BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FIDEL MARTINEZ JULIAN, Claimant, v. SIZZLER RESTAURANT, LLC, Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE COMPANY, Surety, Defendants.	**IC 2012-006471** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed June 17, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on December 4, 2012. Claimant appeared *pro se*. Defendants Employer and Surety were represented by R. Daniel Bowen. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on April 1, 2013. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing and as agreed to by the parties at hearing are:

1. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;
2. Whether the Claimant suffered an injury caused by an accident arising out of and in the course of employment;
3. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

4. Whether and to what extent Claimant is entitled to benefits for:

   (a) Temporary disability (TTD/TPD),
   (b) Permanent partial impairment (PPI),
   (c) Permanent partial disability in excess of impairment,
   (d) Medical care; and

5. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

In briefing, Defendants admitted Claimant gave notice of accident and injury within 60 days and Issue 1 above was withdrawn.

CONTENTIONS OF THE PARTIES

Each side accuses the other of being untruthful.

Claimant contends that on August 10, 2011 he suffered an unwitnessed compensable industrial accident. He twisted or sprained his left ankle while mopping a floor. He is unable to work as a result. He acknowledges an old ankle injury in 1987, but had no problem with it from late 1987 to the date of the accident.

Defendants contend that Claimant initially reported an ankle problem, but he denied it was work related. He initially reported that the ankle problem was the result of a prior injury. Only after doctors informed Claimant he required surgery and only after Employer terminated Claimant for failing to show as scheduled for work did Claimant assert that he suffered an accident which had injured his ankle at work. This reversal of position by Claimant occurred within the notice period allowed by statute. No physician has related Claimant's ankle condition to a recent traumatic event, particularly not to the alleged accident. Alternatively, if Claimant is found to have suffered an accident and injury, he has failed to show he suffered permanent partial impairment and, at most, would be entitled to his medical bills. No physician released Claimant from work or required temporary restrictions which might have limited his work.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, his friend Daniel Diaz, and Employer's managers, Connie Brown and Rodrigo Chavez;
2. Claimant's exhibits 1 and 2 admitted at hearing; and
3. Defendants' exhibits 1-4, admitted at hearing.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Claimant worked for Employer on August 10, 2011.

2. Claimant described an accident in which he slipped on a wet floor which he was mopping; He felt immediate ankle pain and reported it to Connie Brown, Rodrigo Chavez, and another manager. Claimant testified that he also told them of a prior ankle injury in 1987 but did not tell them that the old injury was the cause of his current pain.

3. Claimant returned to work the following morning, August 12, but after two or three hours was unable to continue because of ankle pain. At that point, Ms. Brown sent him home to recover. She suggested he see a physician. Ms. Brown suggested Claimant should be responsible for the cost of any medical treatment.

4. Ms. Brown recalled the August 12th conversation but not the one on August 11. She recalled that Claimant expressly denied having been hurt at work. She recalled that Mr. Chavez was not present for this conversation.

5. Claimant understands little English and speaks less. Ms. Brown understands and speaks some Spanish. However, for important conversations at work she relies upon a translator. During these events, when a translator was called upon, Mr. Chavez filled that role.

6. Claimant testified that he visited the Terry Reilly Clinic in Nampa on August 12. The record does not document that visit. We find that this visit actually occurred on August 16 as described below.

7. On August 16, 2011, Claimant sought medical attention. He was examined by Lawrence Egger, PA. By history, Claimant reported no left ankle pain until he twisted it 7 days prior at work. Claimant reported a 1987 injury in which he twisted his left ankle, but denied pain in the interim. Claimant was taken off work for two to three days.

8. In deposition, Claimant's testimony regarding the condition of his left ankle was confusing and shifting.

> Q. (by Bowen): When did you first start having problems with your left ankle?
> A. When I had an accident at Sizzler's.
>
> Q. Did you ever have any left ankle problems before your accident at Sizzler's?
> A. No. Never.
>
> Q. Am I to understand that you didn't injury your ankle many years ago? Perhaps in 1987?
> A. Never. From then to now? Never.
>
> Q. Did you injury your left ankle back in 1987?
> A. Yes. But after that I knew I could work. So that is why I came here. After that I came here because I knew I could work.
>
> Depo., p. 13.

Claimant even reported to Dr. Roser that he injured his ankle in 1987 breaking up a fight. D. Exh. 3. The majority, if not the consensus, of records support that Claimant fell off a ladder in 1987; this was the initial cause of any ankle problems. He sought medical treatment, but had no problems with it until the August 10, 2011, incident at work.

9. Ms. Brown recalled that after his early doctor visits, Claimant reported to her that

he would return to work on Saturday. On another occasion he reported he would be out for six weeks. After about two weeks, Claimant told her he needed to return to work. She recalled that on each of these conversations she asked Claimant if "anything happened" at the restaurant to cause his ankle pain and that Claimant denied it. Ms. Brown required a doctor's note for Claimant's return to work.

10. Claimant brought a note, but returned to work for only one or two days before he reported his pain had returned to prevent him from working. The process of events in which Claimant would present a doctor's note, work one or two days, report ankle pain, and again be off work for a few days recurred more than twice. Ultimately Claimant simply failed to show for scheduled work without contacting Employer.

11. Over the course of these various conversations, Claimant reported to Ms. Brown that he had suffered an ankle injury in a prior automobile accident, aggravated it in a shower incident, and had longstanding chronic ankle issues. Until Claimant raised the issue of ankle surgery, he had consistently denied, to Employer, having suffered any work-related event.

12. Claimant appeared at the restaurant asking for financial assistance. Employer provides an employee assistance fund, but the fund could not accommodate the extensive amount of money Claimant was seeking to pay for ankle surgery.

13. On October 4, 2011, Employer told Claimant his employment was terminated for failure to show up for work without prior notice. At that point, Claimant stated he was going to hire an attorney because Employer was responsible to pay for his injury from a work accident. Claimant argues that he had earlier notified Employer of his work injury. Ms. Brown and Mr. Chavez persuasively testified that this was Employer's first notification of Claimant's allegation of a potential workers' compensation claim.

14. Ms. Brown contacted Employer's legal department and was instructed to fill out a Form 1. Ms. Brown contacted Claimant. She understood from this conversation that Claimant had hurt his ankle dumping garbage outside the restaurant. She reported the accident as such. The Form 1 is dated February 21, 2012.

Medical Care

15. The nurse's history of Claimant's initial medical treatment with Terry Reilly Health Services on August 16, 2011, noted Claimant reported he rolled his left ankle "8 days ago." He did report he twisted his ankle "at work." An X-ray showed chronic arthritic changes but no acute fracture. PA Egger recommended no work for two to three days. He referred Claimant for orthopedic consult.

16. On August 19, 2011, PA Amber Carley at St. Luke's orthopedic clinic examined Claimant. She diagnosed "bone-on-bone traumatic arthritis." By history, Claimant reported to her that he injured his ankle in 1987 breaking up a fight and that it "has never felt the same." He did describe a work injury ten days prior in which he slipped and encountered a substantial increase in ankle pain. PA Carley told him to return in four to six weeks for follow-up. She raised the issue of surgery for his preexisting ankle condition.

17. On August 30, 2011, Claimant reported to PA Carley that he was not better and would like to discuss potential surgery. On examination, PA Carley found significant swelling and limited range of motion remained. She provided a light duty work release, recommending a brace, no/minimal stairs, and modified work of no carrying loads over 30 pounds for over two hours, but allowing Claimant to walk without loads for up to 8 hours.

18. On September 13, 2011, Claimant again visited PA Carley. On examination, he still retained some tenderness and limitation of range of motion. They discussed potential

surgery for the arthritis, noted Claimant did not have health insurance and that Claimant stated he did have the funds to pay for such a surgery.

19. On September 20, 2011, orthopedic surgeon Steven Roser, M.D., at St. Luke's clinic opined Claimant could return to work and was back to baseline. He discussed with Claimant a possible ankle fusion surgery. It was not until a November 15, 2011 visit with PA Carley that Claimant first mentioned to a physician that he felt Employer should be responsible for payment of his medical bills. PA Carley suggested he attempt to file a workers' compensation claim and provided a written recommendation that he do so.

20. On November 19, 2012, Dr. Roser opined Claimant's need for surgery was unrelated to the sprained ankle suffered at work. He provided persuasive medical analysis to explain the basis of that opinion. He opined Claimant suffered no PPI from the work accident.

DISCUSSION AND FURTHER FINDINGS OF FACT

21. The provisions of the Idaho 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).

Accident and Causation

22. 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).

23. On Claimant's first visit for treatment he reported his injury arose at work. While there may be many reasons why Employer's representatives and Claimant dispute whether

he reported or denied a work accident originally, we find the initial medical record to be persuasive. Though Claimant did not clearly communicate to Employer about whether he suffered an industrial accident, Claimant's medical records support his allegations of an industrial accident. Claimant suffered a compensable injury resulting from an accident.

24. A claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

25. Here, the express medical opinion of record is that Claimant suffered an ankle sprain caused by his work accident, and that he returned to baseline as of September 20, 2011. His chronic ankle condition and concomitant need for surgery preexisted the work accident and was entirely unrelated to it and unaffected by it. We so find.

Medical Care

26. An employer is required to provide reasonable medical care for a reasonable time as recommended by an injured worker's treating physician. Idaho Code § 72-432(1).

27. The medical record establishes that Claimant was injured and received medical

care from August 16 through September 20, 2011, when Dr. Roser found Claimant had returned to baseline Claimant desires additional care, including ankle fusion surgery. Dr. Roser opined that Claimant's need for future ankle fusion surgery is not causally related to Claimant's accident. Claimant's assertions about his need for care, absent persuasive medical testimony, are not enough to show his need for an ankle fusion surgery is related to his industrial accident. Claimant is entitled only to the treatment and diagnostic care he received between August 16, 2011 through September 20, 2011. .

Temporary Disability

28. Eligibility for and computation of temporary disability benefits are provided by statute. Idaho Code §72-408, *et. seq*. (2001). Under *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), once a claimant establishes by medical evidence that he is within a period of recovery from the industrial accident, he is entitled to TTD benefits *unless* and *until* evidence is presented that he has been medically released for light work and (1) that an employer has made a reasonable and legitimate offer of suitable employment to him or that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing, and which is consistent with his physical abilities. Likewise, once the claimant reaches medical stability, the claimant's entitlement to temporary total or temporary partial disability benefits comes to an end. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

29. On August 16, 2011, Claimant sought care at Terry Reilly Health Services and was given a work release for two to three days. On August 19, 2011, Claimant treated with PA Carley at St. Luke's Clinic Intermountain Orthopaedics, work restrictions are not addressed in that note. Then on August 30, 2011, PA Carley recommended modified work including "no

carrying loads over 30 pounds for over two hours, and the ability to walk without loads for up to 8 hours." D. Exh. 3. On September 13, 2011, PA Carley noted that Claimant still desired surgery and pain medication, but did not re-issue work restrictions. On September 20, 2011, Dr. Roser opined that Claimant had reached "baseline" and "can go back to work." D. Exh. 3, p. 9.

30. The record shows that Claimant was taken off work for three days beginning August 16, 2011 and was given modified work restrictions beginning August 30, 2011 and ending September 20, 2011, when Dr. Roser released Claimant to return to work. Ms. Brown testified that she received a doctor's note that stated Claimant was unable to work longer than eight hours and could not lift over 30 pounds. *Malueg* requires that once a claimant establishes he is in a period of recovery the burden is on Defendants to offer suitable work. It is clear that Employer was offering Claimant employment, but the employment offer must be a reasonable and legitimate offer within Claimant's restrictions. Defendants did not present evidence regarding the suitability of the offer of employment and Claimant testified that he attempted to work but could not physically handle his duties. There is not sufficient evidence in the record to support a conclusion that Employer offered Claimant suitable employment within his restrictions. Therefore, Claimant is entitled to temporary disability benefits from August 30, 2011 through September 20, 2011. Claimant reached medical stability on September 20, 2011. Thus, Claimant's is not entitled to temporary disability beyond that date.

Claimant has proven his entitlement to TTD/TPD benefits for three days beginning on August 16, 2011, and from August 30, 2011 through September 20, 2011. Defendants are entitled to credit for wages paid during those time periods, if any. **PPI, Permanent Disability, and Apportionment**

31. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 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*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

32. Dr. Roser persuasively opined that Claimant reached maximum medical improvement by September 20, 2011, and suffered no permanent impairment as a result of his accident. D. Exh. 4. Dr. Roser's opinion is supported by the medical records and is given greater weight than Claimant's subjective complaints about his ankle. Claimant has failed to prove he suffered any permanent partial impairment as a result of his accident and injury.

33. Because there can be no rated permanent disability without permanent impairment, questions of permanent disability and apportionment are moot.

CONCLUSIONS

1. Claimant suffered an industrial accident which caused a compensable injury, a sprained ankle; the remainder of his ankle condition preexisted the industrial accident and was not affected by it;

2. Claimant is entitled to medical care benefits for all treatment from August 16, 2011 through September 20, 2011;

3. Claimant has proven his entitlement to TTD/TPD benefits for three days beginning on August 16, 2011, and from August 30, 2011 through September 20, 2011. Defendants are entitled to credit for wages paid during those time periods, if any;

4. Claimant failed to show he suffered permanent partial impairment as a result of his compensable accident and injury; and

5. Questions of permanent disability and apportionment are moot.

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

DATED this _17th_____ day of ____June_____, 2013.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __17th_____ day of __June_____, 2013, a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER were served by regular United States Mail upon each of the following:

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