

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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|--------------------|---|----------------------------|
| JUSTIN LEE WILSON, |) | |
| Claimant, |) | IC 2009-030624 |
| v. |) | |
| |) | |
| BEEHIVE HOMES, |) | FINDINGS OF FACT, |
| Employer, |) | CONCLUSIONS OF LAW, |
| and |) | AND RECOMMENDATION |
| |) | |
| ISHR, |) | |
| Employer, |) | Filed August 4, 2011 |
| Defendants. |) | |
| |) | |

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Coeur d’Alene on March 4, 2011. Starr Kelso represented Claimant. Beehive Homes, a corporate entity, was not represented at hearing by counsel, but its president, Gary Ghramm was present. Christopher P. Graham represented ISHR/InfiniSource (hereinafter ISHR). The parties presented oral and documentary evidence. The parties submitted briefs. The case came under advisement on June 15, 2011. It is now ready for decision.

ISSUES

The issues to be resolved according to the amended notice of hearing and as added by the parties at hearing are:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;
2. Whether Beehive Homes, ISHR or both are Claimant’s employer(s);
3. Whether and to what extent Claimant is entitled to:
 - a. Temporary disability benefits, and
 - b. Medical care benefits;

4. Whether Claimant is entitled to an award of attorney fees under Idaho Code § 72-210; and
5. Whether Claimant is entitled to an award of attorney fees under Idaho Code § 72-804.

Other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his low back while lifting and moving a nursing home patient. He has been unable to work since. Neither Beehive Homes (“Beehive”) nor ISHR carried workers’ compensation insurance on the date of the accident and an award of attorney fees under Section 210 is appropriate. Their actions in denying and delaying payments for his claim were unreasonable and an award of attorney fees under Section 804 is appropriate as well.

Defendants contend Claimant was not involved in an accident. He is not entitled to benefits.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, Claimant’s mother and co-worker Katherine Reheiser-Buckley, ISHR HR director Rick Whatley, co-workers Penny Vandaveer, Jeannie Breckenridge, and Charlene Leona Hoffman; and of John Gerald McManus, M.D.
2. Claimant’s Exhibits A through N; and
3. Defendants’ Exhibits 1 through 6.

Additional potential exhibits – A number of additional exhibits were marked at hearing: Claimant’s P, Q and R, and Defendant’s 7 and 8. None of these exhibits were served on the opposing party within the time required prior to hearing pursuant to Judicial Rules of Practice and Procedure (J.R.P.) 10. Concerning Claimant’s Exhibit P, the record appears to

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

reflect that this exhibit was offered, and admitted without objection (*See*, Hrg. Tr. p. 175/2-8). However, following review of page 175 of the Hearing Transcript, which also includes brief discussion of Exhibit Q, there is uncertainty in the mind of the Referee as to whether, at the end of the day, the status of Exhibit P was made clear to the parties. Although Exhibit P is considered by the Referee in this decision, that document ultimately has little to no bearing on the outcome of this case. Claimant's Exhibit Q was marked, but never offered. (*See*, Hrg. Tr. p. 175/9-17). Claimant's Exhibit R was marked, offered, and admitted without objection. (*See*, Hrg. Tr. pp. 189/23-190/1). However, immediately after acceding to the admission of Exhibit R, Defendant's counsel retracted his agreement to the admission of the exhibit and interposed a Rule 10 objection, which the Referee sustained. The Referee has not considered Claimant's Exhibits Q and R in this proceeding. Defendant's Exhibits 7.1 and 7.2 were marked, but never offered as exhibits. (*See*, Hrg. Tr. p. 203/5-9). Defendant's Exhibit 8 was marked, offered and objected to. The Referee sustained the objection pursuant to JRP 10. (*See*, Hrg. Tr. p.196/4-17). The Referee has not considered Exhibits 7 or 8 in deciding this matter.

At hearing, Claimant objected to the use in cross-examination of the exhibits marked as Defendant's 7, which were not admitted to the record. (*See*, Hrg. Tr. pp. 103-104.) The Referee reserved ruling at that time, but overruled Claimant's objection after due consideration at a post-hearing telephone conference. Also at hearing, Claimant objected to the testimony of Dr. McManus who was called to testify as an expert without prior notice from Defendants. Here too, the Referee reserved ruling until after due consideration. Although expert medical witnesses are usually called to testify via post-hearing deposition with appropriate notice, there is, of course, no restriction from such live testimony at hearing. Claimant's objection

was overruled at the post-hearing telephone conference. The record was held open to allow Claimant full opportunity to complete cross-examination post-hearing or to call rebuttal witnesses post-hearing. At the post-hearing telephone conference, Claimant declined both. Therefore, because Claimant did not send discovery requests to Defendants and because J.R.P. Rule 10 does not expressly require the identification of such witnesses at hearing, Claimant's objection of Dr. McManus' testimony is overruled.

Having examined the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant worked at the Beehive Homes facility (hereinafter, "Beehive Facility" to distinguish the place of business from the similarly named corporate entity, which entity is hereinafter referred to as "Beehive"). Beehive Facility provides assisted living and nursing care to residents needing varied levels of care. Beehive Facility is comprised of four buildings designated "Courtyard 1", "Courtyard 2", "Courtyard 3" and "Courtyard 4". Claimant initially worked at Beehive Facility as a one-on-one caregiver for two months. Claimant left Beehive Facility to work elsewhere for another employer. After several months, Claimant was rehired to work at Beehive Facility near the end of October 2008.

2. "Terry" (last name unknown) a vice-president, personally hired him. Claimant was hired with the expectation of working full-time, averaging 40-hour weeks. Claimant earned \$8.50 per hour because his "med certification" had lapsed. He anticipated receiving \$9.75 per hour upon recertification.

3. In late 2008 - early 2009, Penny Vandaveer was a "house manager", supervising Courtyard 2. In about October 2008, Claimant began working the night shift in Courtyard 2.

By mid-November 2008, Claimant expressed a preference for other work and his duties were changed to working primarily Courtyards 3 and 4. Employees were sometimes scheduled to work other Courtyards than their primary assignments as needed.

4. At some point in time prior to November 16, 2008, Beehive had an arrangement with a professional employer organization ("PEO") known as PayCheck Connection, LLC.

5. On or about November 16, 2008, Beehive entered into an arrangement with a successor professional employer organization, ISHR. Rick Whatley testified that under the terms of this agreement, Beehive would assume responsibility for acquiring Idaho workers' compensation coverage. However, Whatley, and apparently Beehive, were mistaken in believing that Beehive had workers' compensation coverage under its prior arrangement with Paycheck Connection, LLC, effective through the end of December 2008. In fact, as of November 16, 2008, neither Beehive nor ISHR had coverage under the workers' compensation laws of the State of Idaho. Mr. Whatley testified that sometime in mid December 2008, it was discovered by ISHR that Beehive did not have coverage. Before the parties could obtain coverage on behalf of Beehive, the subject accident occurred on December 20, 2008.

6. The record does not contain the November 16, 2008 agreement between ISHR and Beehive, which purportedly creates the PEO arrangement. However, Mr. Whatley gave his assurance that such an agreement does exist and is in his keeping.

7. The day before Thanksgiving 2008, Claimant was arrested for a DUI. He missed about two weeks' work in late November into early December 2008. Payroll records show that Claimant worked: 15 hours in the 11/16-11/30 pay period; 28.25 hours in the 12/01-12/15 pay period; 69.5 hours in the 12/16-12/30 pay period; and 12.5 hours in the 12/31-1/15 pay period. His incarceration also meant he missed the certification class

which would have increased his wage. It was not offered again before he stopped working at Beehive Facility.

8. On December 20, 2008, Claimant lifted a resident whose “legs buckled.” With the sudden increase in weight, Claimant felt “a shock or a sharp pain” in his back and right shoulder. He deposited the resident into a wheelchair. He immediately found another caregiver with medication dispensing privileges and obtained some ibuprofen for himself.

9. Claimant testified that he then reported the incident to supervisor Penny Vandaveer. She handed Claimant a blank incident report form and instructed Claimant to rest and ice his shoulder, which he did. After about 45 minutes, he resumed work for a length of time, then he rested with heat on his back. Claimant did not seek medical treatment that day. On the date of the incident, RN Karen Rutland lived above Courtyard 2. Ms. Vandaveer lived above Courtyard 4.

10. Ms. Vandaveer had no recollection of Claimant working Courtyard 2 in December 2008. Nevertheless, she confirmed that a time card indicated he worked Courtyard 2 on December 20, 2008 from 6:30 a.m. to 3:00 p.m.

11. At hearing, Ms. Vandaveer had no recollection of the incident or surrounding events. Although Mr. Whatley testified he or Chris Ott conducted an investigation which included follow-up with Ms. Vandaveer, no document shows either person contacted Ms. Vandaveer in December 2008 or early 2009 to investigate this incident. Ms. Vandaveer testified she was unaware an incident had been alleged until about one week before hearing.

12. Claimant’s mother, Katherine Reheiser-Buckley, worked as a nurse at Beehive Facility on the date of the incident. She was a supervisor to Claimant. All nurses are supervisors of caregivers.

13. Claimant's Exhibit A-1 is an incident/accident report form. Beehive Facility uses it for mishaps regardless of whether a resident or a staff member is hurt. Claimant completed his name, identifying data, and the date, time, and location of the alleged incident. He wrote a description of how the incident occurred.

14. Claimant's mother completed the portions identifying the department involved, Claimant's job title, treatment offered, and that at 7:30 p.m. the incident was reported to Penny Vandaveer who was "present." Here, "present" means Ms. Vandaveer was on shift, not that she actually witnessed the incident.

15. The record fails to expressly identify the date on which either Claimant or his mother completed their portions of the incident report.

16. ISHR received notice of the incident that same day or perhaps the next, December 20 or 21, 2008. ISHR did not file a Form 1 with the Commission, ever. ISHR did not send Claimant notice that his claim had been accepted or denied.

17. Claimant was unable to work his next shift and called in sick. When he did return to work, he was unable to lift a resident because of pain. A supervisor sent him for treatment.

18. He first visited a physician on December 23, 2008 when he went to the North Idaho After Hours Urgent Care. Completing a medical history form on that date, he identified December 20 as the date of the incident. Other potential dates recorded for the incident are inaccurate.

19. A Dr. Caldwell examined Claimant and diagnosed a right rotator cuff injury. He prescribed physical therapy, provided medication, imposed temporary restrictions, and allowed a return to light duty.

20. Claimant was terminated on January 5, 2009. Claimant was told he was

being fired for being late to work on January 4, 2009.

21. Claimant next sought medical treatment on January 7, 2009. A Dr. Chisholm examined him.

22. Claimant first attended physical therapy on February 16, 2009. The record summarizes Claimant's description of his right shoulder pain and low back pain with right leg radiculopathy. Claimant received physical therapy again on February 20, 2009. The bills for these treatments, amounting to \$365.61 were still unpaid as of February 18, 2011, two years later.

23. Claimant's symptoms continued, but he was unable to get authorization for more treatment from either Beehive or ISHR. Lakewood Physical Therapy refused to treat him further without cash payment because the bill for the first two visits had been declined.

24. On November 10, 2009, Claimant visited Kirk Hjeltness, M.D. Dr. Hjeltness examined Claimant and referred him back to Kootenai Medical Center.

25. On November 12, 2009, Claimant sought treatment with Michael Ludwig, M.D., at Kootenai Medical Center. Dr. Ludwig examined him and diagnosed chronic right scapular pain. He re-ordered physical therapy.

26. After some treatment, on December 16, 2009, Dr. Ludwig noted, "it is otherwise safe clinically to progress to full lifting." He prescribed continued physical therapy.

27. Dr. Ludwig pronounced Claimant at MMI as of January 7, 2010. He allowed only two more physical therapy appointments. The KMC physical therapy bills for the winter of 2009-2010 remained unpaid as of August 7, 2010 and totaled 634.11. Despite the fact that Claimant had been in contact with ISHR and given ISHR information to the KMC physical therapy facility, his physical therapy was cut off because bills had been declined.

28. As of February 18, 2011, Kootenai Medical Center bills in the amount of \$5,965.69 had not been paid and had been turned over to a debt collector. Two items in that total, one for \$3,577.27 and one for \$387.22, for dates of service March 7 and July 14, 2009, respectively, were probably unrelated to the lifting incident at Beehive Facility. Claimant testified that he had been beaten in an unrelated altercation. The record does not show corresponding medical records. Therefore, the amount claimed related to the industrial incident would be \$2,001.20.

29. Defendants' exhibit 2 identifies certain medical benefit payments made by ISHR, but does not indicate the dates on which such payments were made. ISHR is aware of additional pharmaceutical bills undocumented in this record and has made payments on those.

30. Defendants admit, and certification by Commission Employer Compliance Department Manager Christi L. Simon confirms, that neither Beehive nor ISHR carried workers' compensation insurance in December 2008.

31. Claimant believed he was employed by Beehive. However, his W2 for 2008 was issued by InfiniSource LLC. InfiniSource LLC is synonymous with ISHR. At the time of hearing, at least one other witness believed she was also employed by Beehive. During cross-examination of Claimant, ISHR produced a document, apparently signed by Claimant, acknowledging that ISHR was Claimant's employer. Although Claimant's paychecks were issued by InfiniSource, when he formerly worked at Beehive Facility Claimant's paychecks were issued by PayCheck Connection and he then believed he was employed by Beehive.

32. ISHR has taken the position that it, not Beehive, was Claimant's employer. Upon cross-examination, ISHR's representative, Mr. Whatley, claimed a "co-employer" relationship between Beehive and ISHR vis-à-vis Claimant.

33. ISHR asserts without documentary evidence that its contract with Beehive required Beehive to secure workers' compensation insurance. Nevertheless, Mr. Whatley confirmed that an injured employee was contractually required to report a workers' compensation injury to ISHR, not Beehive.

34. Claimant has not worked since January 5, 2009. He applied for two other caregiver positions in 2009 but was not hired because he remained physically unable to lift residents. He also applied at various fast food and other places of employment at which he thought he might be able to do the work. In June 2009 he began attending classes in business administration at North Idaho College to retrain himself for less physically demanding jobs. He attempted to return to Beehive Facility in June or July 2009 but was told he would not be rehired. The person he spoke with at Beehive Facility told Claimant he was not entitled to any benefits because he had been fired. She referred him to the Industrial Commission and to ISHR for further information. About October 2009 he contacted the Industrial Commission and discovered no bills had been paid. A Commission employee at the Coeur d'Alene field office informed Claimant that being fired did not preclude him from filing a claim for benefits and helped him do so.

35. About November 2009 he contacted ISHR and the person he spoke with told him that ISHR would "take care" of the outstanding medical bills. Beginning about that time, ISHR began keeping e-mails from one or more agents of ISHR to Claimant, via his attorney, which essentially attempt to place the burden on Claimant to collect and forward evidence of unpaid bills. They further accuse Claimant of being unavailable or uncooperative with ISHR's alleged attempts to pay Claimant's compensable medical bills.

36. Mr. Whatley testified that he and another ISHR representative, Chris Ott,

spoke with Claimant by telephone and were involved in assuring Claimant received benefits due him as early as late December 2008. Nevertheless, the November 2009 e-mails are the first written documentation of record that ISHR actively assisted Claimant in obtaining benefits. Other evidence of record shows that medical providers refused to continue to treat Claimant and told Claimant their bills had been declined by ISHR.

37. John Gerald McManus, M.D., reviewed the medical records which were made exhibits in this matter. He did not examine Claimant. He concluded that Claimant's condition was not severe, largely based upon Claimant's failure to follow-up with physical therapy and to seek medical treatment between February and November 2009. He was unaware that ISHR had sabotaged Claimant's attempts to obtain medical treatment. Dr. McManus voiced additional opinions.

DISCUSSION AND FURTHER FINDINGS OF FACT

38. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. *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, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 316, 834 P.2d 878 (1992).

Accident and Injury

39. "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, . . . which can be reasonably located as to time when and place where it occurred, causing an injury." Idaho Code 72-102(18)(b). Where the injury can be reasonably located in time and place, an accident may be found to have occurred. *See, Page v. McCain*

Foods, Inc., 141 Idaho 342, 109 P.3d 1084 (2005); *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983). In both *Page* and *Wynn*, the injury was immediately apparent. Both claimants felt immediate pain – Ms. Page felt knee pain as she arose from a seated position and Mr. Wynn felt back pain as the equipment he was operating bounced. Here, Claimant felt immediate right shoulder pain as he lifted a resident.

40. Here, despite Mr. Whatley’s claim that ISHR “never denied” Claimant’s claim, Defendants deny an accident occurred. ISHR’s post-hearing brief argues Claimant is not credible and the accident never happened, based largely upon the absence of recollection of certain co-workers and some inconsistent check-marks and circles on a report form as to whether the accident occurred in the a.m. or p.m.

41. Claimant suffers from a brain injury after a prior motor vehicle accident. He exhibits some minor confusion about dates, although he appears to remember events without much confusion. The minor inconsistencies about the date and time of the accident do not undercut Claimant’s credibility. Moreover, Mr. Whatley testified ISHR received notice of the accident on December 20, the date it happened, or the next day. ISHR’s focus on other reported dates in December – the 23rd, 26th, 28th – are not persuasive. These merely underscore Claimant’s prior brain injury.

42. The event described by Claimant did involve a mishap or untoward event. A compensable accident occurred.

Causation

43. 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). Magic words are not required.

Jensen v. City of Pocatello, 135 Idaho 406, 18 P.3d 211 (2000). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

44. ISHR called Dr. McManus to testify as an expert witness without providing any notice that he had been retained or could be expected to testify. As a result, Dr. McManus sat outside the hearing room for essentially the entire day before being called to testify. The Referee was unaware of his presence.

45. This Referee and the Commission respect and value the role of physicians in the workers’ compensation process as well as the physicians who provide care and/or testimony. It is unfortunate that the Commission was not notified prior to hearing of his anticipated testimony.

46. The opinions of the treating physicians as reflected in the medical records in evidence establish that Claimant suffered an injury caused by the accident. Dr. McManus’s records review is entitled to little weight because Defendants’ failure or refusal to provide Claimant with reasonable and necessary medical care resulted in an incomplete medical record for Dr. McManus to review. This finding implies no disrespect to Dr. McManus, but rather to the basis Defendants provided him when asking him to form opinions.

Who is Responsible for Securing Workers’ Compensation Insurance?

47. ISHR admits it is Claimant’s employer and responsible for paying Claimant’s benefits. Nevertheless, it asserts Beehive was responsible for obtaining workers’ compensation insurance. Mr. Whatley repeatedly referred to Defendants as “co-employers.” ISHR posits that as a Utah domiciled corporation it could not obtain a policy through the State Insurance Fund. ISHR’s position is contrary to the common experience of the Commission. Idaho allows

PEOs options in how to secure workers' compensation policies; the goal is to get Idaho's workers insured. From the evidence adduced at hearing, the Referee concludes that the relationship between ISHR and Beehive is best described as a professional employer organization (PEO) arrangement, as contemplated at Idaho Code § 44-2401, *et seq.* The evidence establishes that ISHR meets the definition of a professional employer under Idaho Code § 44-2403. As well, ISHR established a professional employer arrangement with Beehive, who meets the definition of "client" under Idaho Code § 44-2403(3). Finally, testimony of Whatley establishes that ISHR had an arrangement with Claimant, such that Claimant qualifies as an "assigned worker" pursuant to Idaho Code § 44-2403(2).

48. Mr. Whatley testified to the existence of a written agreement of the type contemplated by Idaho Code § 44-2405, which defines the rights and obligations of the parties, including, *inter alia*, who, as between ISHR and Beehive, had the obligation to secure Idaho workers' compensation coverage.

49. In connection with the obligation of ISHR and/or Beehive, to obtain the workers' compensation coverage required under Idaho law, reference must also be made to the provisions of Idaho Code § 72-103, which treats the obligations of parties to PEO arrangements to obtain workers' compensation coverage. That section, adopted in 1997, provides as follows:

TEMPORARY AND PROFESSIONAL EMPLOYERS.

(1) So long as the temporary or professional employer, or work site employer, has worker's compensation insurance covering an injured worker, or is a qualified self-insurer covering an injured worker under this title:

(a) The work site employer shall have all of the protections and immunities granted any other employer by this title and shall not be regarded as a third party under section 72-223, Idaho Code.

(b) The temporary or professional employer shall have all of the protections and immunities granted any other employer by this title and shall not be

regarded as a third party under section 72-223, Idaho Code, if it exercised the right of control sufficient to be an employer as defined in section 72-102, Idaho Code, and insures its worker's compensation liability accordingly.

(2) Whenever the parties to a temporary or professional employer arrangement contemplated by subsection (1) of this section comply with that subsection, no penalties under the worker's compensation law for being uninsured shall apply to the temporary or professional employer, or the work site employer, and no violation of any provision of title 41, Idaho Code, shall occur.

(3) Whenever there is a temporary or professional employer arrangement as contemplated by subsection (1) of this section, the parties to such arrangement shall have the option to determine for themselves, in writing, whether the temporary or professional employer or the work site employer will be the party to secure liability as required by section 72-301, Idaho Code, and the party so obligated to secure such liability may do so in any manner permitted by this title. In the event that the parties to such an arrangement do not exercise the option provided in this subsection, the obligation to secure such liability shall be with the temporary or professional employer.

50. Essentially, Idaho Code § 72-103 enables the existence of PEO arrangements by recognizing that when it comes to the obligation to obtain workers' compensation insurance, both the PEO and the worksite employer are able to enjoy the protections afforded by the provisions of the workers' compensation laws so long as one of them obtains the requisite coverage for the workers in their employ. Idaho Code § 72-103(3) specifies that as between the PEO and the worksite employer, the parties may make an election "in writing" as to whether it shall be the PEO or the worksite employer who shall obtain the requisite coverage. Importantly, in the absence of such a written agreement, the statute assumes that it is the responsibility of the PEO, in this case ISHR, to obtain the requisite policy of workers' compensation insurance. Here, it is the position of ISHR that Beehive (the worksite employer) assumed the contractual obligation to secure the requisite coverage. Whatley asserts that this requirement is delineated in the November 16, 2008, contract which was in his possession, or accessible by him, as of the date of hearing. Inexplicably, the original of that agreement

was not produced and is not in evidence. Although there was no testimony to gainsay the averments of Mr. Whatley concerning the parties' agreement¹, Idaho Code § 72-102(3) clearly specifies that the agreement concerning who shall be responsibility to obtain workers' compensation coverage shall be in writing. The best evidence of the terms of the agreement, and specifically, whether the agreement placed responsibility for the procurement of coverage with Beehive, is the agreement itself. (*See*, IRE, 1002). The record does not reflect the existence of circumstances that would excuse the production of the original agreement. (*See*, IRE, 1004). Finally, the nature of the agreement cannot be proved by the testimony of Mr. Whatley, since that testimony is offered by Defendants in support of their case, not against it. (*See*, IRE, 1007). The Referee recognizes that the Commission is not bound to strictly apply the rules of evidence in deciding disputed matters. However, it deems proof of the contents of the ISHR/Beehive agreement to be important to the resolution of this case, such as to require the production of the agreement. Also, it is worth noting that although the legislature allowed an election to be made, it required that election to be reduced to writing in order to be effective. In summary, per Idaho Code § 72-103, the contents of the purported agreement between ISHR and Beehive are central to determining whether an appropriate election was made that Beehive is the entity charged with obtaining workers' compensation insurance effective November 19, 2008. Absent such proof, Idaho Code § 72-103 makes it clear that the default is that the PEO,

¹ Interestingly, Exhibit P, the agreement between ISHR and Claimant, contains the following provision concerning responsibility for workers' compensation coverage:

7. Employee acknowledges and understands that ISHR will be responsible for payroll, withholding, and timely payment of all applicable employer and employee statutory employment taxes and insurance. These include social security, state unemployment, disability (where applicable) and workers' compensation.

While this language is not necessarily inconsistent with Whatley's testimony, it equally supports a conclusion that as between ISHR and Beehive, ISHR was designated to obtain the policy.

in this case, ISHR, is the entity obligated to have in place a policy of workers' compensation insurance covering Claimant as of the date of the subject accident.

Medical Care Benefits

51. Entitlement to medical care benefits is the heart of the Idaho Workers' Compensation Law. Without medical care, injured workers' conditions may linger and fester. Idaho statutes expressly require employers to pay for medical care reasonably required by a treating physician. Idaho Code § 72-432 *et. seq.*

52. ISHR systematically and effectively prevented Claimant from obtaining medical care required by treating physicians. Despite ISHR's insistence that it paid every bill it received, some bills went unpaid for two or more years and some bills remain unpaid.

53. Claimant is entitled to full payment of all related medical bills to the date of hearing.

54. Further, ISHR's actions leave Claimant and the Referee without the ability to determine whether and to what extent Claimant's current and future condition related to the accident may need medical care. Claimant is entitled to future medical care as reasonably required by a physician.

Temporary Disability Benefits

55. Idaho Code § 72-408 provides that income benefits for total and partial disability are paid to disabled employees "during the period of recovery." The burden is on a claimant to present expert medical opinion 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, 763, 605 P.2d 939, 941 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, an injured worker

is entitled to temporary disability benefits unless and until such evidence is presented that the worker has been released for light duty work *and* that (1) the former employer has made a reasonable and legitimate offer of employment to the worker who is capable of performing such a job under the terms of a light work release and which employment is likely to continue throughout the period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of a light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

56. Claimant's testimony that he was hired on a full-time basis is credible and persuasive. Ms. Vandaveer's testimony corroborates that Claimant was hired for the night shift. His hourly wage was \$8.50. Claimant was given work restrictions on December 23, 2008. He was terminated from employment while still in a period of recovery. Thus, Claimant is entitled to temporary disability benefits unless and until evidence is presented which shows he has been released to light duty and his employer has made a reasonable and legitimate offer of employment that is likely to continue throughout the period of recovery, or it is shown that employment is available in the general labor market.

57. Claimant testified that when he returned to work with his restrictions there "really wasn't anything for me to do as far as light duty." He did residents' fingernails and basically hung out with the residents and pampered them during his eight-hour shift. He continued to show up for work, but his light duty work consisted of creating tasks to fill his time. Defendants did not present Claimant with viable light duty work, nor did they prove that employment was available to Claimant in the general labor market. The Referee finds that no reasonable and legitimate offer of employment was made to Claimant. Further, Defendants

put on no proof that employment consistent with Claimant's limitations was likely to continue through his period of recovery.

58. He is entitled to temporary total disability benefits from the day following the accident, December 21, 2008, through January 7, 2010, the date Dr. Ludwig pronounced Claimant at MMI. Whether Claimant is entitled to temporary disability benefits beyond that date will be dependent upon physicians' opinions after he has had a full opportunity to be examined to determine whether future medical treatment is reasonable and necessary.

59. The foregoing paragraph is limited only to the extent that Claimant may have been paid for wages for hours worked, if any, between the date of the accident and the date he was terminated from employment. If such payment for wages is reliably documented by Defendants, appropriate temporary partial disability payments, instead of temporary total disability payments, are due for those dates.

60. Thus, Claimant is entitled to temporary disability benefits as follows:

| <u>DATES</u> | <u>RATE</u> | <u>TOTAL TTD DUE</u> |
|----------------|-------------|----------------------|
| 12/21-12/31/08 | 278.10 | \$ 437.01 |
| 01/01-12/31/09 | 286.20 | 14,923.29 |
| 01/01-01/07/10 | 289.35 | <u>289.35</u> |
| TOTAL | | \$15,649.65 |

§ 72-210 Penalty and Attorney Fees

61. Defendants admit workers' compensation insurance was not in effect in December 2008 at the time of the accident. Idaho Code § 72-210 requires a payment of 10% of the total amount of compensation, plus costs and attorney fees be awarded. Here, compensation includes both medical care benefits and temporary disability benefits.

§ 72-804 Attorney Fees

62. Defendants unreasonably denied or delayed Claimant's receipt of benefits due him. Under Idaho Code § 72-804, attorney fees are awardable regarding all issues decided herein on an independent basis from Idaho Code § 72-210. Moreover, ISHR unreasonably failed in its continuing duty to evaluate this claim. Despite the admission of ISHR's representative that he received notice of the accident on or the day after it occurred, ISHR continued to question the date of the accident and assert it never occurred. Defendants failed to offer credible evidence that a genuine investigation was conducted shortly after the accident. Mr. Whatley is sufficiently experienced and sophisticated to have known an investigation should be documented, rather than making the bare assertion at hearing that it occurred. ISHR's defense at hearing consisted largely of unproven general statements which were unsupported by detailed documentation and often were inconsistent and self-contradictory. Multiple independent bases of Defendants' conduct meet the standard for an award of attorney fees under Idaho Code § 72-804.

63. This decision does not address whether attorney fees are appropriate for the issues reserved.

CONCLUSIONS OF LAW

1. ISHR is a Professional Employer Organization. Beehive is a worksite employer. ISHR and Beehive entered into a PEO arrangement in November 2008.

2. In the absence of persuasive evidence that an election under Idaho Code § 72-103(3) was made, ISHR was obligated to obtain a policy of Workers' Compensation Insurance covering Claimant as of the date of injury;

3. Claimant suffered a compensable accident/injury on or about December 20, 2008;

4. Claimant is entitled to the following Workers' Compensation benefits payable by ISHR:

- a. In addition to medical benefits paid to date by ISHR, Claimant is entitled to recover 100% of the invoiced amount of unpaid medical expenses related to treatment of the compensable injury incurred to the date of this decision. Further, ISHR shall provide such future medical care as Claimant may be entitled to pursuant to Idaho Code § 72-432;
- b. Claimant is entitled to temporary disability benefits from December 21, 2008 through January 7, 2010, inclusive, in the amount of \$15,649.65; ISHR may be entitled to credit for wages paid, if any, for work performed from December 21, 2008 through January 4, 2009;
- c. Claimant is entitled to the penalty of 10% and costs under Idaho Code § 72-210 for the failure of ISHR to secure workers' compensation insurance;
- d. Claimant is entitled to reasonable attorney fees under Idaho Code § 72-804 or § 72-210 or both.
- e. Additional issues are reserved, including permanent impairment and disability.

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 __30th____ day of June, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Douglas A. Donohue, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

db

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUSTIN LEE WILSON,)
Claimant,) **IC 2009-030624**
v.)
BEEHIVE HOMES,) **ORDER**
Employer,)
and)
ISHR,) **Filed August 4, 2011**
Employer,)
Defendants.)
_____)

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. ISHR is a Professional Employer Organization. Beehive is a worksite employer. ISHR and Beehive entered into a PEO arrangement in November 2008.

2. In the absence of persuasive evidence that an election under Idaho Code § 72-103(3) was made, ISHR was obligated to obtain a policy of Workers’ Compensation Insurance covering Claimant as of the date of injury;

3. Claimant suffered a compensable accident/injury on or about December 20, 2008;

4. Claimant is entitled to the following Workers’ Compensation benefits payable by ISHR:

- a. In addition to medical benefits paid to date by ISHR, Claimant is entitled to recover 100% of the invoiced amount of unpaid medical expenses related to treatment of the compensable injury incurred to the date of this decision. Further, ISHR shall provide such future medical care as Claimant may be entitled to pursuant to Idaho Code § 72-432;
- b. Claimant is entitled to temporary disability benefits from December 21, 2008 through January 7, 2010, inclusive, in the amount of \$15,649.65; ISHR may be entitled to credit for wages paid, if any, for work performed from December 21, 2008 through January 4, 2009;
- c. Claimant is entitled to the penalty of 10% and costs under Idaho Code § 72-210 for the failure of ISHR to secure workers' compensation insurance;
- d. Claimant is entitled to reasonable attorney fees under Idaho Code § 72-804 or § 72-210 or both.
- e. Additional issues are reserved, including permanent impairment and disability.

5. Claimant is entitled to attorney fees as provided for by Idaho Code § 72-210 and § 72-804. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel filed the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney's fees.

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

DATED this 4th day of August , 2011.

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 4th day of August , 2011, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

STARR KELSO
P.O. BOX 1312
COEUR D'ALENE, ID 83816-1312

CHRISTOPHER P. GRAHAM
P.O. BOX 1097
BOISE, ID 83701

db

 /s/