BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD C. MALLERY, Claimant, v. PROGRESSIVE LOGISTICS, dba GILTNER TRUCKING, Employer, and THE CURA GROUP, and CNA/RSKCO c/o CRAWFORD AND COMPANY, Sureties, Defendants.	)	**IC 03-003816** **03-005856** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: December 9, 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on March 30, 2004. Bruce D. Skaug of Nampa represented Claimant. James A. Ford of Boise represented Employer and CNA/RSKCO (CNA). Glenna M. Christensen of Boise represented Employer and The Cura Group (TCG). The parties submitted oral and documentary evidence and post-hearing briefs. The matter came under advisement on August 2, 2004 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;

2. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

3. Determination of Claimant's average weekly wage;

4. Whether Claimant is entitled to temporary partial and or temporary total disability (TPD/TTD) benefits, and the extent thereof;

5. Whether apportionment between CNA and TCG is appropriate; and

6. Whether Claimant is entitled to attorney fees due to Employer/Sureties' unreasonable denial of compensation as provided for by Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

The instant case was argued primarily as a dispute between CNA and TCG as to who bears the workers' compensation liability for Claimant's industrial injuries.

Claimant contends that he injured both his shoulders in work-related accidents in March and November 2002. The injuries necessitated surgery on Claimant's left shoulder and a need for surgery on his right shoulder. Claimant argues that he is entitled to payment of the medical expenses incurred to date, including the left shoulder surgery, as well as further medical treatment (surgery) on his right shoulder. In addition, Claimant argues he is entitled to temporary total disability benefits for the period beginning November 21, 2002 until he has reached maximum medical improvement. Finally, he seeks attorney fees for Defendants' continued refusal and or delay in providing benefits to which he was entitled. At bottom,

Claimant does not particularly care whether CNA or TCG pays his benefits, so long as he receives his benefits.

Defendant CNA does not dispute that the accidents occurred, or that Claimant sustained injuries. It does contend that all of Claimant's injuries, and his entitlement to benefits, were the result of the March 2002 accident at which time it did not insure Defendants' workers' compensation risk. Therefore, CNA argues, it has no obligation to Claimant for his injuries and its denial of benefits cannot be considered unreasonable. Further, this Defendant disputes Claimant's claimed average weekly wage.

Defendant TCG does not dispute that both accidents occurred. It does contend that Claimant suffered no compensable injury in the March 2002 accident and that all of Claimant's injuries, and his entitlement to benefits, relate to the November 2002 accident at which time CNA was insuring Claimant's workers' compensation risk. Further, this Defendant disputes Claimant's claimed average weekly wage.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Kathleen Mallery, Colleen Eason and Lynetta D. Orsland taken at hearing;

2. Claimant's Exhibits 1 through 17 admitted at hearing; and

3. CNA/Employer Exhibits 1 through 23 admitted at hearing, hereinafter referred to as CNA Exhibits.

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

FINDINGS OF FACT

The Parties

1. A firm grasp of the putative parties and the relationships among and between them is crucial to understanding the nature of this dispute. A review of the pleading captions over the course of this proceeding will provide no illumination. Employer is variously referred to as: Giltner Trucking, LLC; Giltner Trucking, aka Giltner, Inc.; Giltner Trucking; and Progressive Logistics dba Giltner Trucking. The "Sureties" are variously denominated as: The Cura Group; The Cura Group, and Advantage Workers Compensation Insurance Company; CNA/RSKCO c/o Crawford and Company; and The Cura Group, and CNA/RSKCO c/o Crawford and Company. The only party about whom there is no confusion is Claimant, Richard C. Mallery.

2. The business entity for whom Claimant drove truck is correctly denominated as Progressive Logistics, dba Giltner Trucking (hereinafter "Giltner" or "Employer"). This entity was formed about 2000, when Giltner Trucking merged with Golden Valley Transportation. The new, expanded entity was named Progressive Logistics, with Giltner Trucking being one of its divisions. This matter was clarified at hearing upon the motion of Claimant's counsel and the parties were advised to use "Progressive Logistics, dba Giltner Trucking" as the proper appellation for Employer in pleading captions. Tr., p. 222-223. Records of the Compliance Division of the Commission show that Giltner, in any of its appellations, has no workers' compensation insurance in its name.

3. At the hearing, two entities sat at Defendants' table: Counsel for Employer and CNA (Mr. Ford), and Counsel for Employer and TCG (Ms. Christensen). Both CNA and TCG were identified on the pleading captions as "Sureties." TCG is listed as the "insurance carrier"

(Surety) on the Complaint filed May 14, 2003, the Answer TCG filed on July 25, 2003, the Amended Complaint filed on January 30, 2004, the Answer to the Amended Complaint filed February 10, 2004, and the new Complaint in I.C. 03-005856 filed May 14, 2003. TCG contracted with Crawford and Company to act as its in-state adjuster as if it were a surety. But Commission records establish that TCG is not a surety. It is a payroll leasing company whose surety is CNA/RSKCO.

4. CNA first appeared in the case when it filed its Answer to the Complaint in I.C. 03-005856 on July 3, 2003. The two cases were consolidated by Order dated February 9, 2004.

5. Records of the Compliance Division of the Commission show that on March 3, 2002, TCG insured its workers' compensation risk through CNA/RSKCO, but that Giltner Trucking did not come under the CNA worker's compensation umbrella until July 1, 2002. At the time of the March 3, 2002 accident, TCG was handling Giltner Trucking claims in-house rather than referring them to their surety, CNA.

Employer

6. Claimant worked as a long haul truck driver for many years. Personnel records show that in November 1999 he began driving trucks for Giltner and continued to do so through November 20, 2002.

7. The record in these consolidated cases is replete with references to Claimant's Employer being Giltner. Claimant testified he was an employee of Giltner. Claimant's wife testified he was an employee of Giltner. More importantly, Giltner's representative at the hearing, Ms. Orsland, testified that Claimant was an employee of Giltner:

> Q. [By Mr. Ford] I'm familiar with the concept of owner-operator and other kinds of drivers. What kind of driver was Mr. Mallery as it relates to the company?

A. He was a company driver.

Q. What is a company driver?

A. It means that he drives a company truck. Actually is employed by us.

Tr., p. 185. The written record also supports the position that Claimant was an employee of Giltner. CNA Exhibit 21 contains a number of employment-related documents showing Giltner as the employer, including the signed Acknowledgement of Receipt of Drug Free Workplace Policy and Agreement to Abide by Policy, Insurance Notification, Post Accident Policy, Pre-employment Urinalysis Notification, and a document acknowledging receipt of the company's driver handbook. Two notices of violation, dated August 24, 2001 and January 29, 2002 appear on Giltner letterhead or under the Giltner heading. Finally, Claimant's federal tax returns show his employer to be Giltner and an entity called "Omni Financial Services."[1] Claimant's Exhibit 13, bates 416 and 430. All of these facts are uncontroverted.

8. The Referee finds that Giltner was Claimant's employer on and after November 15, 1999.

March 2002 Accident

9. On March 3, 2002, Claimant was getting out of his truck at a truck stop in Aurora, Colorado. He was holding a handrail with his left hand and the truck door with his right. When he stepped on the running board, both feet slipped out from under him, leaving him hanging. Claimant felt such pain in his shoulders that he could not hold on and he dropped to the ground. Another trucker assisted him to his feet.

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[1] It appears from the record that at some time early in calendar year 2001 some change was made in the company's financial structure. For calendar 2001, a small amount of Claimant's income was attributed to Giltner, with the bulk of Claimant's annual pay attributed to "Omni Financial." "Omni/Golden Valley Transportation" also appears on pay stubs beginning in March 2002. Claimant's Exhibit 14, bates 470 *et. seq*.

10. Claimant immediately telephoned Employer and spoke with the night dispatcher, reporting the accident and that he had hurt his shoulders. Immediately after the accident, Claimant's shoulders ached and he was not able to raise his arms overhead.

11. Lyn Orsland was the human resources manager for Employer in March 2002. At hearing, she testified that she was in contact with Claimant within a day and prepared a written incident report documenting the accident (Claimant's Exhibit 1, bates 000). Ms. Orsland testified that Claimant declined medical care at the time, believing that the shoulder pain was temporary and would resolve on its own. No Form 1 (First Report of Injury or Illness) was filed with the Commission. Ms. Orsland did not send a copy of the incident report she prepared to TCG.

12. Claimant continued to work, and continued to experience bilateral shoulder pain throughout the spring, summer, and fall of 2002. He changed the way he drove, placing his hands lower on the steering wheel, where he had less control, because he could not raise his arms to shoulder level without pain. He never sought medical care, despite his wife's urging, and self treated with generous doses of over-the-counter anti-inflammatory medication. His condition, however, gradually worsened.

13. In July, Claimant underwent surgery for an unrelated matter. While he was off work and recovering, he took a trip with his wife to Canada.[2] Both Claimant and his wife testified that he was not able to do any of the driving on the trip because of his shoulders. During the time he was off work, Claimant's shoulder pain remitted slightly, apparently as a result of the reduced activity level required by his surgical recovery.

[2] Claimant's wife is a professional dog handler who also raises Pembroke Welsh Corgis. She travels throughout the U.S. and internationally showing clients' dogs.

14. In September 2002, Claimant had a required physical in order to maintain his commercial driver's license. After Claimant had passed the physical, he asked the physician's assistant who performed the physical to take a look at his shoulders. Reportedly, the PA stated that had he looked at Claimant's shoulders before he had completed the physical, he probably would not have passed him. Claimant related this story to Ms. Orsland when he turned in the paperwork for his physical and she so testified at hearing. Claimant is a credible witness.

November 2002 Accident

15. After recovering from his surgery, Claimant returned to work. On November 14, 2002, Claimant was in Owensville, Missouri picking up a load. The shipper asked Claimant to restack some pallets to facilitate loading. When Claimant picked up the first pallet and placed it on top of the pile, he heard a pop in both shoulders and his left arm immediately went numb. The pain was severe in both shoulders and he advised the shipper that he couldn't stack the pallets. Claimant testified that he immediately called Employer and spoke with "Kelly," telling her that he was injured and that he needed to return home and see a doctor. Claimant also called his wife and advised her he had hurt his shoulders and was coming home. Mrs. Mallery confirmed Claimant's testimony at hearing.[3]

16. Despite Claimant's request to return home immediately for treatment, it took another week before he was home. From Owensville he drove to Salt Lake City, then Clearfield, both in Utah. He then drove to Jerome, picked up a trailer and took it back to Clearfield where he picked up a trailer and returned to Jerome, after which he returned to his home in Parma on November 20, 2002.

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[3] There is no written record of Claimant's November 14, 2002 contact with Employer. Ms. Orsland testified that it was possible that the call was not written down. She further testified that "Kelly" was no longer with Employer and had been terminated in part because she "was not good with paperwork." Tr., p. 221.

Medical Care

17. On November 21, 2002, Claimant went to see Sid J. Garber, M.D., at West Idaho Orthopedics and Sports Medicine. Dr. Garber had previously treated Claimant's wife for an orthopedic injury, and both Claimant and his wife believed that Dr. Garber had provided excellent treatment. Dr. Garber's chart notes reference both shoulders as problematic, with the left more painful than the right. X-rays taken at the time showed no bony abnormalities. Claimant was given several treatment options and chose to try a cortisone injection in the left shoulder. Claimant had no relief from the injection and on November 26, Dr. Garber gave him a work release until an MRI of the left shoulder was performed.[4] The MRI revealed multiple abnormalities, including impingement in the acromioclavicular joint incident to degenerative arthritis, rotator cuff tendinopathy, and possible tears of the biceps and subscapularis, but no overt evidence of a rotator cuff tear. Dr. Garber recommended anti-inflammatory medication and physical therapy.

18. On November 26, Claimant advised Employer, through Ms. Orsland, that he was seeking medical care for his shoulders and that Dr. Garber released him from work. Ms. Orsland updated the incident report she had prepared in March, and on December 5, 2002, she faxed the incident report to three individuals at TCG. Neither Employer nor TCG provided any information to Claimant regarding how he should proceed to obtain workers' compensation benefits. Thereafter, Claimant's wife had a number of conversations with Ms. Orsland regarding workers' compensation benefits for her husband. At hearing, Ms. Orsland described the many difficulties she had in contacting and working with Defendant TCG.

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[4] Dr. Garber continued to provide work releases, and in fact Claimant had not been released to return to work at the time of hearing.

19. Claimant returned to Dr. Garber on December 3 to discuss the results of the MRI. He had a second cortisone injection in the left shoulder. Claimant began physical therapy on December 5. On December 19, Claimant returned to Dr. Garber. Claimant had not been helped by the injections, the anti-inflammatories, or the physical therapy. Dr. Garber diagnosed a torn rotator cuff and impingement and scheduled a surgical decompression.

20. In late December, having received no workers' compensation benefits, Claimant's wife contacted the Commission. She learned that no Form 1 had ever been filed and was directed to the Commission's website for the form. Claimant's wife prepared and submitted the Form 1. CNA Exhibit 1.[5] Sometime after December 27, 2002, Claimant received a check, delivered by FedEx, in the amount of $2,529.42. The check arrived in an envelope showing TCG in the return address, but the name on the check was Cooke Stevens & Co., LTD. There was no letter or other explanation enclosed with the check. Claimant had no idea who the checks were actually from or how the amount of the payments had been calculated. Thereafter, Claimant received weekly checks in the amount of $421.57.

21. Claimant had surgery on his left shoulder on January 7, 2003. The operative report documents extensive damage to the left shoulder:

> There was complete tear of the anterior portion of the rotator cuff. The subscapularis was retracted back and appeared to be very extensive and markedly retracted. The biceps tendon was dislocated completely posteromedially [sic] around the humeral head out of the biceps groove altogether. The rotator cuff was then teased back as well as could be done with what we had to work with. The biceps tendon was placed back in the biceps groove, and tenodesis done with two Mitek sutures in its more corrected position. Then using two more Miteks the rotator cuff was brought together as well as could be done.

CNA Exhibit 7, bates 4063. Dr. Garber continued Claimant's work release.

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[5] CNA Exhibit 1 was dated 12/23/2003 in error. It was prepared and submitted on December 23, 2002.

22. Claimant had a normal post-operative recovery, including physical therapy, until March 2003. On March 25, Claimant went to see Dr. Garber without an appointment because of a painful, swollen elbow. Dr. Garber diagnosed a large olecranon bursa secondary to using his elbow, rather than his shoulder, to get up from a supine position. Dr. Garber recommended conservative treatment.

23. By this time, Crawford and Company was acting as a third party adjuster for TCG's workers' compensation claims. Colleen Eason, senior adjuster, was assigned the claim. Ms. Eason's involvement with Claimant began on March 27, 2003, when she received a call from Ms. Orsland informing her that Claimant had an unfiled claim. Ms. Eason prepared a Form 1 for the March 2002 accident and submitted it to the Commission. This was the first and only Form 1 on file with the Commission.

24. Also on March 27, Ms. Eason contacted Claimant, Dr. Garber, and Employer regarding the claim. The record is clear that Employer, Dr. Garber, and Claimant were in agreement that Claimant sustained bilateral shoulder injuries as a result of the March 3, 2002 accident. Ms. Eason learned that Claimant had a second accident on November 14, 2002, and that both Claimant and Dr. Garber attributed his injuries to the March accident. She also learned that Claimant had had shoulder surgery. She determined that Claimant was entitled to compensation and medical care based on the March accident and undertook to determine the TTD benefits to which he was entitled and to run down the medical bills for Dr. Garber's services, the surgery bills, and his post-operative care. Ms. Eason also contacted TCG via e-mail on March 27 observing that while Claimant had been receiving income benefits, his average weekly wage had not been calculated, and implicitly questioning the basis on which TCG was paying $421.57 per week.

25. Claimant returned to Dr. Garber on April 4. His elbow was much worse. Dr. Garber scheduled a surgical excision of the bursa for the following week. Dr. Garber's office contacted Crawford and Company and received authorization for the surgical procedure, which was performed on April 15, 2003. Claimant had a difficult post-operative recovery from the bursa, and at the time of hearing almost a year later was still experiencing drainage of both pus and sera from the incision.

26. The medical records show that Claimant last saw Dr. Garber on May 12, 2003, at which time he was having drainage from the elbow incision. Dr. Garber continued issuing orders for physical therapy for the shoulder through September 26, 2003. Although there is nothing in Dr. Garber's records, there was credible testimony that he imposed a permanent lifting restriction of no more than 25 pounds and no more than 10 pounds frequently. The physical therapy records stop without comment or explanation after the entry for September 23, 2003.

27. There was credible testimony at hearing that TCG paid only a few of Claimant's medical bills. TCG's failure to pay Claimant's medical bills eventually resulted in a number of providers turning the matter over to collection agencies, and ultimately led to a breakdown of Claimant's relationship with Dr. Garber. It is undisputed that Dr. Garber told Claimant that no one would provide the treatment he needed (for his right shoulder and his left elbow) because Claimant had no insurance and could not afford to pay.

28. Claimant saw Michael O'Brien, M.D., on September 25, 2003. It is not clear how Claimant came to be a patient of Dr. O'Brien. Dr. O'Brien, a neurologist, noted that Claimant had sustained two separate industrial injuries to his shoulders. While Dr. Garber had repaired the left shoulder to some extent, the right shoulder remained symptomatic and was getting worse. He observed that problems with insurance had kept Claimant from receiving the treatment he

needed. An MRI was ordered, but Claimant did not attend the appointment because he could not pay for the imaging.

29. Claimant received a TTD check on September 11, 2003. No checks arrived for the next eight weeks. On November 4, 2003, Claimant received a check in the amount of $1,144.26 for TTD benefits through September 29, 2003. Claimant was not notified of any change in his status or of any change in his TTD payments. No further TTD checks were received thereafter.

30. Claimant did eventually have an MRI of the right shoulder on December 12, 2003. (The bill remains unpaid.) The MRI revealed serious problems with Claimant's right shoulder, including:

> Moderate degenerative changes present in the acromioclavicular joint.
>
> Abnormal supraspinatus tendon with evidence of tendinosis, as well as numerous partial thickness tears as outlined in the main report [Partial thickness tears present at the musculotendinous junction related to the bursal surface, as well as within the mid and anterior aspects of the distal supraspinatus tendon on the articular surface.]
>
> Tear suspected within the anterosuperior aspect of the glenoid labrum.
>
> Degeneration of the posterior portion of the glenoid labrum suspected with adjacent paralabral cyst.
>
> Tendinosis/partial tearing of the proximal portion of the tendon of the long head of the biceps muscle.

Claimant's Exhibit 5, bates 357.

31. Dr. O'Brien referred Claimant to James M. Johnston, M.D., for surgery on his right shoulder. Dr. Johnston saw Claimant on January 13, 2004. He concurred in Dr. O'Brien's opinion that Claimant needed immediate surgery on the right shoulder if he was to have near-normal function. Dr. Johnston noted the permanent lifting restrictions imposed by Dr. Garber

and agreed with them. As to Claimant's left shoulder repair, Dr. Johnston noted:

> Good, although not excellent rotator cuff repair result on the left. This is likely the best result that could have been obtained based on the description of this as a huge global rotator cuff tear.

Claimant's Exhibit 7, bates 367. Dr. Johnston related Claimant's injury to his March 2002 accident.

32. At the time of hearing, Claimant was released from work until he had his right shoulder repaired. Claimant has not had the surgery on his right shoulder because he could not pay for it and had no insurance to cover the cost.

DISCUSSION AND FURTHER FINDINGS

Parties

33. As a matter of law, it is clear that TCG is not a surety. TCG could not be and was not Giltner's surety. Neither was TCG Claimant's employer. There is nothing in the record that even hints that Claimant was an employee of TCG leased to Giltner. In fact, the Referee has found that the uncontroverted and overwhelming evidence is that Claimant was the employee of Giltner. No evidence was presented to establish what, if any, obligation TCG had to insure Giltner's workers' compensation risk in some capacity other than as an employer or surety, or how it would do so if it had such an obligation. Commission records do show, however, that on March 3, 2002, TCG had no workers' compensation coverage for Giltner's employees.

34. The only conclusion that the Referee can draw from the record before her is that Giltner had no workers' compensation insurance in effect for its employees in March of 2002.

Accident/Injury

35. The burden of proof in an industrial accident case is on the claimant.

> The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an

> accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot,* 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

There is no real dispute that Claimant had an accident at work on March 3, 2002, when he slipped while exiting his truck. Although there is no written documentation in Employer's records concerning Claimant's report of the November 2002 injury, the Referee finds that Claimant's testimony that there was an accident is credible, consistent, and corroborated by other credible witnesses.

The more difficult question is whether Claimant's injuries were caused by the March accident, the November accident, or some combination of the two. TCG argued that the claim should be attributed 100% to the November accident at which time CNA was purportedly insuring TCG for Giltner's workers' compensation risk. CNA argued that the claim should be apportioned 100% to the March accident at which time CNA denies it was covering Giltner's workers' compensation liability through TCG. Claimant urges that the injuries be apportioned as set forth in Dr. O'Brien's March 22, 2004 letter (33% to the March accident and 66% to the November accident). Claimant's Exhibit 6, bates 364-A.

For the reasons set out below, the Referee finds that Claimant's injuries were caused entirely by the accident of March 3, 2002.

In particular, the Referee found CNA's discussion of the "but for" test especially illuminating. The record demonstrates that Claimant had immediate pain; the pain never went away thereafter; Claimant had to change the way he drove as a result of pain; he reported the

pain to the physician's assistant who performed his department of transportation physical and who confirmed the injury; Claimant reported the PA's comments to Ms. Orsland when he turned in his paperwork from the physical.

Three physicians weighed in on the issue of causation of Claimant's bilateral shoulder injuries. Dr. Garber attributed the injuries to the accident in March 2002. So did Dr. Johnston. Both are orthopedic specialists. Dr. Garber performed surgery on Claimant's left shoulder and saw the extent of the damage. Dr. Johnston reviewed the images of the right shoulder, and noted no evidence of recent injury. Dr. O'Brien's late entry into the causation fray, at the behest of Claimant's counsel, was too little and too late to be persuasive.

Finally, the actions of the parties throughout the progress of this case are consistent with the finding that Claimant's injuries sprang from the March accident. TCG and Employer were aware of both accidents, determined that all of Claimant's injuries stemmed from the March accident, and eventually began paying TTD benefits. When the November claim eventually reached CNA, it was denied because all of Claimant's injuries had been attributed to the March accident and TCG was paying the claim. The record shows three-way communication and explicit or tacit agreement between representatives of TCG, CNA, and the in-state adjuster regarding CNA's denial and TCG's acceptance.

Medical Care/Necessary Travel Expenses

36. Idaho Code § 72-432 provides:

> (1) The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

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> (12) An injured employee shall be reimbursed for his expenses of necessary travel in obtaining medical care under this section. Reimbursement for transportation expenses, if the employee utilizes a private vehicle, shall be at the mileage rate allowed by the state board of examiners for state employees; provided however, that the employee shall not be reimbursed for the first fifteen (15) miles of any round trip, nor for traveling any round trip of fifteen (15) miles or less. Such distance shall be calculated by the shortest practical route of travel.

Claimant is statutorily entitled to reasonably necessary medical treatment. There is no evidence to dispute the necessity or the reasonableness of the care that Claimant has received to date. Therefore, all of the medical expenses (including travel costs), related to Claimant's shoulder injuries (including treatment for the olecranon bursa) are compensable, beginning with his first visit to Dr. Garber on November 21, 2002. This includes the expenses incurred to date as well as those to be incurred as a result of additional treatment for the left elbow olecranon bursa and the right shoulder surgery deemed necessary by both Drs. O'Brien and Johnston.

There was testimony at hearing that very few of Claimant's medical bills to date had been paid. Claimant submitted substantial documentation of medical billings from a variety of providers,[6] including: West Valley Medical Center ($17,005.40 [does not include amounts billed for PSA testing]), Idaho Physical Therapy ($5,380.00), West Idaho Orthopedic ($7,512.50), Gem State Radiology ($160.00), Gem State Anesthesia ($1,210.00), Idaho Pathology Associates ($138.05), Dr. O'Brien ($107.60), Dr. Johnston ($147.00), Intermountain Medical Imaging ($800.00), and Super Thrift Drug ($462.05). TCG (the only entity that paid anything on this claim) submitted no evidence as to which, if any, of the bills had actually been paid.

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[6] This listing may not be comprehensive, and does not attempt to break down amounts owed to providers, amounts owed to Claimant, and amounts owed to Blue Cross. Amounts paid by Blue Cross did not include the amount of contractual write-offs. Those write-offs must be repaid to the medical provider.

Claimant submitted mileage totaling 3839.2 miles for reimbursement. From the evidence provided, it is not clear whether this mileage calculation took the 15-mile per round trip exclusion into account. Further, mileage reimbursement rates were different in each of the years since Claimant's injury. The Referee takes judicial notice of the fact that the mileage reimbursement rate in calendar 2002 was 36.5 cents per mile, in calendar 2003 the rate was 36 cents per mile, and in calendar 2004 the rate was 37.5 cents per mile. Claimant is entitled to reimbursement for mileage to date as well as mileage that will be incurred as a result of further treatment pursuant to the provisions of Idaho Code § 72-432 (12).

Average Weekly Wage

37. Using CNA Exhibit 22, Claimant's average weekly wage for the 52 weeks preceding his injury was $751.80. This results in a compensation rate of $503.71 per week. This amount is $82.14 per week more than Claimant received during the period that TCG paid income benefits.

TPD/TTD Payments

38. Claimant is entitled to income benefits from the time he was taken off work due to his industrial injuries throughout his period of recovery until he has reached medical stability. Idaho Code § 72-408. Claimant's last day of work was November 20, 2002. He has not yet been released to work, and is in need of additional surgery. Claimant is entitled to TTD payments at the rate of $503.71 for the first 52 weeks following his last day of work and thereafter at the rate of 67% of the applicable average weekly state wage until he has reached maximum medical improvement or returned to light duty work.

Apportionment

39. Because 100% of Claimant's injuries are attributable to the March 2002 accident, there is no need to apportion liability.

Statutory Penalty

40. Idaho Code § 72-210 provides for a mandatory statutory penalty for an employer's failure to secure workers' compensation insurance. In this case, Employer had no worker's compensation insurance in its name on March 3, 2002. Employer's putative surety, TCG had no workers' compensation insurance on Employer's workers on March 3, 2002. Even Giltner's good faith belief that it had secured workers' compensation insurance through TCG does not relieve Giltner of is obligations under the workers' compensation law and the penalties for failing to meet those obligations. *Heese v. A & T Trucking,* 102 Idaho 598, 635 P. 2d 962 (1981).[7] The Referee finds that the imposition of the statutory penalty against Employer is appropriate. Claimant is also awarded costs and fees under Idaho Code § 72-210.

CONCLUSIONS OF LAW

1. Claimant, an employee of Employer Giltner Trucking, sustained bilateral shoulder injuries in a work-related accident on March 3, 2002.

2. Giltner Trucking was an uninsured Employer on March 3, 2002.

3. Claimant is entitled to necessary medical treatment, including: payment of outstanding medical care related to the bilateral shoulder injury and subsequent elbow injury on and after November 21, 2002; reimbursement for amounts paid by Claimant for medical care and costs of transportation incurred to date; and the costs of future medical care related to the

[7] Because Giltner did not actively participate in the proceedings, the issue of whether it acted in good faith was never raised and the Referee makes no finding as to whether or not Giltner acted in good faith.

bilateral shoulder injuries and the subsequent olecranon bursa injury that resulted from the original injuries. Employer shall receive credit for any amounts paid by TCG.

4. Claimant's average weekly wage for the 52 weeks preceding his injury is $751.80. This results in a compensation rate of $503.71 per week for the first 52 weeks. Thereafter, he shall receive TTDs at the rate of 67% of the applicable average weekly state wage until he has reached maximum medical improvement or returned to light duty work.

5. Claimant is entitled to TTD or TPD benefits from November 21, 2002 until he reaches medical stability. Employer Giltner is entitled to credit for any TTDs paid by TCG.

6. Employer Giltner shall pay a statutory penalty in the amount of 10% of the total amount of compensation awarded Claimant by this decision, together with attorney fees and costs, for failure to secure workers' compensation coverage for its employees.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 29th day of November, 2004.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2004, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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djb /s/_____