BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CODY ROBINSON, Claimant, v. ROCKY MOUNTAIN INSULATION, LLC, Employer, Defendant.	**IC 2010-005847** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED AUG 16 2013**

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. Dennis R. Petersen represented Claimant. Employer ("Rocky Mountain") failed to answer Claimant's Complaint. Default was entered. Claimant presented his *prima facie* case via testimony at a hearing conducted on October 3, 2012 in Idaho Falls, supporting documentation admitted at the hearing, and post-hearing deposition testimony. The case is ready for decision.

CLAIMANT'S CONTENTIONS

Claimant contends that, as a result of an industrial ankle injury he suffered on November 19, 2009 while working for Rocky Mountain, he is entitled to the following benefits:

1. Reimbursement for medical costs of $4,625.97 ($5,206.97 less credit for $581 already paid by Rocky Mountain);

2. Temporary total disability benefits of $2,757.94 ($3,557.94 less credit for $800 already paid by Rocky Mountain) from November 19, 2010 through January 12, 2010;

3. Partial permanent impairment of 2% of the whole person, equal to $3,498; and

4. Permanent partial disability beyond impairment of 26.5%, equal to $48,097.50. [1]

[1] Per the Commission's calculations, 26.5% PPD equals $46,348.50 (500 x 26.5% = 132.5 x $349.80).

EVIDENCE CONSIDERED

The record in this matter consists of:

1. The testimony of Claimant presented at the hearing;

2. Claimant's Exhibits A through S admitted at the hearing; and

3. The post-hearing depositions of Laurence V. Hicks, D.O., taken March 14, 2013 and Delyn Porter, C.R.C., taken April 2, 2013.

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

FINDINGS OF FACT

Vocational and Educational Background

1. Claimant graduated from Marsh Valley High School in 1989. He obtained a certificate of completion of the collision repair program at Idaho State University's Vocational Technical College. At the time of hearing, Claimant was 41 years of age and attending college at College of Southern Idaho. Claimant has no other formal training.

2. For about a year and nine months after receiving his certificate, Claimant worked for auto body shops doing collision repair, automobile painting, and frame work. He did short stints repairing washers and dryers and working as a laborer. He worked as a ski lift operator. He worked building molds for camper shells for about nine months. Claimant worked for Hyde Drift Boats for 13 years. He started as a laminator and progressed into building molds and designing new boats. In 2005, Claimant went to work for Sneakers Bar as a manager and bartender. He has also worked for various temp agencies doing various jobs.

3. On October 24, 2009, Claimant went to work for Rocky Mountain, installing insulation in homes, at a rate of $25 per installation. Claimant was hired by Gabe Robinson, Claimant's cousin, who was one of the owners of Rocky Mountain. Rocky Mountain provided Claimant with a vehicle and equipment and determined when Claimant would work.

Rocky Mountain provided him with a 1099 tax form for the first $600 he earned and a W-2 tax form for the $1,200 he earned thereafter. Claimant confirmed at the hearing that he understood he was initially hired as an independent contractor but subsequently became a regular employee when work picked up. All together, prior to his industrial injury, Claimant worked at Rocky Mountain for 26 days.

4. Claimant testified that his average weekly wage was $600.00 and that Rocky Mountain paid him $200.00 per week for four weeks after the industrial accident, even though he was not working.

5. Claimant has a history of right ankle injuries, including a fracture.

Industrial Accident and Injury

6. On November 19, 2009, Claimant rolled his right ankle and heard a "pop" when he stepped out of his truck at work. Claimant reported the accident and injury to Gabe who drove Claimant to Physicians Immediate Care in Pocatello. Gabe paid for the initial visit.

7. X-rays taken November 19 revealed a tibial avulsion fracture on the medial malleolus. Nic Hale, P.A., treated Claimant. He noted Claimant's prior fracture was not causing any difficulty.

8. For the next two weeks, Claimant took medications, wore a walking boot and used crutches to keep weight off his right lower extremity. By December 3, 2009, he had mild pain, no numbness or tingling, no swelling and only minimal tenderness to palpation over the medial malleolus. Claimant was returned to work with restrictions including no driving, no prolonged walking on uneven terrain, no squatting and no kneeling. However, there was apparently no work for Claimant, and his employment was terminated.

9. By December 15, 2009, Claimant was still non-weight-bearing on his right leg. He had no pain or tenderness, and his exam was completely normal.

10. Claimant remained nearly symptom-free on December 29, 2009, after he had been weight-bearing in and out of the walking cast for at least two weeks. Randy Vawdrey, N.P., noted a mild limp and that Claimant did report some pain when "pushing off using his toes." On exam, Claimant demonstrated no ecchymosis or swelling and no physical abnormality of the ankle. X-rays taken that day identified no change in the avulsion fracture.

11. Mr. Vawdrey recommended taking a break from the walking boot and released Claimant to work without specific restrictions. Mr. Vawdrey also referred Claimant for physical therapy and anticipated he would reach medical stability by January 10, 2010, or soon thereafter. Claimant's contemporaneous physical therapy records indicate he had ankle pain, increasing to moderate pain with activity and stiffness in the morning.

12. On January 12, 2010, Claimant was released to full-duty work. He had a little bit of swelling in the ankle; however, the swelling was more prominent on the lateral side than on the medial side where his avulsion fracture is located. He had no pain to palpation of the ATF ligaments, the medial aspect of the malleolus or the dorsal or inferior sides of the tibia. He had good strength with movement. Claimant was anxious to return to work.

13. On January 26, 2010, Warren Willey, D.O., a physician practicing at the clinic with P.A. Hale and Nurse Vawdrey, examined Claimant. Dr. Willey noted Claimant's ankle looked normal, and Claimant had normal muscle strength and tone of the RLE as well as full range of motion. However, Claimant's gait was somewhat favored and he had tenderness on the medial aspect of the malleolus. Dr. Willey referred Claimant to Anthony Joseph, M.D., a physiatrist.

14. On February 1, 2010, following examination, Dr. Joseph ordered an MRI. After reviewing the MRI and X-ray images and repeatedly examining Claimant, Dr. Joseph opined

Claimant's condition was related to trauma. He referred Claimant to Steven Coker, M.D., an orthopedic surgeon.

15. Following examination on a few occasions and review of Claimant's imaging, Dr. Coker diagnosed a number of conditions, but he did not opine as to the work-relatedness of any of them. On April 13, 2011, his last visit with Claimant, Dr. Coker opined that Claimant would likely continue to improve. He expected a full recovery.

16. On March 29, 2012, Dr. Hicks evaluated Claimant for rating purposes. He diagnosed chronic right ankle pain with mild to moderate decreased range of motion, posttraumatic osteoarthrosis, and chronic tenosynovitis of the peroneus brevis tendon. Dr. Hicks also reviewed Claimant's relevant medical records and opined that the treatment Claimant received on and after November 19, 2009 was reasonable, necessary and related to his industrial accident and injury.

17. Dr. Hicks opined Claimant had reached medical stability and assessed 2% whole person impairment.

18. Based upon Claimant's pain reports and, with respect to walking on uneven surfaces, his potential for increasing his ankle instability, Dr. Hicks assessed restrictions. "Restrictions should include no prolonged driving and pulling. Avoid excessive standing, walking and climbing. Avoid walking on uneven surfaces." At his deposition, Dr. Hicks added that Claimant should not work on roofs.

Medical Costs

19. Claimant's medical costs related to treatment of his industrial injury amount to $5,206.97. Employer has paid $581.00 of that amount.

Post-Accident Employment and Function

20. In March through July 2010, Claimant went to work installing water lines for

an excavation company, at $12.36 per hour. He then signed on with a staffing company, which sent him to work on a commercial construction project and at a linen supply company. At the linen supply company, Claimant was on his feet on concrete floors all day. He would bundle and wrap clean laundry and place it for delivery by the drivers. Two days per week he would load dirty laundry into washers. Although his right ankle hurt at night and made sleeping difficult, Claimant was able to do this job until he eventually quit from the pain. He had earned from $8.02 to $10 per hour. Claimant also worked as a relief sanitation worker, for up to six weeks at a time, at first earning $9.00 then $11.50 per hour.

21. At the time of hearing, Claimant was attending a three-year physical therapy assistant program at College of Southern Idaho. He is confident he can do the work of a physical therapy assistant upon completion of the program. No medical expert opined on this topic or, similarly, on how the physical demands of a physical therapy assistant compare with those of an insulation installer.

22. Claimant testified that without significant pain he can walk on concrete 3-4 hours; can stand still in one place for up to two hours; can stand while moving around on a flat surface for 8-9 hours; can stand while moving around on an uneven surface for 1-3 hours; has a little pain if he doesn't keep his right ankle moving while he sits, and he can hear it pop; has no problems pushing or pulling; and can drive long distances with cruise control, but only about 1.5 hours in his truck before he needs to get out and walk around. As to climbing, Claimant said he hadn't really tried; he hadn't been around stairs or ladders, so he did not know his climbing capabilities.

23. Claimant has increased pain and stiffness on activities in excess of those described above.

Vocational Factors

24. Delyn Porter, CRC, a vocational consultant, conducted a telephone interview with Claimant on August 27, 2012. He also reviewed Claimant's medical records prior to rendering an opinion in this case.

25. Utilizing Dr. Hicks' permanent restrictions, Mr. Porter opined that Claimant has incurred both loss of access to his local labor market and loss of wage earning capacity as a result of his industrial injury. Averaging Claimant's respective loss of access percentages with his loss of wage-earning capacity results, Mr. Porter opined that Claimant has suffered permanent partial disability inclusive of PPI of either 28.5% or 29.5% applying the Pocatello or Twin Falls labor markets, respectively.

DISCUSSION AND FURTHER FINDINGS

Accident and Causation

26. 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).

27. 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).

28. 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).

29. 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).

30. Claimant's testimony, his medical records relating to his accident and subsequent symptoms, and Dr. Hicks' opinions as to the etiology of his persisting right ankle condition are unrefuted and credible. They indicate Claimant experienced acute right ankle pain and other symptomatology when he rolled it after stepping down awkwardly out of a truck on November 19, 2009 and, further, that his symptoms persisted to some degree from that date forward.

31. Claimant's medical records also establish that he had a prior right ankle fracture. The evidence shows that Claimant's prior right ankle condition did not contribute to his current right ankle symptoms.

32. Claimant has met his burden of proving he suffered his right ankle injury as a result of an accident arising out of and in the course of his employment on November 19, 2009.

Medical Care Benefits

33. 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.

34. Claimant has met his burden of proving, pursuant to Idaho Code § 72-432,

that the medical care he received, was reasonable and necessary to treat his industrial right shoulder injury.

35. On one bill, Claimant was not obligated to pay the full invoiced amount. He received a discount for the cost of his MRI through Intermountain Health Care, in part because his brother is a radiology technician who works there, and in part as an uninsured patient. Because Rocky Mountain refused to pay for Claimant's medical care beyond his initial physician visit, Claimant waited until he could pay for it on his own and went out of his way – to Burley – to obtain the discount offered by his brother. Claimant seeks reimbursement for the full invoiced amount $1,354.00, although he only paid $812.40 for the MRI services. *Neel v. Western Construction,* 147 Idaho 146, 206 P.3d 852 (2009), provides that a claimant is entitled to reimbursement of the full invoiced amount for reasonable medical costs incurred following a denial of further treatment. *Neel* 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. The *Neel* rule was discussed more recently in Commission cases *Bogar v. Sodexo, Inc.*, 2012 IIC 0100 and *Aspiazu v. Homedale Tire Service,* 2012 IIC 0004. In these cases, the Commission recognized the potential for the *Neel* rule to result in a windfall to claimants in situations like the one at hand. The Commission also concluded that the Idaho Supreme Court foresaw this potential. "We believe the Court was aware of the possibility of an outcome like this, yet felt its ruling was necessary to prevent other kinds of mischief which would be more damaging to the Workers' Compensation system." *Aspiazu,* p. 13. Further:

> The irony would be that following a finding of compensability by the Industrial Commission, surety would be able to satisfy its obligation for the payment of the

> bills for a sum considerably less than it would have paid had it originally accepted responsibility for the claim. This could encourage sureties to deny responsibility for medical care knowing that if proved wrong, the surety's exposure would be less than it would be for an accepted claim.

Id. Here, as in *Neel*, Claimant contracted for medical services outside the Workers' Compensation system after being denied further treatment and, as a result, there is a discount to be redeemed.

36. Consistent with *Neel*, Claimant is entitled to payment of the full invoiced amount of his unpaid reasonable medical expenses related to treatment of his November 19, 2009 industrial injury, including the full amount invoiced by Intermountain Health Care. He is entitled to medical care benefits in the amount of $5,206.97. Defendant is entitled to credit for $581.00 already paid.

Temporary Disability

37. 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).

38. Claimant requests TTDs from November 19, 2009, the date of his industrial right ankle injury, through January 12, 2010, the date on which Claimant admits he reached medical stability and was released from medical care. The evidence shows Claimant reached maximum medical improvement on January 12, 2010 and, thus, was thereafter no longer in a period of recovery. Claimant is entitled to temporary disability benefits from November 19, 2009 until January 12, 2010, or 7 weeks and 6 days. Rocky Mountain paid him $200 in wages for the first four weeks following his industrial accident. Therefore, Claimant is entitled to

temporary partial disability (TPD) for four weeks, plus temporary total disability (TTD) for the remainder of his recovery period.

39. The evidence shows Claimant received $1,800.00 in compensation during the 26 days he worked for Rocky Mountain. Thus his average weekly wage (AWW) at the time of his industrial accident was $484.62, not the $600.00 he estimated in his testimony.

40. Adjusting for the four $200.00 payments made by Rocky Mountain in the first four weeks of Claimant's recovery, Claimant is entitled him to TPD of $762.78 for the first four weeks, plus TTD of $1,252.41 for an additional three weeks and six days to January 12, 2010. Thus, the amount due and owing from Rocky Mountain for TPD and TTD benefits is $2,015.19.

Permanent Impairment and Disability

41. "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).

42. Relying upon guidance from the *AMA Guides*, *6th Edition*, Dr. Hicks assessed PPI in the amount of 2% of the whole person as a result of Claimant's right ankle injury. Claimant's treating physicians all presumed he would fully recover; however, Claimant's

medical records and Dr. Hicks's testimony establish it is more likely that he did not. The evidence shows that Claimant suffered 2% PPI of the whole person as a result of his industrial right ankle injury.

43. "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. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*,

115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

44. The only vocational expert offering an opinion regarding Claimant's PPD is Mr. Porter, who utilized Dr. Hicks's work restrictions. Dr. Hicks' restriction against walking on uneven surfaces is apparently a true medical restriction because it was assessed to prevent undue additional harm to Claimant. Although Claimant's testimony indicates he can walk on uneven surfaces more than what Dr. Hicks recommends, Dr. Hicks's restriction is, nevertheless, controlling for purposes of determining Claimant's functional capacities with respect to his ability to walk on uneven surfaces and work on roofs.

45. The Pocatello labor market is the appropriate geographical unit to consider. Claimant is from Pocatello and intends to return there after his schooling. Twin Falls is only a temporary educational sojourn. Based upon all medical and nonmedical factors in evidence, including but not limited to the Pocatello local labor market, age, transferable skills, physical limitations, and medical restrictions, Claimant has suffered 28.5% PPD inclusive of PPI.

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 ankle injury was caused by the industrial accident of November 19, 2009;

3. Claimant has proven that his treatment related to his November 19, 2009 industrial injury constituted reasonable and necessary medical care amounting to an award of $4,625.97 for medical care benefits;

4. Claimant is entitled to an award of $2,015.19 for temporary disability; and

5. Claimant is entitled to an award of $49,846.50 for PPD, inclusive of PPI, rated at 28.5%.

RECOMMENDATION

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

DATED this 31ST day of July, 2013.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S_____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 16TH day of AUGUST, 2013, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

DENNIS R. PETERSEN
P.O. BOX 1645
IDAHO FALLS, ID 83403-1645

ROCKY MOUNTAIN INSULATION
1552 EAST TERRY STREET
POCATELLO, ID 83201

dkb /S/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CODY ROBINSON, Claimant, v. ROCKY MOUNTAIN INSULATION, LLC, Employer, Defendant.	**IC 2010-005847** **ORDER** **FILED AUG 16 2013**

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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 established a *prima facie* case to support his application for a default judgment.

2. Claimant has proven his right ankle injury was caused by the industrial accident of November 19, 2009.

3. Claimant has proven that his treatment related to his November 19, 2009 industrial injury constituted reasonable and necessary medical care amounting to an award of $4,625.97 for medical care benefits.

4. Claimant is entitled to an award of $2,015.19 for temporary disability.

5. Claimant is entitled to an award of $49,846.50 for PPD, inclusive of PPI, rated at 28.5%.

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

DATED this 16th day of AUGUST, 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 16TH day of AUGUST, 2013, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

DENNIS R. PETERSEN
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/S/_____