

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEBORAH MARTINEZ,

Claimant,

v.

MICHAEL AERNI AGENCY

Employer,

and

FARMERS INSURANCE GROUP OF
COMPANIES,

Surety,
Defendants.

IC 2007-002401

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

10/29/2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor. Claimant, represented by Michael J. Verbillis of Coeur d’Alene, Idaho, filed her Complaint on July 5, 2011, and her Amended Complaint on September 2, 2011. Defendants did not respond. On April 25, 2012, Claimant filed her Motion for Entry of Default. On June 15, 2012, Claimant filed her Second Motion for Entry of Default. Both motions were denied by order of the Commission on July 12, 2012. On February 25, 2013, Claimant filed her Supplemental Motion for Entry of Default and for Further Relief. Defendants Michael Aerni Agency and Farmers Insurance Group of Companies did not respond at any time. On June 7, 2013, the Commission entered default against Defendants.

On June 28, 2013, Claimant filed her Affidavit of Deborah Martinez and Affidavit of Michael J. Verbillis in support of her request for default. On July 18, 2013, Claimant filed the

medical records referenced in the previously filed Affidavit of Michael J. Verbillis. The matter came under advisement on July 19, 2013.

ISSUES

As set forth in Claimant's Amended Complaint, the issues to be decided are:

1. Claimant's entitlement to medical care;
2. Claimant's entitlement to temporary disability benefits;
3. Claimant's entitlement to permanent partial impairment benefits; and
4. Claimant's entitlement to permanent partial disability benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Affidavit of Deborah Martinez filed June 28, 2013;
3. Affidavit of Michael J. Verbillis filed June 28, 2013; and
4. Medical records filed July 18, 2013, as referenced in the above-mentioned Affidavit of Michael J. Verbillis, and hereby identified as Claimant's Exhibit A, consisting of 33 pages.

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

FINDINGS OF FACT

1. On January 10, 2007, Claimant was an employee of Michael Aerni Agency (Agency). At all relevant times, Agency was insured for its obligations under the Idaho Workers' Compensation Act by Farmers Insurance Group of Companies.

2. In the course of Claimant's employment on January 10, 2007, in Kootenai County, Idaho, Claimant suffered an industrial accident and sustained injuries when she slipped on the ice and fell in Agency's parking lot. She sustained injuries to her neck, back, and right shoulder and was diagnosed with neck and back strain. Claimant's above-stated injuries were caused by her accident arising out of and in the course of her employment with Agency.

3. Claimant gave notice of her industrial accident to her supervisor that very day. Claimant thereafter received medical treatment over the course of multiple visits to a physician and physical therapists in Hayden, Idaho through at least March 14, 2007. Claimant missed no more than two days of work on account of her industrial injuries.

4. Claimant experienced a sore neck and upper back for approximately six weeks but after her course of physical therapy ended, she was without symptoms at all in her upper back, neck, and shoulders for the next four years until such time as she resumed employment with a different employer in a different line of work.

DISCUSSION AND FURTHER FINDINGS

5. 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). 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).

6. **Medical benefits.** Claimant's Amended Complaint alleges entitlement to additional medical benefits. 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).

7. In the present case, as a result of Claimant's industrial accident she incurred medical expenses. However she acknowledges in her affidavit that "It appears as though the medical and related expenses were paid by the appropriate surety at the time." Martinez Affidavit, p. 2. Claimant has identified no unpaid medical expenses related to her industrial accident. Claimant has not proven her entitlement to additional medical benefits from Defendants.

8. **Temporary disability.** Claimant's Amended Complaint alleges her entitlement to temporary disability benefits. 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).

9. In the present case, Claimant's affidavit establishes that she missed no more than

two days of work on account of her industrial injuries and expressly states “Claimant is making no claim for time loss benefits.” Martinez Affidavit, p. 2. Claimant has identified no period of unpaid temporary disability benefits resulting from her industrial accident. Claimant has not proven her entitlement to temporary disability benefits from Defendants.

10. **Permanent impairment.** Claimant’s Amended Complaint alleges entitlement to permanent partial impairment benefits. 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).

11. In the present case, Claimant experienced a sore neck and upper back “for approximately six weeks but after her course of physical therapy ended, she was without symptoms at all in her upper back, neck, and shoulders for the next four years until such time as she resumed employment with a different employer in a different line of work.” Martinez Affidavit, p. 2. Claimant’s affidavit expressly states that she leaves “to the discretion of the hearing officer whether or not she is entitled to any impairment ... on account of the injuries that she suffered.” Martinez Affidavit, p. 2.

12. Claimant’s affidavit implies that some physical symptoms may have recurred four years after her industrial accident; however, she makes no such express assertion and provides no evidence thereof. Furthermore, there is no medical evidence in the record relating the recurrence of her symptoms, if any, to her 2007 industrial accident. 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, 785, 890 P.2d 732, 736 (1995). Claimant has not proven her entitlement to any permanent impairment benefits.

13. **Permanent partial disability.** Claimant's Amended Complaint alleges entitlement to permanent partial disability benefits. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423.

14. In the present case, Claimant's affidavit expressly states that she leaves "to the discretion of the hearing officer whether or not she is entitled to any ... disability on account of the injuries that she suffered." Martinez Affidavit, p. 2. However, pursuant to Idaho Code § 72-423, without permanent impairment due to her industrial accident, there can be no permanent disability from her industrial accident. Claimant has not proven her entitlement to any permanent disability benefits.

CONCLUSIONS OF LAW

1. Claimant has not proven her entitlement to additional medical benefits for her industrial accident.

2. Claimant has not proven her entitlement to temporary disability benefits due to her industrial accident.

3. Claimant has not proven her entitlement to permanent impairment benefits due to her industrial accident.

4. Claimant has not proven her entitlement to permanent disability benefits due to her industrial accident.

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 1st day of October, 2013.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2013, 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:

MICHAEL J VERBILLIS
PO BOX 519
COEUR D'ALENE ID 83816-0519

MICHAEL AERNI AGENCY
7352 N GOVERNMENT WAY STE D
DALTON GARDENS ID 83815

FARMERS INSURANCE GROUP OF COMPANIES
PO BOX 4820
POCATELLO ID 83204

FARMERS INSURANCE
2599 S 5TH
POCATELLO ID 83204

TRUCK INSURANCE EXCHANGE
4680 WILSHIRE BLVD
LOS ANGELES CA 90010

mg

_____/s/_____

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ORDER

10/29/2013

Pursuant to Idaho Code § 72-717, Referee 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 not proven her entitlement to additional medical benefits for her industrial accident.
2. Claimant has not proven her entitlement to temporary disability benefits due to her industrial accident.
3. Claimant has not proven her entitlement to permanent impairment benefits due to her industrial accident.

4. Claimant has not proven her entitlement to permanent disability benefits due to her industrial accident.

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

DATED this 29th day of October, 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 29th day of October, 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

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