BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVEN R. PRETZ,

Claimant,

v.

ALYN CORPORATION aka WAYBACK CAFE

Employer,
Defendant.

IC 2011-012292

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

FILED ON: 10/12/12

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just. Claimant, through his attorney, Paul Thomas Clark, filed his original Complaint on December 12, 2011, and an Amended Complaint on December 27, 2011. When no Answer was forthcoming, Claimant filed his Notice of Intent to Take Default on April 30, 2012. Defendants accepted service of the Notice of Intent to Take Default by signing for the certified letter. On August 23, 2012, Claimant filed his Motion for Default with supporting Affidavit, together with documents he alleges constitute *prima facie* evidence of a compensable workers' compensation claim. The Commission entered its Order on Default on August 29, 2012. The matter come under advisement on August 30, 2012 and is now ready for decision.

ISSUES

The issues to be decided are:

1. Whether the Claimant suffered an injury from an accident arising out of and in the

course of employment;

2. 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

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

All other issues, including permanent partial impairment (PPI) and disability in excess of impairment (PPD) are reserved for future consideration.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The affidavit of Claimant;

2. Certified copies of medical records from Tri-State Memorial Hospital, Clarkston, Washington;

3. Certified copies of Claimant's prescription records from Walgreens;

4. Certified copies of medical records from Twin Cities Radiology;

5. Claimant's Memorandum of Attorney Fees and Affidavit of Amounts Due; and

6. The Industrial Commission legal file.

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

FINDINGS OF FACT

1. At the time of his injury, Claimant was forty-seven years of age, and resided in Clarkston, Washington. Employer employed Claimant as a chef in its restaurant, the Wayback

Café. In April 2011, Claimant earned $10.00 per hour and worked between 32 and 40 hours per week.

2. On April 7, 2011, Employer asked Claimant to help three other employees move a large, flat-top grill, weighing approximately 400 pounds, outside the restaurant for cleaning. Claimant expressed his disinclination to move the grill, to no avail.

3. Claimant stated:

> When I picked up the grill, I felt a dull pain in my back. As I was moving the stove, I felt a pop and a burning feeling in my lower back. I then got nauseated and the pain increased. I told my supervisor, Theresa, that I needed to go to the hospital and she said, "What do you want me to do?"

Cl. Aff., p. 2. Claimant's version of these events is uncontroverted.

4. Claimant first sought medical care at Tri State Memorial Hospital (TSMH) on April 9, 2011. He reported the onset of low back pain two days previous while he was helping move a grill at work. Donald K. Chin, M.D. treated Claimant on April 9. Lumbar spine x-rays were normal. Dr. Chin diagnosed a low back strain, ordered five days of bed rest, five additional days off work, and discharged Claimant with prescriptions for Vicodin and Flexeril. Claimant was to follow up with his primary care physician (PCP).

5. Claimant was off work April 9 through April 14, 2011.[1]

6. Claimant returned to TSMH on April 18, 2011. He had not been able to get an appointment with his PCP until the next week, and he had run out of his pain medications. He requested a refill of the Vicodin, and received a new prescription.

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[1] Claimant's affidavit states that he "lost work due to my injury May 9, 10, 11, 12, 13, and 14." The Referee presumes that the days off were actually in April, not May, since Claimant was released from work for five days beginning April 9.

7. Claimant saw his PCP, Donald Greggain, M.D., on April 25, 2011. Dr. Greggain agreed that Claimant had suffered a lumbar sprain or strain as a result of moving the grill at work. He recommended reduced physical activity, a ten-pound lifting restriction, and restrictions on twisting and turning. Dr. Greggain also recommended NSAIDs and moist heat and provided prescriptions for Lortab and Skelaxin. Dr. Greggain noted that he would recommend consultation with a physical therapist if Claimant's lumbar strain did not resolve on its own.

8. Claimant returned to Dr. Greggain on May 25, 2011, complaining of increased back pain:

> Says that his back pain is changing, and getting worse over time . . .now has a sharp pain on the L side, comes and goes "like a shock" and on Saturday he developed weakness in the R leg while he was walking and the leg gave way. Is working 8 hrs and then "is done for the rest of the day" – is not carrying things of any weight at all, is only standing or walking. Continues to have a burning aching pain in the R lower leg, in spite of the meds, heating pad, adjusting his activity. R leg weakness lasted for about a minute, then gradually returned to baseline.

CE A, p. 33. Dr. Greggain offered an alternative diagnosis of intervertebral disc degeneration, ordered a lumbar MRI, and recommended Claimant continue with stretches, home exercise, and work restrictions.

9. In early June 2011, Dr. Greggain's office contacted Claimant seeking contact information for Employer's work comp claims manager as the office had been unable to contact anyone to obtain authorization for the MRI. Theresa, Claimant's supervisor, had not returned calls from Dr. Greggain's office.

10. Claimant returned to Dr. Greggain on July 13, 2011. He reported on-going moderate low back pain without radiation into his legs. Claimant was still taking hydrocodone and Flexeril, but was concerned that his work demanded that he be on his feet ten to twelve

hours per day. Claimant still had not undergone the MRI ordered in late May. Dr. Greggain told Claimant to continue performing his home exercises and keep taking his medications. Claimant agreed to get the MRI that Dr. Greggain ordered previously.

11. Employer did not have workers' compensation insurance coverage at the time of Claimant's injury in April 2011.

12. July 13, 2011 was Claimant's last documented visit to Dr. Greggain. Employer did not pay any of Claimant's prior medical bills. In his June 2012 Affidavit, Claimant stated that he continues to suffer from the same low back symptoms that he reported to Dr. Greggain in the spring and summer of 2011. He lacks medical insurance or the means to pay for the imaging Dr. Greggain ordered or any follow-up care.

13. As a result of his industrial injury, Claimant incurred the following charges:

DATE	PROVIDER	SERVICES	CHARGES	TOTAL
4/9/11	TSMH	Radiology, emergency room, drugs, services, professional fees	784.50	784.50
4/9/11	Twin Cities Radiology	Reading lumbar x-rays taken at TSMH	45.00	829.50
4/9/11 – 1/25/12	Walgreens	Prescription medication	486.82	1316.32
4/18/11	TSMH	Urgent care, professional fees	191.00	1507.32
4/25/11	Greggain	Office visit	146.00	1653.32
5/24/11	Greggain	Office visit	146.00	1799.32
7/13/11	Greggain	Office visit	201.00	2000.32

DISCUSSION AND FURTHER FINDINGS

ACCIDENT/INJURY

16. The burden of proof in an industrial accident case is on the claimant.

> 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).

17. An “accident” is defined by Idaho Code § 72-102(17)(b) as:

> “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.”

“Injury” is defined by Idaho Code § 72-102(17)(a) and (c):

> (a) “Injury” means a personal injury caused by an accident arising out of and in the course of any employment covered by worker’s [sic] compensation law.
>
> * * *
>
> (c) “Injury” and “personal injury” shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury.

18. Claimant’s testimony that he injured his low back while moving a large grill as required by his employer on April 7, 2011 is uncontroverted. Medical records dating from Claimant’s injury date through July 2011 establish that Claimant suffered a low back sprain or strain on April 7, 2011 as a result of lifting a heavy piece of equipment. Claimant has established that he suffered an injury from an accident arising out of and in the course of his employment.

MEDICAL CARE

19. 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 the employer to provide reasonable medical treatment, including medications and procedures.

20. As of the date of these findings and conclusions, Claimant has accrued expenses for medical care, imaging, and prescription medications of $2,000.32. Claimant's treating physician has ordered additional imaging, which Claimant has not been able to obtain because he cannot afford to pay for it. The Referee finds that Claimant (and/or his medical providers) is entitled to $2,000.32 for medical care received through January 25, 2012, together with such additional diagnostics and treatment as may be required as a result of his April 7, 2011 industrial injury.

TTDs

21. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Compan*y, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Idaho Code § 72-402 provides that an injured employee is not entitled to TTD benefits for the first five days that he is disabled from work. If the disability from work exceeds two weeks, then disability benefits are retroactive from the date of disability.

22. Claimant testified that he missed five days of work as a result of his accident. This was consistent with the work release provided by the emergency room physician on April 9. Claimant was off work for five days, but not for a period exceeding two weeks. Therefore, he is not entitled to TTD benefits related to his industrial injury at the present time. If Claimant's physician takes him off work in the future for treatment related to his April 9, 2011 injury, he may become entitled to TTD benefits as set out in Idaho Code 72-408 and 72-402.

PENALTIES

23. Idaho Code § 72-210 provides that if an employer fails to obtain workers' compensation insurance as required by law, an injured employee may claim compensation under the workers' compensation law. In addition, the Commission shall award an amount equal to 10% of the total amount of his compensation as a penalty.

24. The total amount of compensation awarded Claimant equals $2,000.32. Claimant is entitled to a penalty of $200.03.

25. Idaho Code §72-210 states that a claimant shall also be awarded costs, if any, and reasonable attorney fees if he has retained counsel. In *Shae v. Bader,* 102 Idaho 697 (1981), the Court found that Claimant's attorney fees under Idaho Code § 72-210 should be based on what would be a reasonable fee on a contingent basis, including the factors set forth in *Clark v. Sage,* 102 Idaho 261 (1981). The Court reiterated the importance of the *Clark* factors in *Hogaboom v. Economy Mattress,* 107 Idaho 13 (1984). While generally applied to Idaho Code § 72-804 attorney fee cases, the Commission has found the *Hogaboom* factors and procedure relevant to a claimant's request for Idaho Code § 72-210 fees. See *Mattos v. Mountain Multi Services, LLC*, 2011 IIC 0079 (11/8/2011).

26. Generally, the Commission urges the parties to come to an agreement on appropriate attorney fees or asks Claimant to submit an affidavit and/or brief in support of his request for fees with appropriate elaboration on the *Hogaboom* factors. As this is a default case, Employer has forfeited its opportunity to further participate in the matter. However, the Commission must still consider the *Hogaboom* factors in discharging its obligations.

27. Claimant's counsel has submitted an Affidavit and accounting of the services he provided in pursuing this default decision. Counsel spent 7.6 hours on this matter, which the

Referee finds to be a reasonable about of time considering the complexity of obtaining an order of default and establishing a *prima facie* case for compensability. Counsel assessed his usual and customary hourly fee of $275.00 for the time spent on this matter.

28. While the amount of time and effort counsel devoted to this matter is reasonable, the hourly rate is not, and results in an award of attorney fees that nearly equal the value of compensation obtained. The usual and customary hourly rate for workers' compensation defense attorneys is about $150.00, and a similar rate is appropriate for claimants' work as well. The Referee therefore awards attorney fees to Claimant in the amount of $1,140.00.

RETENTION OF JURISDICTION

29. The Claimant did not ask the Commission to retain jurisdiction in this proceeding. Whether or not to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. Where a claimant's medical condition has not stabilized or where a claimant may be required to pursue a collection action in district court, it is appropriate for the commission to retain jurisdiction. *Reynolds v. Browning Ferris Industries,* 113 Idaho 965 (1988). Retention of jurisdiction may also be appropriate in cases where there is a probable need for future temporary disability benefits. *Elmore v. Floyd Smith, Jr. Trucking* 86 IWCD 100, p. 1278. The Referee finds it appropriate to recommend that the Commission retain jurisdiction in this matter beyond the applicable statutes of limitation on all issues.

CONCLUSIONS OF LAW

1. Claimant suffered an injury as the result of an accident arising out of his employment on April 7, 2011.

2. Claimant is entitled to medical benefits of $2,000.32.

3. Claimant is not entitled to TTD benefits at this time.

4. Claimant is entitled to penalties of $200.03 for Employer's failure to insure.

5. Claimant is entitled to attorney fees of $1,140.00.

6. Claimant did not submit an itemization of costs of suit, so no such costs are awarded.

7. The Commission will retain jurisdiction of this matter beyond the applicable statues of limitations.

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 19 day of September, 2012.

INDUSTRIAL COMMISSION

/s/___________________________________
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVEN R. PRETZ, Claimant, v. ALYN CORPORATION aka WAYBACK CAFE Employer, Defendant.	**IC 2011-012292** **ORDER** **FILED ON: 10/12/12**

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 suffered an injury as the result of an accident arising out of his employment on April 7, 2011.

2. Claimant is entitled to medical benefits of $2,000.32.

3. Claimant is not entitled to TTD benefits at this time.

4. Claimant is entitled to penalties of $200.03 for Employer's failure to insure.

5. Claimant is entitled to attorney fees of $1,140.00.

6. Claimant did not submit an itemization of costs, so no costs are awarded.

7. The Commission will retain jurisdiction of this matter beyond the applicable statues of limitations.

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

DATED this 12 day of October, 2012.

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 12 day of October, 2012, 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 THOMAS CLARK
PO DRAWER 285
LEWISTON ID 83501

ALYN CORPORATION aka WAYBACK CAFÉ
2138 – 13TH AVENUE
LEWISTON ID 83501

kla /s/____________________________