

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TEDDY SMITH,
Claimant,

v.

CALVERT GROUP, INC.,
Employer,
Defendant.

and

CALVERT GROUP, Employer, and
PACIFIC INDEMNITY COMPANY, Surety,
Defendants.

IC 2009-013539

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

Filed October 15, 2012

INTRODUCTION

Pursuant to *Idaho Code § 72-506*, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. This matter traversed an unusual procedural history. A Notice of Hearing was issued for January 25, 2011. Near the date of hearing, Employer obtained an attorney who requested additional time to prepare for hearing. The hearing was vacated and reset to March 7, 2011. On March 7, 2011, the parties appeared before the Referee and represented they had reached a settlement agreement. Later, Employer failed to perform according to its representations made on March 7, 2011. After some months of Claimant attempting to obtain Employer's performance and upon the Employer's attorney's withdrawal from this matter, another Notice of Hearing was issued. The Referee conducted a hearing in Boise on March 23, 2012. Claimant was present represented by Darin Monroe. Defendant Employer was not represented by counsel, but its owner and president, John Calvert, was present at hearing. Real parties in interest, Calvert Group and its surety, Pacific Indemnity Company, submitted documentary evidence, and were represented by Lora Breen who, with prior notice, elected not to be present at hearing. Oral and documentary evidence was

presented. Claimant and Pacific Indemnity Company later submitted briefs. The case is now ready for decision. The undersigned Commissioners hereby issue their own findings of fact, conclusions of law, and order.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Temporary disability benefits, partial or total (TPD/TTD);
 - b. Permanent partial impairment (PPI);
 - c. Permanent disability in excess of impairment; and
 - d. Medical care;
2. Whether Employer is liable to Claimant for the penalties set forth in *Idaho Code § 72-210* for failing to insure liability; and
3. Subrogation due to Pacific Indemnity Company, if any.

CONTENTIONS OF THE PARTIES

Claimant contends he fractured a heel bone in a compensable accident. He is entitled to all benefits claimed; specifically, \$28,397.34 in medical benefits, \$10,802.40 in TTD, and \$31,482.00 in PPD inclusive of PPI. These amounts are uncontested. Further, Claimant is entitled to penalties as set forth by *Idaho Code § 72-210*. Employer and its owner and president, John Calvert, should be jointly and severally liable, under *Idaho Code § 72-319*.

Defendant Employer, by and through Cori Calvert, filed an Answer which alleged contributory negligence by Claimant and denied that the parties were subject to the provision of the Idaho Workers' Compensation Law. During discovery, an attorney appeared and withdrew before hearing. Defendant Employer filed no brief.

Pacific Indemnity Company contends it mistakenly paid \$18,566.85 in medical benefits and \$5,437.80 in TTD upon representation that Calvert Group, not Calvert Group, Inc., was an employer in this matter. Later, Pacific Indemnity was able to obtain reimbursement of

the mistakenly paid medical benefits from the various physicians. It seeks a return of the mistakenly paid TTD.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. The legal file of the Commission;
2. The hearing testimony of Claimant and John Calvert;
3. Claimant's exhibits 1- 6; and
4. Pacific Indemnity Company's exhibits 1 – 7.

Claimant objected to the testimony of John Calvert. Because Claimant seeks to recover under *Idaho Code § 72-319* from either or both Employer and John Calvert personally, Claimant's objection is overruled.

FINDINGS OF FACT

1. Claimant worked for Calvert Group, Inc., on May 25, 2009. He received a W-2; taxes were withheld.
2. On May 25, 2009, he was repairing rotted soffit on a second-story level when a ladder collapsed with him on it. He fell and landed primarily on his left foot.
3. Claimant reported the accident to Employer's dispatcher and sought medical treatment.
4. He visited St. Alphonsus ER. X-rays showed a broken calcaneus with fragments and displacement.
5. On June 12, 2009, the fracture was reduced surgically. Dr. David Hassinger, M.D., performed the procedure. He allowed Claimant to return to only sedentary work as of June 16, 2009. Restrictions were gradually eased as Claimant healed.
6. On October 7, 2009, Dr. Hassinger opined Claimant would not reach MMI

for one year after the injury.

7. Claimant returned to work for Employer for approximately four weeks in October/November 2009. Claimant quit in November when he discovered Employer did not have workers' compensation insurance and because his foot was very painful at the end of the day. C. Exh. 5, p. 12.

8. On April 12, 2010, Kerry Anderson, D.P.M., examined Claimant. He noted atrophy, decreased strength, and a 6 mm shortening of Claimant's left leg as a result of the injury. He opined Claimant was at MMI. Acknowledging that a 6 mm shortening did not result in any PPI, he calculated specific deficits which did and rated Claimant's PPI at 17% of the whole person. He specified permanent restrictions of lifting, movement and position. He noted that Claimant may develop arthritis which may require surgery in the future.

9. Born July 21, 1965, Claimant was 46 years old on the date of hearing. He obtained a 2-year degree in psychology. He has taught English in China for a few months, worked on a cell-phone assembly line, owned a nursing home and worked as a title officer for a few years. Otherwise, his adult worklife has involved property management, more from the tool-using and less from the paper-pushing side.

10. After obtaining his degree, Claimant began working as a therapist for autistic children in June 2011.

11. At the time of injury, he earned \$14.00 per hour.

12. Vocational expert Doug Crum opined Claimant suffered permanent disability rated at 35% of the whole person, inclusive of PPI.

DISCUSSION AND FURTHER FINDINGS OF FACT

13. 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).

Causation

14. The 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 medical testimony supporting the claim for compensation to a reasonable degree of medical probability. 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), *overruled on other grounds by Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

15. 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).

16. Claimant credibly testified that he injured his heel when his ladder collapsed and he landed on his left foot. Medical records from the date of injury through April 12, 2010, establish that Claimant suffered a severe heel fracture when he fell from the ladder. Claimant showed his broken heel, medical treatment and resulting PPI and permanent disability are likely caused by the accident of May 25, 2009.

Medical Care

17. An employer is required to provide reasonable medical care for a reasonable time. *Idaho Code § 72-432(1)*. Claimant submitted numerous medical records detailing the medical treatment he received for his industrial injury, including records from David Hassinger, M.D. and Kerry Anderson, M.D. Claimant showed he is entitled to medical care benefits. The parties did not significantly dispute the amounts to the date of hearing.

18. Claimant is entitled to medical care benefits in the amount of \$28,397.34.

Temporary Disability

19. Temporary disability benefits are statutorily defined and calculated for the time when a claimant is in a period of recovery. *Idaho Code § 72-408, et. seq.* Upon medical stability, a claimant is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617 (2001); *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111 (2005). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light duty work release and which employment is likely to continue throughout his or her period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986).

20. Claimant immediately presented at St. Alphonsus ER after his industrial accident on May 25, 2009. Claimant was given medication, images were taken of the ankle, a splint was

applied to his foot, and he was told that nothing could be done until the swelling decreased. Claimant had a follow up appointment and surgery was performed on June 12, 2009. From the date of injury through the time of surgery, Claimant could not walk on his left foot and he did not work. Claimant was clearly in a period of recovery as of the date of injury and through his surgery. Claimant was released to sedentary work on June 16, 2009, but no offer of sedentary work was made. Claimant returned to work from October 6, 2009 to November 19, 2009.

Claimant quit in November when he discovered Employer did not have workers' compensation insurance and because his foot was very painful at the end of the day. At the time Claimant quit he was still in a period of recovery. Ordinarily, when a worker quits a position within his physical restrictions this constitutes a refusal of suitable work and would allow a defendant to terminate a claimant's TTD benefits. In this case, Claimant quit after learning that Employer did not have workers' compensation insurance. Claimant was still recovery from a work injury and the importance of having coverage was particularly evident. While the work offered by Employer was within Claimant's physical restrictions, the lack of workers' compensation insurance makes the job unsuitable. The Commission finds that an offer of work by an employer without workers' compensation insurance is not a reasonable or legitimate offer of employment. Thus, on November 19, 2009, Employer had not made Claimant a reasonable or legitimate offer of employment, nor had Employer shown that there was employment available in the general labor market which was available and consistent with the terms of Claimant's restrictions.

Claimant did return to work and Dr. Anderson declared Claimant medically stable on April 12, 2010. The record shows it likely Claimant is entitled to TTD benefits from the date of accident to the date of medical stability, April 12, 2010, less the periods he actually worked.

FINDINGS, CONCLUSIONS, AND ORDER - 7

Claimant showed this calculates to \$10,802.40.

PPI and Permanent Disability

21. 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).

22. “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 permanent impairment and by pertinent nonmedical factors provided in *Idaho Code* § 72-430.

23. 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, 766 P.2d 763 (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, 896 P.2d 329 (1995).

24. Permanent disability is defined and evaluated by statute. *Idaho Code* § 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory

opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

25. The only medical evidence on Claimant's permanent partial impairment was an evaluation by Dr. Anderson. Dr. Anderson concluded, and the Commission finds, that Claimant incurred permanent impairment of 17% of the whole person. Mr. Crum reviewed medical records and notes from the Idaho Industrial Commission Rehabilitation Division. Mr. Crum noted Claimant's restrictions, education, and work history and opined Claimant suffered 35% disability inclusive of impairment. Claimant's computer skills and interpersonal communication skills will be strong assets in finding a new position, but Mr. Crum notes that with his restrictions Claimant would not be returning to his time of injury position as a property maintenance technician. Considering all medical and non-medical factors as presented by this record, Claimant established he likely suffered permanent partial disability rated at 35% of the whole person, inclusive of PPI as a result of this compensable accident and injury. This calculates to a total of \$31,482.00

Attorney Fees

26. Attorney fees and penalties are requested pursuant to *Idaho Code § 72-210*.

27. Claimant testified that Employer was uninsured at the time of his accident. The Commission's publicly accessible database also shows that Calvert Group, Inc. had no workers' compensation insurance coverage on May 25, 2009. Claimant, having been found to have been employed by an uninsured employer, is entitled to attorney fees and penalties under *Idaho Code § 72-210*.

Subrogation of Pacific Indemnity Company's Interest

28. Pacific Indemnity Company frankly and fairly identifies the difficulties, contrasts and similarities involved in applying *Idaho Code § 72-313* and *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 260 P.3d 1186 (2011), in asserting its claim for reimbursement.

29. Here, the similarity of Employer's name with Calvert Group, Real Party in Interest, mistakes in interpreting public information, and Pacific Indemnity Company's incomplete investigation before paying benefits combined to create the mistaken payments. Claimant should not receive a windfall of double payment arising from such a mistake. Idaho Code § 72-313 grants the Commission authority to order payment of compensation by a surety when liability between two employers or sureties is in dispute. Yet, because this situation is not covered precisely by Idaho Code § 72-313, the Commission will order the recovery of benefits by Claimant from Employer. Then Pacific Indemnity Company will be entitled to seek reimbursement from Claimant for the \$5,437.80 in TTD benefits paid.

30. Upon Claimant's recovery of benefits due from Employer, Pacific Indemnity Company is entitled to recover mistakenly made payments to Claimant. Claimant and Pacific Indemnity Company are expected to cooperate in obtaining all money due Claimant and reimbursing Pacific Indemnity Company.

Employer's Failure to Meaningfully Participate

31. After withdrawal of Employer's attorney, Employer was advised that, as a corporation, Employer must be represented by an attorney to participate in the hearing. Employer elected not to do so. Employer elected not to file a brief.

32. When testifying at hearing Employer's president, John Calvert, stated, "When we are done here I will have no choice but to – you know, I guess try to reopen the case, because it's not – it's not – it's not realistic. It's not fair." Mr. Calvert's assertion is not well

taken. Employer, through its president, failed to promptly obtain an attorney to represent it. It retained an attorney shortly before the date of the first hearing. Based in part upon telephonic conferences with the parties and in part upon Employer's subsequent actions, the Referee found Employer retained the attorney largely for the purpose of delaying the hearing in this matter. Further, the Referee found that Employer falsely represented his agreement to a settlement to further delay a hearing on this matter. After Employer's attorney withdrew, Employer did not meaningfully participate in attempting to pursue administrative remedies or to provide for its defense. Mr. Calvert was allowed to testify and submit a brief for purposes of presenting his position on the issue of his personal liability for Claimant's benefits. He neglected or refused to do so.

33. The Referee further found that these actions by Employer do not establish a basis for any allegation against Employer's attorney, who, for the short time he represented Employer, acted with appropriateness and diligence.

34. *Idaho Code* § 72-319(1) and (2) provide that "any officer . . . of the corporation . . . who had authority to secure payment of compensation on behalf of the corporation or limited liability company and failed to do so . . . shall be personally liable jointly and severally with such corporation or limited liability company for any compensation which may accrue under this law in respect to any injury or occupational disease suffered by any employee of such corporation." John Calvert, as president of Employer, is jointly and severally liable under this statute.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered a compensable accident and injury while in the employ

of Employer;

2. Claimant is entitled to medical care benefits amounting to \$28, 397.34;
3. Claimant is entitled to TTD benefits amounting to \$10,802.40;
4. Claimant is entitled to PPI rated at 17% of the whole person and to permanent disability rated at 35% of the whole person, inclusive of PPI, which disability amounts to \$31,482.00;
5. Claimant is entitled to attorney fees and to the penalties set forth at *Idaho Code § 72-210*;
6. Employer and John Calvert are jointly and severally liable for all awards made herein pursuant to *Idaho Code § 72-319*;
7. Pacific Indemnity Company is entitled to recover its mistaken payment of up to \$5,437.80 from Claimant after Claimant's benefits have been paid by Employer and/or other liable individuals.
8. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this ___15th_____ 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 15th day of October, 2012, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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/s/