

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANGELICA MCCALL,

Claimant,

v.

GARY G. GORNICK AND EVELYN A.
HOWARD dba CONSTRUCTION
ENTERPRISES,

Un-Insured Employer,
Defendants.

IC 2021-006796

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

FILED

JUL 22 2021

INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel. Starr Kelso, of Hayden, represented Claimant, Angelica McCall. This matter came before the Commission pursuant to an Order of Default, and a hearing was not held. Claimant Angelica McCall filed an Application for Default in the form of an Affidavit and supporting exhibits as default proof. Defendants, Gary G. Gornick and Evelyn A. Howard, d/b/a Construction Enterprises, a non-insured Employer, did not appear or otherwise submit a defense prior to the entry of Default. The matter came under advisement on June 9, 2021.

ISSUES

The issues to be decided by the Commission as the result of the Default 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 Temporary Partial and/or Temporary Total Disability benefits (TPD/TTD);

3. Whether and to what extent Claimant is entitled to a 10% penalty, costs and attorney fees pursuant to Idaho Code § 72-210; and
4. Whether the Commission should retain jurisdiction beyond the statute of limitations.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant argues that she sustained an injury in the employment of Employer on August 19, 2020 that required medical care and disabled her temporarily from working. She claims reimbursement for past medical expenses in the total amount of \$10,637.69, together with mileage and the cost of drivers, and past temporary disability benefits in the total amount of \$17,560.00. Claimant further argues that she is not at maximum medical improvement and therefore is entitled to continuing medical and temporary disability benefits. Finally, she argues that she is entitled to a statutory penalty pursuant to Idaho Code § 72-210 in the amount of 10% of the total amount of her compensation costs, together with costs and reasonable attorney fees.

Defendants did not file an Answer to the Complaint or otherwise appear or defend this action prior to the entry of Default.¹

COURSE OF THE PROCEEDINGS

Claimant filed a Complaint with the Commission on March 15, 2021. Although served with a copy of the Complaint, neither Defendant filed an Answer or otherwise appeared and defended this action prior to Default. Claimant filed a Notice of Intent to Take Default on April 12, 2021. The Referee entered an Order of Default on May 6, 2021. On June 8, 2021,

¹ Gary G. Gornick submitted a letter dated June 15, 2021, a month and a half after Default was entered. The letter alleges that Claimant was not an employee of his construction firm. Because this letter was received after Default was entered, it is disregarded.

Claimant filed an Affidavit with supporting exhibits, in support of her Application for Default.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits A through P admitted pursuant to the Order of Default.
3. Claimant's Affidavit with attached Exhibits 1 through 3, admitted pursuant to the Order of Default.

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

FINDINGS OF FACT

1. **Employer.** At all relevant times, "Construction Enterprises" was an assumed business name of Gary G. Gornick and Evelyn A. Howard. Employer conducted business in or about Priest River, Idaho. Employer operated a small construction firm. Affidavit of Claimant at 2, ¶ 3; Ex. K:226.

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.** Employer hired Claimant to perform carpentry duties on or about July 5, 2020. Her wage was \$14.00 per hour, and she was paid in cash. Claimant submitted filled-out time sheet forms to Employer to receive her wages.² She worked a schedule of 10 hours per day, 5 days per week. *Id.* at ¶¶ 3, 4, and 5.

4. **Industrial Accident.** On August 19, 2020, Claimant was working for Employer at a jobsite located in a residential home located in Laclede, Idaho. Her job duties on this

² A copy of the timesheet form is included in the record as Affidavit Exhibit 1.

occasion included assisting with the construction of a porch. Claimant's Affid. at 2 ¶ 6. While Claimant was cutting a piece of lumber with a saw, her supervisor, "Chris," accidentally knocked over a 2x6 board, which fell striking Claimant on the right side of her head. *Id.* at 3, ¶ 7.

5. Claimant immediately began suffering from head pain, which progressed to include dizziness with nausea, pain behind her eyes, and splotchy vision. Chris, the supervisor, called Claimant's boyfriend to drive her home because she was unable to drive. *Id.* at 3, ¶ 8.

6. **Medical Care.** On the following day, August 20, 2020, Claimant sought treatment at Sandpoint Family Medicine & Urgent Care. Mark Hernandez, M.D., examined her. He restricted her from returning to work. *Id.* at ¶ 9; Ex. C:40. Examination of her head revealed a scalp contusion on the right side with intact skin surface "consistent with being struck on the head." Dr. Hernandez assessed as follows: 1.) decreased concentrating ability; 2.) abnormal cognitive functioning; 3.) decreased executive functions; and 4.) decreased cognitive speed. Ex. C:61. He diagnosed the following: 1.) contusion of the right side of the scalp with intact skin surface; 2.) concussion with no loss of consciousness with mental confusion or disorientation; 3.) diffuse TBI (traumatic brain injury) and sequelae; and 4.) vision, cognitive and cervical spine impairment. *Id.*; Ex. C:38-39.

7. Claimant returned to Dr. Hernandez for follow-up on August 24, 2020. He observed that her concussion was still "unstable" with mild symptoms. He continued her work restrictions. *Id.* at 42-43.

8. On August 31, 2020, Claimant reported to Dr. Hernandez that she continued to experience confusion, memory loss, difficulty finding her words, eye pain, ear pain, blurry vision, nausea, and fatigue. Dr. Hernandez noted that her contusion had resolved but she still had a "bit of a bump" on her head. He observed that her condition was still unstable but not worse.

He also referred her to physical therapy/occupational therapy. Dr. Hernandez continued her work restrictions. Ex. C:44-46.

9. Claimant followed up again with Dr. Hernandez on September 14, October 1, October 12, and October 26, 2020. Dr. Hernandez sent her for an MRI on October 8, 2020, the results of which were unremarkable and showed a normal brain. He also referred her to the Eye Clinic of Sandpoint for an exam on October 21, 2020, which did not reveal any organic findings that could account for Claimant's eye symptoms. On October 26, 2020, Dr. Hernandez noted that Claimant's concussion/TBI were still unstable; he referred Claimant to Dr. Panos who would take over her workers' compensation care. He also reviewed the plan of care from her physical therapy which stated that Claimant "required skilled therapy to restore prior level of function." *Id.* at 47-60.

10. Claimant met via video connection with Craig J. Panos, M.D., of the Kootenai Clinic Family Medicine and Concussion Medicine, on November 3, 2020. Dr. Panos recommended "cognitive modifications" to help her brain recover from the concussion. These included, among other recommendations, limiting time watching TV and using computers, minimizing exposure to bright lights and loud sounds, wearing prism lenses prescribed by her eye doctor, avoiding multitasking, and similar recommendations designed to prevent the brain from being overwhelmed by sensory overload. Ex. G:136-144.

11. Claimant continued to treat with Dr. Panos on January 6, February 3, March 3, April 8, April 29, and May 25, 2021. *Id.* at 145-189. He continued to recommend cognitive and physical rest as remedies for the sequelae of her concussion, as well as other recommendations, such as continuing with physical therapy. Ex. G. at 145-189.

12. Claimant received referrals from Dr. Hernandez and Dr. Panos to physical therapy, Ex. D., eye treatment and therapy, Ex. F *and* Ex. L, occupational therapy, Ex. I, speech therapy, Ex. J, and chiropractic care. Ex. N. Claimant underwent all of these therapies and treatments. *Id. and* Claimant's Affid. at 4 ¶ 13.

13. Claimant provided copies of her medical bills for the record. *See*, Ex. B. These bills, according to the calculation supplied by Claimant, totaled \$10,637.69. Ex. B:8. These account for medical services to Claimant between August 20, 2020 and June 2, 2021. *Id.* at 7-8.

14. Claimant submitted an itemization of her mileage incurred in attending medical appointments for the record. The total mileage for 2020 was 646 miles, and for 2021 through June 2, 2021 it was 774. The total amount for mileage reimbursement was \$804.89. Ex. P:246-247.

15. Claimant was required to use a driver to attend medical appointments. She is requesting compensation for her driver. Claimant's Affid. at 6 ¶ 20.

16. Claimant submitted a calculation of temporary total disability benefits (TTD) for the record. *See*, Ex. M:235. Based upon an average weekly wage of \$700 per week, the compensation rate of 67% AWW = \$469 (first 52 weeks). Claimant was paid her regular salary through the end of August 2020. Thereafter, the date of disability for calculating TTDs started September 1, 2020. For the time period September 1, 2020 through June 7, 2021 (40 weeks) at the compensation rate of \$469.00, the total amount of TTDs was \$18,760.00. Employer receives a credit for wages paid in September and October of \$1,200.00, resulting in a net balance of TTDs due as \$17,560.00. *Id.*

DISCUSSION AND FURTHER FINDINGS

17. 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).

18. **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.

19. 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).

20. 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).

21. This is a default case and Claimant has not provided the deposition testimony of a physician in connection with her default proof. Nevertheless, Claimant has provided sufficient information in her Affidavit and the accompanying medical exhibits to show that the medical expenses she incurred while treating her industrial injury were both necessary and reasonable. Furthermore, Dr. Hernandez's medical records contain a specific opinion relating the industrial accident to Claimant's condition, including her concussion and TBI.

22. For the foregoing reasons, Claimant is entitled to recover the costs of the medical treatment that she received in connection with her industrial injury in the total amount of \$10,637.69. 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 she incurred and for which Defendant denied responsibility.

23. Claimant is further entitled to recover the costs of mileage for attending medical appointments during her recovery in the total amount of \$804.89.

24. Idaho Code §72-432(1) provides that the "employer shall provide for an injured employee such reasonable medical, surgical or *other attendance* or treatment... as may be reasonably required by the employee's physician or needed immediately after an injury..." Pursuant to this statute, Claimant would be entitled to recover the costs incurred by hiring a driver that she required to assist her by driving her to medical appointments due to her disability. However, beyond Claimant's request for "reasonable compensation" for such a driver (Claimant's Affid. at 5 ¶ 15), there is nothing in the record to indicate the specific amount of

these requested costs. Nor is there sufficient evidence – such as the hours worked by her driver or the driver’s hourly wage - to calculate the amount of these requested costs. Claimant has failed to meet her burden on this issue and the Referee is unable to award Claimant the past costs incurred by hiring a driver for past medical appointments. However, as stated below, Claimant is entitled to recover reasonable and necessary future medical expenses as may be required by her physicians, which includes costs of drivers.

25. Claimant has not yet reached maximum medical improvement, Claimant’s Affid. at 6 ¶ 22, and is therefore entitled to recover from Defendant such further amounts necessary to compensate her for ongoing and future medical care.

26. **Temporary disability.** The next issue is Claimant’s entitlement to temporary disability benefits. Idaho Code § 72-102 (11) defines “disability” for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further 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 medical 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).

Additionally:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his 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 his light-duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

27. By reason of her industrial injury, Claimant entered into a period of disability which is still ongoing. Claimant is entitled to recover TTDs for the period September 1, 2020 through June 7, 2021 in the total amount of \$17,560.00, as shown in her Affidavit and exhibits. Claimant is further entitled to ongoing and future TTDs after June 7, 2021, until such time as she reaches medical stability or the *Malueg*, 111 Idaho at 791-92, 727 P.2d at 1219-20, conditions apply.

28. **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. Claimant is entitled to recover 10% of her total compensation, as follows: medical costs, \$10,637.69, + mileage, \$804.89 + TTDs, \$17,560.00 = total compensation, \$29,002.58 x 10% = \$2,900.26. Claimant is therefore entitled to recover \$2,900.26 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.

29. Claimant's Affidavit argues that she is entitled to recover a contingent attorney fee in the amount of 30% of her claimed total compensation. *See*, Claimant's Affid. at 6 ¶ 21. Claimant is entitled to recover attorney fees pursuant to Idaho Code § 72-210, provided that her

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).

30. **Retention of Jurisdiction.** Claimant's Affidavit requested reservation of the issues not presently adjudicated. 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.

31. 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 \$10,637.69, together with medical mileage in the amount of \$804.89.

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 she incurred, and that Defendants did not reimburse.

3. Claimant is entitled to recover TTDs in the total amount of \$17,560.00 for the period September 1, 2020 through June 7, 2021.

4. Claimant is entitled to recover such reasonable and necessary ongoing and future medical expenses as may be required by her physicians. This includes medical mileage and the costs of drivers.

5. Claimant is entitled to recover ongoing and future TTDs provided that she has not reached MMI or the *Malueg* conditions do not apply.

6. Claimant is entitled to recover \$2,900.26 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.

7. 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).

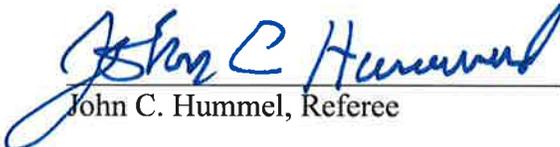
8. The Commission shall retain jurisdiction over the reserved issues beyond the applicable statute of limitations.

RECOMMENDATION

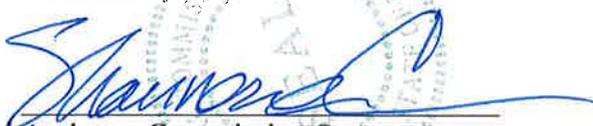
Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 21st day of July, 2021.

INDUSTRIAL COMMISSION


John C. Hummel, Referee

ATTEST:



Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2021, 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:

STARR KELSO
PO BOX 2456
HAYDEN ID 83835-2456

GARY G GORNICK
EVELYN A. HOWARD
DbA CONSTRUCTION ENTERPRISES
7841 SPIRIT LAKE CUT OFF ROAD
PRIEST RIVER ID 83835



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANGELICA MCCALL,

Claimant,

v.

GARY G. GORNICK AND EVELYN A.
HOWARD dba CONSTRUCTION
ENTERPRISES,

Un-Insured Employer,
Defendants.

IC 2021-006796

ORDER

FILED

JUL 22 2021

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee John 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 \$10,637.69, together with medical mileage in the amount of \$804.89.
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 she incurred, and that Defendants did not reimburse.
3. Claimant is entitled to recover TTDs in the total amount of \$17,560.00 for the period September 1, 2020 through June 7, 2021.
4. Claimant is entitled to recover such reasonable and necessary ongoing and future medical expenses as may be required by her physicians. This includes medical mileage and the costs of drivers.
5. Claimant is entitled to recover ongoing and future TTDs provided that she has not reached MMI or the *Malueg* conditions do not apply.

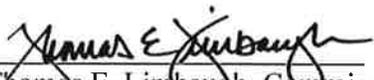
6. Claimant is entitled to recover \$2,900.26 as a penalty for Employer's failure to secure payment of compensation as required by the Idaho Workers' Compensation Act, pursuant to Idaho Code § 72-210.
7. Defendant Employer is liable for costs and attorney fees pursuant to Idaho Code § 72-210 due to a 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).
8. The Commission shall retain jurisdiction over the reserved issues beyond the applicable statute of limitations.
9. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 21st day of July, 2021.

INDUSTRIAL COMMISSION



Aaron White, Chairman



Thomas E. Limbaugh, Commissioner



Thomas P. Baskin, Commissioner

ATTEST:

Kameron Slay
Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2021, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

STARR KELSO
PO BOX 2456
HAYDEN ID 83835-2456

GARY G GORNICK
EVELYN A. HOWARD
DbA CONSTRUCTION ENTERPRISES
7841 SPIRIT LAKE CUT OFF ROAD
PRIEST RIVER ID 83835

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