

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BROCK VANORDEN,

Claimant,

v.

PINECREST EVENTS CENTER/JK
PROMOTIONS, L.L.C.,

Non-Insured Employer,

Defendant.

IC 2019-021329

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

FILED

SEP 25 2020

INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel. This matter came before the Commission pursuant to an Order of Default, and a hearing was not held. Matthew Romrell of Idaho Falls represented Claimant, Brock VanOrden. Claimant, by and through his counsel of record, filed an Application for Default, together with a brief with supporting exhibits and an affidavit as default proof. Defendant, a non-insured Employer, Pinecrest Events Center/JK Promotions, LLC, did not appear or otherwise submit a defense. The matter came under advisement on July 3, 2020.

ISSUES

The issues to be decided by the Commission are as follows:

1. Whether and to what extent Claimant is entitled to medical care;
2. Whether and to what extent Claimant is entitled to a penalty, costs and attorney fees pursuant to Idaho Code § 72-210;
3. Whether the members of Defendant Employer's limited liability company are personally liable, jointly and severally, for any compensation, penalty, costs and attorney fees; and

4. Whether the Commission should retain jurisdiction beyond the applicable statute of limitations.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant argues that he sustained an injury in the employment of Employer on March 2, 2019 that required medical care. He claims reimbursement for past medical expenses in the total amount of \$47,240.77, pursuant to the *Neel* doctrine. He further argues that he is entitled to a statutory penalty pursuant to Idaho Code § 72-210 in the amount of 10% of the total amount of his compensation costs, together with costs and reasonable attorney fees. Finally, he argues that the members of Defendant Employer's limited liability company should be held personally liable, jointly and severally, and that the Commission should retain jurisdiction of reserved issues.

Defendant did not file an Answer to the Amended Complaint or otherwise appear or defend this action.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits A through H, admitted to the record pursuant to Defendant's Default; and
2. Claimant's Affidavit dated April 13, 2020, admitted to the record pursuant to Defendant's Default.

COURSE OF THE PROCEEDINGS

Claimant filed a Complaint with the Commission on July 25, 2019. Thereafter, Claimant filed an Amended Complaint on July 26, 2020. The Commission mailed a "*pro se*" packet to Defendant as an uninsured employer on August 6, 2019. Although served with a copy of the

Amended Complaint, neither Defendant nor its principal officers/members filed an Answer or otherwise appeared and defended this action. Claimant filed a Notice of Intent to Take Default on August 28, 2019. The Referee entered an Order of Default on September 23, 2019. On July 2, 2020, Claimant filed a Brief, together with supporting exhibits and an Affidavit, in support of his Application for Default.

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

FINDINGS OF FACT

1. **Employer.** “Pinecrest Events Center” is an assumed business name of JK Promotions, LLC. Jesse W. Dye and Kathy S. Dye are the members of JK Promotions, LLC. Employer conducted business in Idaho Falls. Ex. B (Secretary of State certificates); *see also*, Claimant’s Brief at 2-3. Employer operated a small business convention center where customers could rent space for various events, including bridal shows and home shows. Affidavit of Claimant at 1.

2. Administrative notice is taken that, at all relevant times, Employer failed to secure payment of compensation as required by the Idaho Workers’ Compensation Act.

3. **Employment of Claimant.** Jesse W. Dye, whom Claimant knew personally, asked him in or about January 2019 to work for Employer. Employer then hired Claimant as a laborer to work 40 hours per week at \$10 per hour, however in practice his hours fluctuated. *Id.* at 1-2; Ex. D (Claimant’s timecard).

4. **Industrial Accident.** On March 2, 2019, while working for Employer, Claimant climbed a ladder to fix a ceiling tile. He fell while attempting to climb down from the ladder and

landed on his right elbow. Claimant continued to work, but quickly felt too much pain and he left the premises to seek medical treatment. Claimant's Affid. At 2.

5. Before leaving the work premises, Claimant informed Chandler Dye, Jesse Dye's son, about the accident. One to two days later, Claimant spoke with Jesse Dye about the accident. *Id.* at 3. Jesse Dye told Claimant that the business did not have workers' compensation insurance and that Claimant would have to pay for his injury himself. *Id.*

6. **Medical Treatment.** Claimant's wife took him to the emergency department of Eastern Idaho Regional Medical Center (EIRMC) on March 2, 2019 for evaluation. X-rays indicated a fractured right elbow. Claimant received pain medication, a splint, and instructions to consult an orthopedic surgeon. *Id.* at 2; Ex. D (EIRMC records).

7. Claimant followed up with Brandon Mennear, M.D., an orthopedic surgeon in Idaho Falls, on March 5, 2019. Claimant reported mild to moderate, constant pain on the posterior aspect of his right elbow, worse when not elevated, with stiffness in his hand. Claimant was unable to pronate or supinate his elbow upon extending past 90 degrees; he also had gross instability and dislocation in his right elbow. Dr. Mennear diagnosed a "traumatic elbow injury after a fall," and noted that the X-rays taken at the hospital showed a displaced fracture fragment interposed between the radial neck and proximal ulna. Dr. Mennear ordered an MRI; he also instructed Claimant to remain in a splint and to return to the clinic upon completion of the MRI. Claimant's Affid. at 2; Ex. E (Dr. Mennear's records).

8. Claimant underwent an MRI on March 7, 2019. He returned to Dr. Mennear on March 12, 2019 to review the MRI. Dr. Mennear diagnosed Claimant with right elbow instability, LUCL and lateral collateral ligament tears, intra-articular bodies, and impaction fractures of the capitellum and radial neck. Dr. Mennear recommended surgery in the form of a right elbow

irrigation, removal of loose bodies, and primary repair of the LUCL. Claimant's Affid. at 2; Ex. E (Dr. Mennear's records).

9. Dr. Mennear took Claimant to surgery on his right elbow on March 14, 2020. Claimant tolerated the procedure well and there were no complications. Ex. E.

10. Claimant had his first post-surgery appointment with Dr. Mennear on March 27, 2019. Dr. Mennear was satisfied with Claimant's progress and prescribed physical therapy (PT). Dr. Mennear also ordered a hinged elbow brace. Claimant's Affid. at 2-3; Ex. E.

11. Claimant had one PT session with Physical Therapist Deb West at the EIRMC physical therapy department on April 11, 2019. Ex. F (EIRMC PT records).

12. C.P.O. Bruce Whitbeck fitted Claimant for a brace on April 18, 2019. Ex. G (Rocky Mountain Artificial Limb & Brace records).

13. Claimant had three more appointments with Dr. Mennear, as follows: April 10, 2019; May 1, 2019; and November 20, 2019. At their final appointment, Dr. Mennear told Claimant that he was doing well. He also told Claimant that he would reach maximum medical improvement one year following his surgery and that he would provide an impairment rating at that time. Claimant's Affid. at 3; Ex. E.

14. Claimant has not returned to Dr. Mennear for an impairment rating because Dr. Mennear's office told him it would cost him \$500 out-of-pocket. Claimant did not feel that he could afford that expense. Claimant's Affid. at 3.

15. **Medical Costs Incurred.** Including the costs of his emergency care and hospitalization at EIRMC, Dr. Mennear's fees, radiographic charges, anesthesia, PT, and brace fitting, Claimant incurred medical expenses in the total amount of \$42,946.15. Ex. H (medical charges).

DISCUSSION AND FURTHER FINDINGS

16. 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 that 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).

17. **Medical Treatment.** An employer shall provide reasonable medical care for a reasonable time after an injury. Idaho Code § 72-432(1). A "reasonable time" includes the period of recovery before medical stability but may include a longer period. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Reasonable medical treatment benefits may continue for life; there is no statute of limitation on the duration of medical benefits under Idaho Workers' Compensation Law.

18. A claimant bears the burden of showing that medical treatment required by a physician is reasonable. Idaho Code § 72-432(1). A claimant must support his or her workers' compensation claim with medical testimony that establishes compensability to a reasonable degree of medical probability. *Hope v. ISIF*, 157 Idaho 567, 572, 338 P.3d 546, 552 (2014), citing *Sykes v. CP Clare & Co.*, 100 Idaho 761, 764, 605 P.2d 939, 942 (1980). The reasonableness of treatment is dependent upon the totality of the facts and circumstances of the individual being treated. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 605 (2013). Totality of the facts and circumstances is a factual determination, but not a retrospective analysis with the benefit of hindsight. *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

19. It is for the physician, not the Commission, to decide whether the treatment is required; the only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Where there is both a positive and a negative diagnosis between two qualified doctors, the fact finder may examine the methodologies of both physicians to determine which physician is more credible. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 759, 302 P.3d 718, 727 (2013). It is the role of the Commission to determine the weight and credibility of testimony, and resolve conflicting interpretations of testimony. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006).

20. This is a default case and Claimant has not provided the deposition testimony of a physician in connection with his default proof. Nevertheless, Claimant has provided sufficient information in his affidavit and the accompanying medical exhibits to show that the medical expenses he incurred while treating his industrial injury were both necessary and reasonable. The most significant medical expenses were incurred with Claimant's hospitalization and surgery to his right elbow. Dr. Mennear's records clearly demonstrate the reasonable need for that surgery and accompanying medical procedures, including the PT and elbow brace fitting.

21. For the foregoing reasons, Claimant is entitled to recover the costs of the medical treatment that he received in connection with his industrial injury in the total amount of \$42,946.15. Furthermore, pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses that he incurred and for which Defendants denied responsibility.

22. **Penalty, Costs, & Attorney Fees.** Idaho Code § 72-210 provides as follows:

EMPLOYER'S FAILURE TO INSURE LIABILITY. If an employer fails to secure payment of compensation as required by this act, an injured employee,

or one contracting an occupational disease, or his dependents or legal representative in case death results from the injury or disease, may claim compensation under this law and shall be awarded, in addition to compensation, an amount equal to ten per cent (10%) of the total amount of his compensation together with costs, if any, and reasonable attorney's fees if he has retained counsel.

Employer failed to secure the payment of workers' compensation as required by statute. 10% of the medical compensation due to Claimant is \$4,294.62. Claimant is entitled to recover this amount as a penalty for Employer's failure to secure payment of compensation as required by the Idaho Workers' Compensation Act, pursuant to Idaho Code § 72-210.

23. Claimant's brief alleges that he has incurred litigation costs in the total amount of \$250.00. *See*, Claimant's Brief at 7. Claimant is entitled to recover these costs pursuant to Idaho Code § 72-210, provided that his counsel complies with the procedure set forth in the paragraph below.

24. Claimant's brief argues that he is entitled to recover a contingent attorney fee in the amount of 30% of his claimed medical compensation, \$14,172.23. *See*, Claimant's Brief at 7. Claimant is entitled to recover attorney fees pursuant to Idaho Code § 72-210, provided that his counsel provides the Commission with an affidavit of costs and attorney fees that complies with IDAPA § 17.01.01.802.02 and the factors provided by *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984).

25. **Joint & Several Liability.** Idaho Code § 72-319(1) and (2) provide as follows:

(1) Any employer required to secure the payment of compensation under this law who fails to secure the payment thereof shall be guilty of a misdemeanor. In any case where the employer is a corporation or a limited liability company, any officer or employee of the corporation or manager or employee of a limited liability company who had authority to secure payment of compensation on behalf of the corporation or limited liability company and failed to do so shall individually be guilty of a misdemeanor.

(2) Such officer, employee or manager 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 or limited liability company while it shall so fail to secure the payment of compensation.

26. The record shows that Jesse W. Dye and Kathy S. Dye are the members of Defendant Employer's limited liability company. As such, pursuant to Idaho Code § 72-319(2), they are personally liable, jointly and severally, with Defendant Employer for the compensation, penalty, costs, and attorney fees due under this decision.

27. **Retention of Jurisdiction.** Claimant's brief requested reservation of the following issues: temporary disability benefits; permanent partial impairment; permanent partial disability; and whether Claimant is entitled to additional penalty, costs, and attorney fees for the reserved issues. *See*. Claimant's Brief at 2.

28. Good cause exists for the Commission to retain jurisdiction over the reserved issues beyond the applicable statute of limitations. Claimant has complied with applicable time limitations for notice, claim filing, and complaint filing, and the Complaint alleged the reserved issues in addition to the ones at issue in this decision. Furthermore, Claimant was unable to obtain an impairment rating prior to submitting default proof.

29. For the foregoing reasons, the Commission should retain jurisdiction over this case on the reserved issues beyond the applicable statute of limitations.

CONCLUSIONS OF LAW

1. Claimant is entitled to recover medical expenses in the total amount of \$42,946.15.
2. Pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses that he incurred and that Defendants did not reimburse.

3. Claimant is entitled to recover \$4,294.62 as a penalty for Employer's failure to secure payment of compensation as required by the Idaho Workers' Compensation Act, pursuant to Idaho Code § 72-210.

4. Defendant Employer is liable for costs and attorney fees pursuant to Idaho Code § 72-210 due to a failure to secure compensation as required by the Idaho Workers' Compensation Act. 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 and costs 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 and costs in the matter. *See, Hogaboom v. Economy Mattress*, 107 Idaho 13, 18, 684 P.2d 900, 995 (1984).

5. Pursuant to Idaho Code § 72-319(2), Jesse W. Dye and Kathy S. Dye are personally liable, jointly and severally, with Defendant Employer for compensation, penalty, costs, and attorney fees arising from this workers' compensation claim.

6. The Commission shall retain jurisdiction over the reserved issues beyond the applicable statute of limitations.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 1st day of September, 2020.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

ATTEST:



Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of September, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

PINECREST EVENTS CENTER/JK
PROMOTIONS, L.L.C.
560 E ANDERSON ST
IDAHO FALLS ID 83401

MATTHEW D ROMRELL
1495 E 17TH ST
IDAHO FALLS ID 83404

REGISTERED AGENT JESSE W DYE
10517 N 5TH W
IDAHO FALLS ID 83701

sjw

Sara Danta

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BROCK VANORDEN,

Claimant,

v.

PINECREST EVENTS CENTER/JK
PROMOTIONS, L.L.C.,

Non-Insured Employer,

Defendant.

IC 2019-021329

ORDER

FILED

SEP 25 2020

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee John C. Hummel 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 is entitled to recover medical expenses in the total amount of \$42,946.15.
2. Pursuant to *Neel v. Western Construction, Inc.*, 147 Idaho 146, 149, 206 P.3d 852, 855 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical expenses that he incurred and that Defendants did not reimburse.
3. Claimant is entitled to recover \$4,294.62 as a penalty for Employer's failure to secure payment of compensation as required by the Idaho Workers' Compensation Act, pursuant to Idaho Code § 72-210.

4. Defendant Employer is liable for costs and attorney fees pursuant to Idaho Code § 72-210 due to a failure to secure compensation as required by the Idaho Workers' Compensation Act. 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 and costs 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 and costs in the matter. *See, Hogaboom v. Economy Mattress*, 107 Idaho 13, 18, 684 P.2d 900, 995 (1984).

5. Pursuant to Idaho Code § 72-319(2), Jesse W. Dye and Kathy S. Dye are personally liable, jointly and severally, with Defendant Employer for compensation, penalty, costs, and attorney fees arising from this workers' compensation claim.

6. The Commission shall retain jurisdiction over the reserved issues beyond the applicable statute of limitations.

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

DATED this 25th day of September, 2020.

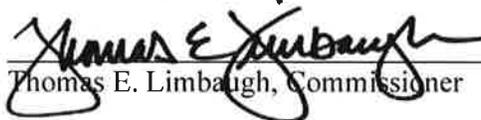
INDUSTRIAL COMMISSION



Thomas P. Baskin, Chairman



Aaron White, Commissioner



Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2020, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

PINECREST EVENTS CENTER/JK
PROMOTIONS, L.L.C.
560 E ANDERSON ST
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sjw

Sara Winter