

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES MARCUM,

Claimant,

v.

BRENT GULL,

Employer,  
Defendant.

**I.C. No. 2011-010389**

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

FILED 10/07/2011

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee LaDawn Marsters, who entered an Order Entering Default herein on August 1, 2011. On August 25, 2001, a telephone hearing was conducted in which Claimant and his counsel, Delwin W. Roberts, participated. Defendant Employer was neither present nor represented. Claimant agreed to submit his case via an affidavit and supporting records, waiving his right to a hearing. He also presented unsworn testimony, which was neither recorded nor used in determining any factual findings herein. Subsequently, on August 30, 2011, Claimant filed proposed Findings of Fact, Conclusions of Law and Recommendation, along with documents for admission into evidence, identified below. Claimant waived his right to file a legal brief. This matter became ready for decision and was taken under advisement on August 31, 2011. On September 9, 2011, the Referee entered an Order to Supplement the Record, to which Claimant responded by filing supplemental affidavits and/or evidentiary documents on September 9, 2011 and September 16, 2011.

## **ISSUES**

Claimant's issues to be decided at this time are:

1. Whether Claimant has established a *prima facie* case to support his application for a default judgment;
2. Whether Claimant sustained an injury from an accident arising out of and in the course of employment;
3. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
4. 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. Permanent Partial Impairment (PPI);
5. Whether and to what extent Claimant is entitled to attorney fees; and
6. Whether the Commission should retain jurisdiction beyond expiration of the statute of limitations.

Claimant specifically withdrew and reserved for future proceedings the issue of Claimant's eligibility for permanent partial disability to allow him more time in which to compile his evidence.

## **EVIDENCE CONSIDERED**

1. Claimant's Exhibits 1 through 8;
2. Affidavit of Charles Marcum, filed August 30, 2011;
3. Affidavit of Delwin W. Roberts Regarding Insurance, filed August 30, 2011;

4. Supplemental Affidavit in the Matter of Charles Marcum, filed September 9, 2011;
5. Second Supplemental Affidavit in the Matter of Charles Marcum, filed September 16, 2011; and
6. Operative Report dated May 3, 2011 by Gregory Biddulph, M.D.

### **FINDINGS OF FACT**

1. Claimant was 28 years of age and residing in Idaho Falls at the time this case went under advisement. He began working as a mail hauler for Employer on September 27, 2007. Claimant has no history of right shoulder pathology, but he did undergo arthroscopic left shoulder surgery, including a distal clavicle excision, in 2001.

2. On March 23, 2011, Claimant was in Rigby unloading his work truck, using a cart weighing approximately 600 pounds, when the truck rolled forward. The cart fell between the cage and the truck, jerking the Claimant's arm and body backward and injuring his right shoulder. Claimant notified Mr. Gull (Employer) of the accident via phone from the job site in Ashton after the injury. At Employer's direction, Claimant waited five days before obtaining medical care.

3. On March 28, 2011, Claimant presented to Lloyd D. Stolworthy, M.D., at Idaho Urgent Care. Claimant reported continuing right shoulder pain due to the workplace accident. Dr. Stolworthy prescribed medications and a sling, obtained x-rays, ordered an MRI, and referred Claimant to Gregory Biddulph, M.D., an orthopedic surgeon.

4. Dr. Biddulph evaluated Claimant's right shoulder on April 13, 2011. Claimant reported severe pain and, on exam, Dr. Biddulph confirmed popping and catching, weakness with resisted abduction and decreased range of motion. An April 5, 2011 MRI revealed significant pathology, and Dr. Biddulph diagnosed a partial thickness rotator cuff tear, a posterior labral tear and posttraumatic bursitis. He recommended surgical repair and released Claimant to work with

restrictions including no reaching, no overhead movement and no lifting over five pounds with his right arm.

5. On May 3, 2011, Claimant underwent arthroscopic right shoulder surgery. Dr. Biddulph's preoperative diagnoses included resistant impingement syndrome, bursitis and symptomatic right shoulder acromioclavicular arthritis/internal derangement. However, his post-operative diagnoses notably did not include arthritis. Instead, Dr. Biddulph assessed symptomatic inflammation/synovitis of the right shoulder acromioclavicular joint, impingement syndrome with bursitis, grade 2 chondritis of the humeral head and a small radial flap tear of the anterior labrum. Dr. Biddulph repaired Claimant's labral tear, decompressed his shoulder and performed a distal claviclectomy, among other procedures.

6. Following surgery, Claimant participated in a course of physical therapy under Dr. Biddulph's direction. His right shoulder symptoms steadily improved, and, by June 10, 2011, Claimant was released to work full-time with right arm restrictions including no reaching, no overhead movement, and no lifting in excess of 20 pounds.

7. Unfortunately, Claimant's condition then began to show signs of worsening. By August 3, 2011, he reported symptoms to Dr. Biddulph including sharp, achey pain that radiated down his arm, as well as pain when reaching overhead, across his body and behind him. Nevertheless, Claimant felt better than before surgery and attributed his increased symptoms to irritation as a result of using his right shoulder more. Dr. Biddulph examined Claimant and diagnosed bursitis, most likely due to overuse. Claimant declined a cortisone injection because he is allergic to that medication. He also declined physical therapy. Dr. Biddulph then recommended ibuprofen and a follow-up examination in three months.

8. Also on August 3, Dr. Biddulph released Claimant back to work, without restrictions. On August 17, 2011, he assessed a 2% whole person permanent partial impairment (PPI) rating (1% each for the labral tear and the articular cartilage damage) attributable to the industrial injury, specifically ruling out preexisting causes.

9. Claimant's condition has improved, in that his shoulder tear was repaired, but he continues to report on-going pain and range of motion limitations that prevent him from reaching overhead or lifting more than 20-30 pounds. Claimant does not dispute Dr. Biddulph's PPI assessment.

10. Claimant continued to work for Employer following his injury, using only his left hand to drive and lift, until May 2, 2011, the day prior to his right shoulder surgery. Afterward, Employer never offered Claimant light-duty work and, at some point, their employment relationship terminated for reasons unrelated to Claimant's injury.

11. Claimant's costs related to his surgery are documented in Exhibit 5 by copies of itemized bills. They amount to \$1,191 (plus \$23) for radiology expenses, \$8,235 for Dr. Biddulph's services, \$203 for emergent care services, \$7,770.82 for hospital services, \$1,235 for anesthesiologist services and \$2,625 for post-surgical physical therapy, for a total of 21,282.82.

12. At some point, Employer assured Claimant that he would pay for Claimant's costs related to the accident. As it turned out, however, Employer did not pay any of Claimant's related costs. Claimant (through his counsel) verified with the Commission that Employer had no worker's compensation insurance coverage at the time of Claimant's accident.

13. Claimant testified that he earned \$18.88 per hour and worked 46.5 hours per week across seven days, amounting to weekly earnings of \$877.92.

## DISCUSSION AND FURTHER FINDINGS

Claimant seeks to establish a *prima facie* case to support his application for default award. He requests that judgment be entered against Employer for medical expenses, temporary disability benefits, permanent partial impairment, and attorney fees and penalties that have accrued thus far. Claimant reserved the issue of permanent partial disability benefits for future resolution.

A *prima facie* case is defined as “(s)uch as will prevail until contradicted and overcome by other evidence.” Black’s Law Dictionary, Sixth Edition, 1990, p. 1189. 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).

### **Accident/injury and causation.**

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).

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).

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).

14. Claimant's affidavit testimony relating to his accident and subsequent symptoms is unrefuted and credible. It indicates he experienced an acute onset of shoulder symptoms when he was jerked by a cart while unloading a truck for Employer on March 25, 2011 and that his symptoms persisted from that date forward. Claimant's affidavit also establishes he had no prior problems with his right shoulder. Furthermore, Claimant's medical records and Dr. Biddulph's August 17, 2011 opinion both support his claim that the industrial accident caused his right shoulder injuries, including a a partial thickness rotator cuff tear and a posterior labral tear.

15. The Referee finds Claimant has met his burden of proving he suffered his right shoulder injuries as a result of an accident arising out of and in the course of his employment on March 23, 2011.

#### **Medical Benefits.**

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. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). 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). "Probable" is defined as "having more

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7

evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

In *Sprague*, the following factors were found to be relevant to the determination of whether the particular care at issue in that case was reasonable: (1) a claimant should benefit from gradual improvement from the treatment rendered, (2) the treatment was required by a claimant’s treating physician, and (3) the treatment was within the physician’s standard of practice and the charges were fair and reasonable.

16. The evidence in the record establishes that Claimant’s shoulder condition improved following his surgery by Dr. Biddulph. Although Claimant still has symptoms, his tears have been repaired and he has greater use of his right arm than he did following his industrial accident, prior to surgery.

17. The evidence also establishes the remaining two factors. Although his medical records indicate Claimant “pushed” for surgery, they also demonstrate that he was experiencing a great deal of pain and difficulty moving his right arm, leading Dr. Biddulph to recommend surgical intervention:

The patient is complaining of significant pain and pushing for right shoulder arthroscopy because of the significant mechanical symptoms that he is experiencing in his right shoulder...I recommend right shoulder arthroscopy for labral repair and also repair/debridement of the partial rotator cuff tear with subacromial decompression. I believe that the decision regarding distal clavicle excision should be made close to the time of surgery. If the pain across the a.c. joint is improving then I would elect not to do a distal clavicle resection.

EX1, p. 6. The surgical recommendation of Dr. Biddulph is sufficient to establish that the surgery was required by Claimant’s treating physician. Also, the procedure was clearly within the standard of practice of Dr. Biddulph, an orthopedic surgeon.



18. Further, Claimant has met his burden of proving that the costs related to his industrial accident were fair and reasonable. Exhibit 5 contains copies of bills sufficiently detailed to determine that the claimed costs are, indeed, related to treatment for the industrial injury and, further, that they are costs customarily incurred in treatment and care leading up to and following a shoulder surgery. In addition, the amounts charged do not appear patently unreasonable and there is no evidence suggesting this.

19. Claimant has met his burden of proving, pursuant to Idaho Code § 72-432, that the medical care he received, as evidenced by the documentation in Exhibit 5, was reasonable and necessary to treat his industrial right shoulder injury. *Neel v. Western Construction*, 147 Idaho 146, 206 P.3d 852 (2009), is premised on the assumption that an injured worker who contracts for medical care outside the worker's compensation system has, or may have, exposure to pay the full invoiced amount of medical bills incurred with connection with his treatment. Here, there is no evidence that Claimant is obligated to pay anything other than the full invoiced amount. Therefore, consistent with *Neel*, the Referee finds Claimant is entitled to payment of the full invoiced amount of his unpaid reasonable medical expenses related to treatment of his March 25, 2011 industrial injury. Exhibit 5 sets out the bills for which Claimant seeks reimbursement; they total \$21,282.82. The Referee finds Claimant is entitled to reimbursement for those bills. The amount due and owing from Employer for medical benefits is \$21,282.82.

**Temporary Disability Benefits (TTD/TPD).**

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).

20. Claimant requests TTDs from May 3, 2011, the date of his right shoulder surgery, through August 3, 2011, the date on which Dr. Biddulph released Claimant without restrictions. The Referee finds Claimant reached maximum medical improvement on August 3, 2011 and, thus, was thereafter no longer in a period of recovery. Claimant is entitled to TTD benefits from May 3, 2011 until August 3, 2011, or 13 weeks and 2 days.

21. The Referee further finds Claimant's average weekly wage at the time of his industrial accident was \$877.92, which entitles him to 90% of the Average State Wage, or \$581.40 per week. Thus, Claimant is entitled to TTD benefits in the amount of \$7,724.31 (13.285714 x \$581.40). The amount due and owing from Employer for TTD benefits is \$7,724.31.

**Permanent Partial Impairment (PPI).**

“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).

22. Dr. Biddulph assessed PPI in the amount of 2% of the whole person as a result of Claimant's right labral tear and articular cartilage damage. Further, he was aware of Claimant's residual symptoms at the time he made his PPI assessment. Dr. Biddulph did not indicate what authority he relied upon in reaching his conclusion. The *AMA Guides, 6<sup>th</sup> Edition*, for instance, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 10

allows up to 13% PPI, for a labral tear when the patient manifests significant residual symptoms or functional loss. Claimant has raised the question of whether his post-surgical symptoms warrant an increased PPI rating because, most significantly, he has alleged they include functional loss. Given that Claimant does not disagree with Dr. Biddulph's assessment, however, the Referee adopts the same and finds that Claimant suffered 2% PPI of the whole person as a result of his industrial right shoulder injury.

23. Claimant is entitled to a PPI compensation benefit of \$3,553.00 (10 weeks @ 355.30). The amount due and owing from Employer for PPI benefits is \$3,553.00.

**Attorney's Fees and Penalties.**

24. Idaho Code § 72-210 allows a Claimant to collect reasonable attorney fees, costs, and a statutory penalty equal to 10% of the compensation award from an uninsured Employer. The Referee finds Employer failed to carry worker's compensation insurance coverage at the time of Claimant's March 23, 2011 industrial accident and injury.

25. As determined, above, Claimant is entitled to a compensation award of \$32,560.13 (\$21,282.82 for medical benefits, \$7,724.31 for TTD and \$3,553.00 for PPI). Therefore, Claimant is entitled to reasonable attorney fees and costs, as well as a statutory penalty of \$3,256.01 (10% x \$32,560.13).

26. The amount due and owing from Employer for attorney fees and costs is a matter of contract between Claimant and his attorney. No evidence concerning the terms of that relationship exists in the record; therefore, the Referee declines to assess the amount owed for attorney fees and costs in this order.

27. The amount due and owing from Employer for the statutory penalty is \$3,256.01.

**Retention of jurisdiction.**

28. Consistent with Idaho Code § 72-706(2), the Commission shall retain jurisdiction for a period of five years following Claimant's March 23, 2010 industrial accident, for the purpose of ensuring adequate time in which to pursue his disability claim. Although that statute is not directly applicable to this case because no compensation payments have actually been rendered, such benefits have been awarded herein. Therefore, Claimant is entitled to a limitations period equal to that provided in § 72-706(2) regardless of whether Employer satisfies his obligation to pay Claimant's benefits.

**CONCLUSIONS OF LAW**

1. Claimant has established a *prima facie* case to support his application for a default judgment.
2. Claimant has proven his right shoulder injury was caused by the industrial accident of March 23, 2011.
3. Claimant has proven that his May 3, 2011 right shoulder surgery and related treatment was reasonable and necessary medical care for his industrial right shoulder injury.
4. Claimant has proven that he is entitled to reimbursement from Employer for medical benefits in the amount of \$21,282.82.
5. Claimant has proven that he is entitled to reimbursement from Employer for TTD benefits from May 3, 2011 until August 3, 2011 in the amount of \$7,724.31.
6. Claimant has proven that he is entitled to reimbursement from Employer for PPI benefits for his right labral tear and articular cartilage damage in the amount of 2% of the whole person, for a total of \$3,553.00.

7. Claimant has proven that he is entitled to a statutory penalty from Employer, under Idaho Code § 72-210, in the amount of \$3,256.01.

8. Claimant has proven that, under Idaho Code § 72-210, he is entitled to reimbursement from Employer for his reasonable attorney fees and costs incurred in pursuing his claims.

9. The Commission will retain jurisdiction over this matter for five years from March 23, 2011, the date of Claimant's industrial injury.

10. Issues pertaining to PPD related to Claimant's compensable right shoulder injury are reserved.

#### RECOMMENDATION

The Referee recommends the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED at Boise, Idaho, this 22nd day of September, 2011.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
LaDawn Marsters, Referee

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2011, a true and correct copy of the foregoing **Findings of Fact and Conclusions of Law and Recommendation** was served by regular United States Mail upon each of the following persons:

DELWIN W. ROBERTS  
1495 E. 17<sup>TH</sup> ST.  
IDAHO FALLS ID 83404-6236

BRENT GULL  
925 ANDREWS PL  
REXBURG ID 83440-5188

BRENT GULL  
4200 PHILBIN RD TLR 50  
POCATELLO ID 83202-2852

BRENT GULL  
139 FULLER WAY AVE  
POCATELLO ID 83201

\_\_\_\_\_/s/\_\_\_\_\_  
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**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

CHARLES MARCUM, )  
 )  
 Claimant, ) **IC 2011-010389**  
 )  
 v. )  
 ) **ORDER**  
 BRENT GULL, )  
 ) **FILED 10/07/2011**  
 )  
 Employer, )  
 Defendant. )  
 \_\_\_\_\_ )

Pursuant to Idaho Code § 72-717, Referee submitted the record in the above-entitled matter, together with her 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 established a *prima facie* case to support his application for a default judgment.
2. Claimant has proven his right shoulder injury was caused by the industrial accident of March 23, 2011.
3. Claimant has proven that his May 3, 2011 right shoulder surgery and related treatment was reasonable and necessary medical care for his industrial right shoulder injury.
4. Claimant has proven that he is entitled to reimbursement from Employer for medical benefits in the amount of \$21,282.82.

5. Claimant has proven that he is entitled to reimbursement from Employer for TTD benefits from May 3, 2011 until August 3, 2011 in the amount of \$7,724.31.

6. Claimant has proven that he is entitled to reimbursement from Employer for PPI benefits for his right labral tear and articular cartilage damage in the amount of 2% of the whole person, for a total of \$3,553.00.

7. Claimant has proven that, under Idaho Code § 72-210, he is entitled to a 10% penalty on all benefits.

8. Claimant has proven that he is entitled to a statutory penalty from Employer, under Idaho Code § 72-210, in the amount of \$3,256.01.

9. The Commission will retain jurisdiction over this matter for five years from March 23, 2011, the date of Claimant's industrial injury.

10. Issues pertaining to PPD related to Claimant's compensable right shoulder injury are reserved.

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

Claimant's counsel shall, within 21 days of entry of the Commission's Order, file with the Commission a memorandum requesting attorney fees incurred in counsel's representation of Claimant and an affidavit in support thereof. Claimant is instructed to address the factors set forth in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The Commission shall then review the pleadings and issue an order determining reasonable attorney fees.



DATED this 7th day of October, 2011.

INDUSTRIAL COMMISSION

/s/  
Thomas E. Limbaugh, Chairman

/s/  
Thomas P. Baskin, Commissioner

/s/  
R.D. Maynard, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of October, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DELWIN W ROBERTS  
1495 E 17TH ST  
IDAHO FALLS ID 83404-6236

BRENT GULL  
925 ANDREWS PL  
REXBURG ID 83440-5188

BRENT GULL  
4200 PHILBIN RD TLR 50  
POCATELLO ID 83202-2852

BRENT GULL  
139 FULLER WAY AVE  
POCATELLO ID 83201

srn

/s/