho Falls represented Claimant. Defendant(s) did not appear. The Claimant submitted oral and documentary evidence and filed a post-hearing brief. The matter came under advisement on July 23, 2010 and is now ready for decision.

ISSUES

As set out in the notice of hearing, the issues to be decided are:

1. Whether and to what extent claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);and
 - c. Attorney fees; and

2. Whether Employer is liable to Claimant for the penalties set forth in Idaho Code § 72-210 for failing to insure liability.

CONTENTIONS OF THE PARTIES

Claimant asserts that he sustained an injury to his low back while working for Defendant(s). He sought treatment for his injury, but had to suspend treatment when he learned that Defendant(s) did not have workers' compensation insurance. Claimant incurred out-of-pocket costs for treatment, travel, and prescription drugs for which he is entitled to reimbursement and needs additional medical care. Claimant also sustained time loss from work, entitling him to temporary total disability benefits. Finally, because Defendant(s) did not have workers' compensation coverage on the date of his injury, Claimant is entitled to the 10% penalty and attorney fees and costs as provided by Idaho Code § 72-210.

Defendant(s) did not participate in the proceedings, but admitted in a letter to Claimant's counsel that Claimant injured himself at work, and that neither Patricia D. Reynolds nor Reyson Custom Stone and Tile maintained workers' compensation coverage at the time of the injury.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Crystal Hibbert, taken at hearing;
2. Claimant's Exhibits 1 through 6, admitted at hearing; and
3. Claimant's Exhibits 7 through 9, admitted post-hearing with leave of the Referee.

After having considered all the above evidence and Claimant's brief, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was thirty-four years of age at the time of hearing. He resides in Alta, Wyoming, with his wife, Crystal.

2. Defendant(s) Patricia Reynolds and/or Reyson Custom Stone and Tile operate a stone, granite and tile shop, working primarily as fabricators and installers of granite countertops. The business operates from facilities located in Victor, Teton County, Idaho, on Highway 31, approximately one-half mile west of the intersection with Highway 33. It was at that location where Defendant(s) hired Claimant and where Claimant worked. Claimant was employed by Defendant(s) on April 2, 2008. He earned \$12.00 per hour and worked a forty-hour week.

3. By letter to Claimant's counsel dated July 7, 2008, made in response to a demand for benefits, Defendant(s) asserted that Claimant's accident and injury were undisputed, and admitted that workers' compensation coverage had lapsed at the time of Claimant's injury.

THE ACCIDENT AND INJURY

4. At approximately 3:30 or 4:00 p.m. on April 2, 2008, Claimant and a co-worker were working on an "L-shaped" piece of granite. The two men, with Claimant holding the side with the longer part of the "L," were turning the piece over when Claimant felt "a little pop. It felt like something snapped, basically," in his low back. Tr., p. 13. Claimant described the event:

We was [sic] lifting a piece of granite that was in an L shape. We were turning it over so we could smooth out the bottom. I had the higher end with the L part in the air. When we went to set it down we set it down slowly, but it was more than my back to [sic] take. It stressed it too much. We did get the piece down. And then within 15 or 20 minutes I couldn't even walk.

Id.

5. Within about twenty minutes of the event, Claimant was in severe pain, and his legs were numb. It was nearly the end of the workday, and Claimant spent the remainder of his shift sitting.

6. Claimant did not return to work for Defendant(s). He was off work from April 3 through June 2, 2008. On June 3, he started a new job that did not require lifting and which paid \$15.00 per hour.

MEDICAL CARE

Teton Orthopaedics

7. On the morning of April 3, the day following the accident, Claimant presented at Teton Orthopaedics. Claimant saw Joshua Beck, M.D., who took x-rays and examined Claimant. The x-rays were negative for fracture. Dr. Beck diagnosed “[l]ikely acute disk herniation L5-S1 with acute S1 radiculitis.” Ex. I.A. p. 004. He prescribed a Medrol Dosepak and Ultracet for pain and ordered an MRI.

8. The lumbosacral MRI done April 4 at St. John’s Hospital revealed degenerative disk disease at L4-L5 and L5-S-1, an annular tear at L4-5, and a synovial cyst at L3-4 and a likely synovial cyst at L5-S1. Dr. Beck continued Claimant’s medications and wrote a prescription for physical therapy.

9. Claimant attended six physical therapy sessions between April 7 and May 7, 2008.

10. On April 9, Dr. Beck ordered an epidural steroid injection (ESI) at L4-5. Geoffrey K. Skene, D.O., a colleague of Dr. Beck, performed the ESI on April 10.

11. On April 12, Claimant presented at the emergency room at St. John’s Medical Center, complaining of a positional headache. Alan Oram, D.O., diagnosed a post-lumbar

puncture headache and prescribed caffeine and a saline IV. An anesthesiologist administered a blood patch.

12. Claimant returned to Dr. Skene for follow-up on April 16, still complaining of positional headache. Dr. Skene ordered blood tests to rule out an infection. On April 18, Claimant had a repeat MRI. It was essentially unchanged from the MRI done April 4.

13. An anesthesiologist applied a second blood patch on April 24, which resolved Claimant's post-ESI headache, but his low back pain persisted. He declined a second ESI on April 30, and Dr. Beck recommended he continue with physical therapy and return in four-to-six weeks.

14. Claimant's last documented physical therapy session was May 7. At hearing, Claimant testified that he believed that the physical therapy helped, but that he had to discontinue the therapy for financial reasons.

15. By letter dated April 13, 2010, Claimant sought Dr. Beck's opinion on the causal relationship between Claimant's industrial accident and the medical care Dr. Beck provided. Dr. Beck responded by checking a box stating that it was more likely than not that the injuries of which Claimant complained on April 3, 2008 were the result of his industrial accident and that Claimant would make further improvements if he were to receive additional treatment.

E. Alan Jeppsen, M.D.

16. In March 2009, Claimant began treating with E. Alan Jeppsen, M.D., in Murray, Utah. Dr. Jeppsen's practice includes psychiatry and pain management. Dr. Jeppsen's treatment, prolo therapy, involves the use of trigger point injections. Dr. Jeppsen prescribed

Tylenol #3 for pain and Amytriptylene to help Claimant sleep. According to Dr. Jeppsen's records, Claimant treated on ten occasions between March 16 and December 28, 2009.¹

17. By letter dated April 13, 2010, Claimant sought Dr. Jeppsen's opinion on the causal relationship between Claimant's industrial accident and the medical care Dr. Jeppsen provided. Dr. Jeppsen responded by checking a box stating it was more likely than not that the injuries for which Claimant sought his care were the result of his industrial accident, noting in particular that Claimant had no prior medical history of low back problems. Dr. Jeppsen also checked a box indicating that he treated Claimant's low back pain, the treatment was necessary, was within Dr. Jeppsen's standard of care, and that Claimant showed gradual improvement as a result of the treatments. Dr. Jeppsen denied being Claimant's primary care physician, but agreed he was a treating physician for Claimant's low back injury.

DISCUSSION AND FURTHER FINDINGS

CAUSATION

18. A claimant in a worker's compensation case has the burden of proving that he is entitled to benefits. The claimant must prove not only that he was injured, but also that his injury was the result of an accident arising out of and in the course of his employment. His proof must establish a probable not merely a possible connection between cause and effect to support his contention that he suffered an accident. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 600, 603 (1985).

19. It is undisputed that Claimant was involved in an accident on the job on April 2, 2008, and the Referee so finds.

20. Not only must a claimant establish that there was an industrial accident, he or she

¹ Claimant requested reimbursement for only five visits.

must also prove a causal relationship between the accident and the injury for which he or she seeks benefits:

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

21. Claimant provided the expert medical opinions of Drs. Beck and Jeppsen that the treatment they provided related to the low back injury Claimant sustained at work on April 2, 2008. While check box letters in general are not the most persuasive evidence of medical causation, in this proceeding the opinions are unrefuted. Claimant has met his burden of proving a causal relationship between his work injury and the medical care provided.

MEDICAL CARE

22. Once a claimant has established the compensability of his claim, Idaho Code § 72-432 requires an employer to provide such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician. 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).

It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable.

Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 722, 779 P.2d 395, 397 (1989).

Provider Services

23. Claimant incurred the following documented expenses from service providers which remained outstanding as of the date of the hearing:

<i>Provider</i>	<i>Total Services</i>	<i>Interest</i>	<i>Date of Last Invoice</i>
Teton Orthopaedics	\$2,223.00	\$15.77*	2/6/09
Jackson Hole Medical Imaging	\$476.00	*	6/20/08
MRI of Jackson Hole	\$2,500.00	\$41.66*	1/2/09
Eagle Ortho. & Sports (P.T.)	\$775.00	*	7/21/08
Teton Outpatient Services	\$1,825.00	*	6/13/08
St. John's Medical Center	\$889.75	*	4/23/08
Glacier Anesthesia	\$656.00	*	10/9/08
Grand Anesthesiology Services	\$656.00	*	10/16/08
<i>Total</i>	\$10,000.75	\$57.43*	
<i>Combined Total</i>	\$10,058.18		
* Additional interest or late charges may have accrued since the date of the last statement.			

In addition, Claimant provided documentation that he paid \$250.00 cash per treatment for five treatments from Dr. Jeppsen for an additional \$1,250.00.

24. The Referee finds that Claimant has proven that he has incurred a total of \$11,308.18 in billed services from medical providers, relating to his industrial injury.

Prescription Drugs

25. Claimant asserts entitlement to reimbursement for \$814.54 for prescription drugs he purchased, related to his injury. Claimant submitted, as part of his exhibits, photocopies of a number of drug receipts. A careful review of the receipts revealed that one prescription (No. 267419, filled 8/14/09) was for thyroid medication, unrelated to his workers' compensation claim. A physician, Scott Thomas, whose name does not appear in the records regarding

treatment of Claimant's low back, wrote two other prescriptions (Nos. C250040, and 250037, both filled 1/7/09). One prescription written by Dr. Skene (No. 229396, filled 4/16/08) was for Theophylline ER tabs, a bronchodilator, not related to the industrial injury. Finally, many of the receipts were duplicates or did not include necessary information, such as the name of the drug or the name of the prescriber. Without information regarding the drug name and who prescribed it, it is not possible to assure that the prescriptions relate to the industrial injury. The following properly documented prescriptions are reimbursable:

<i>Date</i>	<i>Rx No.</i>	<i>Drug</i>	<i>Physician</i>	<i>Cost</i>	
4/3/08	228359	Tramadol/Acetaminophen	Beck	\$66.08	
4/3/08	228358	Methylprednisolone	Beck	\$18.85	
4/10/08	C228924	Diazepam	Skene	\$11.00	
4/10/08	N228925	Oxycodone (30)	Skene	\$11.11	
4/16/08	C229395	Butalbital/ASA/Caffeine	Skene	\$27.68	
4/16/08	N229406	Oxycodone (30)	Skene	\$11.11	
4/19/08	C229649	Diazepam	Skene	\$11.00	
4/25/08	N230096	Oxycodone (60)	Skene	\$17.63	
2008 prescription total					\$174.46
3/16/09	4440333	Lortab	Jeppsen	\$22.54	
3/30/09	4440774	Zolpidem	Jeppsen	\$47.78	
12/16/09	6891033	Amytriptylene	Jeppsen	\$10.00	
2009 prescription total					\$80.32
1/25/10	6891033	Amytriptylene (refill)	Jeppsen	\$10.00	
2010 prescription total					\$10.00
Prescription Total					\$264.78

The Referee finds that Claimant is entitled to \$264.78 as reimbursement for prescription drugs.

Mileage

26. Idaho Code § 72-432(13) governs the reimbursement of necessary travel expenses:

An injured employee shall be reimbursed for his expenses of necessary travel in obtaining medical care under this section. Reimbursement for transportation expenses, if the employee utilizes a private vehicle, shall be at the mileage rate allowed by the state board of examiners for state employees; provided however, that the employee shall not be reimbursed for the first fifteen (15) miles of any round trip, nor for traveling any round trip of fifteen (15) miles or less. Such distance shall be calculated by the shortest practical route of travel.

27. According to Google Maps, the distance between Claimant's home address and Jackson Hole, Wyoming, where he received much of his treatment, is 34.6 miles. As set out in the findings, Claimant treated in Jackson Hole on fifteen different occasions (nine visits to doctors and hospitals, and six physical therapy visits). The first fifteen miles of each round trip is not reimbursable. Reimbursable mileage for travel from his home to Jackson Hole is 813 miles $(69.2 - 15) \times 15$. At all times pertinent, the mileage rate as established by the state board of examiners for state employees was 50.5 cents per mile. Claimant is entitled to mileage reimbursement of \$410.56 for local travel.

28. According to Google Maps, the distance between Claimant's home and Dr. Jeppsen's office in Utah is 296 miles. Claimant has documented five treatments with Dr. Jeppsen. Reimbursable mileage from Claimant's home to Dr. Jeppsen's office is 2,885 miles $(592 - 15) \times 5$. The mileage rate applicable for each of the five trips was 45.5 cents per mile. Claimant is entitled to mileage reimbursement of \$1,312.68 for travel to Utah.

Per Diem

29. Reimbursement for meals and lodging is governed by the allowable rates set by the state board of examiners for state employee travel. Only the injured worker is entitled to reimbursement for *per diem*, unless the record establishes that the worker requires a driver. In the case at bar, there is no evidence that Claimant required a driver. With an approximate driving time of a little more than five hours, two days travel is more than adequate for each

appointment. The applicable *per diem* rate for Claimant's travel for treatment on March 16, March 30, and April 13, 2009 was \$39.00 per day, for a total of \$234.00. The applicable *per diem* rate for travel to appointments on October 26 and December 28, 2009, was \$46.00 per day, for a total of \$184.00.

30. An internet check of hotel rates for a single room with a king bed located near Dr. Jeppsen's office shows that rooms are regularly available, even during the summer tourist season, for between \$53.00 and \$74.00 per day. The Referee finds that \$74.00 per night is a reasonable rate for lodging in Salt Lake City. Claimant is entitled to reimbursement for lodging of \$370.00.

31. The Referee finds that Claimant is entitled to a total award for medical care, prescription drugs, and associated travel of \$14,084.20.

32. Claimant may also be entitled to additional medical care. To that end, Claimant shall return to one of his initial treating physicians—either Dr. Beck or Dr. Skene—for an evaluation to determine whether Claimant is medically stable from his industrial accident. If he is not medically stable, Defendant(s) are obligated to provide such reasonable on-going treatment as his treating physician determines is necessary.

TTD BENEFITS

33. Claimant testified that he was off work from April 3, 2008 through June 2, 2008. However, there is no evidence in the medical record that any medical professional actually took Claimant off work or placed him on light duty. While it would not be unreasonable for Dr. Beck to have taken Claimant off work pending the results of his MRI, or placed him on light duty for a period of time, there is no indication that Dr. Beck did so. Claimant presumably sustained ten days of lost time from his new employment for his medical visits to Utah. Claimant's average

weekly wage (AWW) at the time of his injury was \$480.00 (\$12 x 40). Based on his AWW, Claimant's compensation rate is 67% of his AWW or \$321.60 per week. Applying Claimant's compensation rate to a period of one week and three days, Claimant is entitled to TTD benefits of \$459.43.

PENALTY

34. Idaho Code § 72-210 provides:

If an employer fails to secure payment of compensation as required by this act, an injured employee, or one contracting an occupational disease, or his dependents or legal representative in case death results from the injury or disease, may claim compensation under this law and shall be awarded, in addition to compensation, an amount equal to ten per cent (10%) of the total amount of his compensation together with costs, if any, and reasonable attorney's fees if he has retained counsel.

35. Defendant(s) admit that no workers' compensation coverage was in effect on the date of Claimant's industrial injury. Claimant is entitled to a penalty of \$1,454.36 plus Claimant's reasonable costs and attorney fees. Counsel for Claimant submitted his memorandum of costs and attorney fees along with the post-hearing brief.

CONCLUSIONS OF LAW

1. Claimant is entitled to payment of \$14,084.20 for medical expenses incurred as a result of his industrial accident, together with such additional reasonable care as his treating physician deems necessary.

2. Claimant is entitled to TTD benefits of \$459.43.

3. Claimant is entitled to a penalty of \$1,454.36 for Defendant(s)' failure to maintain workers' compensation insurance.

4. Claimant is entitled to attorney fees and costs incurred in the prosecution of this proceeding. Unless the parties can agree on an amount for reasonable attorney fees,

Defendant(s) shall, within fourteen (14) days of the filing of this Order, file a memorandum in response to Claimant's memorandum of fees and costs served with Claimant's post-hearing brief. If Defendant(s) object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant(s)' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

RECOMMENDATION

Based upon 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 10 day of August, 2010.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRENT D. HIBBERT,)
)
 Claimant,)
)
 v.)
)
 PATRICIA D. REYNOLDS/REYSON)
 CUSTOM STONE AND TILE,)
)
 Employer(s),)
)
 Defendant(s).)
 _____)

IC 2008-019040

ORDER

Filed: August 24, 2010

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 is entitled to payment of \$14,084.20 for medical expenses incurred as a result of his industrial accident, together with such additional reasonable care as his treating physician deems necessary.
2. Claimant is entitled to TTD benefits of \$459.43.
3. Claimant is entitled to a penalty of \$1,454.36 for Defendant(s)' failure to maintain workers' compensation insurance.

4. Claimant is entitled to attorney fees and costs incurred in the prosecution of this proceeding. Unless the parties can agree on an amount for reasonable attorney fees, Defendant(s) shall, within fourteen (14) days of the filing of this Order, file a memorandum in response to Claimant's memorandum of fees and costs served with Claimant's post-hearing brief. If Defendant(s) object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant(s)' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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

DATED this 24 day of August, 2010.

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 24 day of August, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

PATRICIA REYNOLDS
REYSON CUSTOM STONE & TILE
PO BOX 3587
ALPINE WY 83128

djb

/s/ _____