BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CLAYTON BACKMAN,	)	
	)	
Claimant,	)	**IC 03-000704**
v.	)	
	)	
MIKE HAMLIN, dba	)	**FINDINGS OF FACT,**
FRANCHISE LTD ROOFING,	)	**CONCLUSIONS OF LAW,**
	)	**AND RECOMMENDATION**
Employer,	)	
	)	January 25, 2005
Defendant.	)	
	)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on November 17, 2004. Rachael M. O'Bar represented Claimant. Defendant did not appear in person or through counsel. Claimant presented oral and documentary evidence. The case was submitted on the record at the close of the hearing, and came under advisement on November 18. The matter is now ready for decision.

ISSUES

As agreed upon at hearing, the issues to be resolved are:

1. Whether Claimant has established a *prima facie* case to support his application for default judgment pursuant to Rule 6(B), J.R.P.;

2. Whether and to what extent Claimant is entitled to the following benefits:

   a. reasonable and necessary medical care;

   b. temporary partial and/or temporary total disability benefits (TTD/TPD);

3. Whether Defendant is liable to Claimant for penalties set out in Idaho Code

§ 72-210 for failing to insure liability; and

4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-210.

Issues of permanent impairment and disability are specifically reserved.

CONTENTIONS OF THE PARTIES

Claimant contends that he has established a *prima facie* case for default judgment arising out of a work-related knee injury that occurred on November 18, 2002. He asserts that his testimony, medical evidence, and supporting documents are credible, and that he is entitled to compensation, the statutory penalty, and attorney fees.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Testimony of Claimant offered at hearing;

2. Claimant's Exhibits 1 through 7, admitted at hearing, including the addition of page 14A to Exhibit 3; and

3. Industrial Commission legal file.

FINDINGS OF FACT

BACKGROUND

1. Claimant filed his Complaint March 17, 2003 seeking medical benefits, time loss benefits, impairment and disability benefits, retraining, and attorney fees. No answer was filed. On May 16, 2003, Claimant filed a 21-Day Notice of Intent to Take Default pursuant to Rule 6(A), J.R.P. Defendant was given 21 days to file a proper answer; no answer was ever filed. On June 20, 2003, Claimant filed a Motion for Entry of Default. No responsive pleading was filed. The

Commission's Order Entering Default was filed on June 30, 2003. On July 29, 2004, this Referee filed a Notice of Intent to Recommend Dismissal for lack of action for a period of six months. On August 3, 2004, Claimant filed a Motion to Retain and a Request for Calendaring along with an Application for Judgment and supporting documents pursuant to Rule 6(B), J.R.P. The case was retained on the active calendar and set for hearing on November 17, 2004.

CLAIMANT

2. At the time of the hearing, Claimant was thirty-two years of age. He testified that he was married and had three stepchildren. Claimant began working for Employer as a roofer in March 2001 at the rate of $7.00 per hour. Exhibit E of Motion For Default, filed June 20, 2003. Claimant's work entailed tearing off old shingles and putting on new ones. His hourly wage was $8.00 at the time of his injury.

3. Claimant described his work-related accident of November 18, 2002:

> I was handling – handing down shingles down to my foreman. I was sitting on the peak of the roof, I stood up and that's when my knee popped, and I told my foreman that I can't stand up.

Tr., p. 10. As Claimant was unable to walk down a ladder, one of the other employees – at the foreman's direction – helped Claimant slide down the ladder. Claimant asserted that he could not "step on the rungs of the ladder, because my knee was like a grapefruit." *Id.* at 11.

4. Claimant testified that Defendant was contacted by cell phone, came to the job site, and looked at Claimant's knee. Defendant then drove Claimant home. Claimant testified that Defendant told him to remain home "for two days" and see "if it got any better." *Id.* Claimant testified that when the knee did not improve in two days, Defendant took Claimant to seek care and to do the necessary paperwork. Medical records show that on November 20, Claimant was seen at Saltzer Medical Group North (Saltzer) for his knee. Claimant was treated at Saltzer again on

November 22, had an MRI on November 27, and returned to Saltzer on December 13, at which time Clark Robinson, M.D., scheduled Claimant for surgery on January 14, 2003 for an ACL reconstruction and partial medial and lateral meniscectomies. Claimant testified that when he appeared at Mercy Medical Center (MMC) on January 14th for surgery "they [doctors and secretaries] told me that there was no record of me being there or anything." *Id.*

5. Claimant testified that he contacted Defendant and told him that "they [MMC staff] didn't have no records of me being there or anything and he was the one that helped me fill out the workmen's comp claim at the hospital." *Id.* at 12.

6. Claimant asserted that it was about two days later (January 16, 2003) that he learned that Defendant did not have workers' compensation coverage.

7. Claimant alleged that he has had no further contact with Employer since January 2003.

8. Claimant testified that he has not been able to work since his knee injury. "I can't stand up or hardly sit for very long." *Id.* at 13. Claimant believes that he needs surgery in order to be able to work.

9. Defendant prepared a Notice of Injury and Claim for Benefits (Form 1). The form is not dated, but is signed by Defendant and notes the date of injury as November 18, 2002. The Form 1 was filed with the Commission on January 17, 2003. A second Form 1 was prepared by Claimant's counsel on January 16, 2003 and filed with the Commission on January 31, 2003.

DR. ROBINSON

10. In his chart note dated November 22, 2002, Clark Robinson, M.D., recommended that Claimant obtain an MRI. Dr. Robinson indicated that Claimant had previously injured his right

knee, about three or four years ago, and had the necessary surgery. Moreover, though Claimant has had "several occasions of instability episodes . . . he has never had an episode of swelling such as the current episode and he has always been able to ambulate on the leg. He has never had the pain that he has now." Claimant's Exhibit 1, p. 004. Dr. Robinson also wrote: "I think he has had an exacerbation of a previous knee injury. The exacerbation was caused by his work." *Id.*

11. In his chart note dated December 13, 2002, Dr. Robinson indicated that the MRI showed an "ACL rupture as well as probable tears of the medial and lateral meniscus." *Id.* at 002. He recommended "ACL reconstruction and partial medial and lateral meniscectomies." *Id.*

12. In his letter dated December 1, 2003 to Claimant's counsel, Dr. Robinson opined as to costs regarding Claimant's medical care, e.g., surgeon's fee of $3,313.75 for ACL reconstruction and estimated hospital costs between $1,000.00 and $3,000.00. As regards work restrictions following surgery, Dr. Robinson estimated that Claimant could return to sedentary light duty in about two weeks. Six weeks after the surgery Claimant's restrictions would lessen, but he would not be fully released until approximately 3½ months post surgery. *Id.* Generally, a patient is "considered completely recovered" between six months to a year after surgery. *Id.* at 001.

Discussion and Further Findings

13. **Accident/Injury.** An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17).

A preexisting disease or infirmity of the employee does not disqualify a workers'

compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as it finds him or her. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983). A claimant seeking compensation for the aggravation of a preexisting condition must prove that an accident as defined by Idaho Code § 72-102(17) aggravated the preexisting condition. *Nelson v. Ponsness-Warren IDGAS Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994).

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

On November 18, 2002, Claimant sustained a knee injury while working as a shingler on a pitched rooftop. Claimant's testimony and the Form 1 prepared by Defendant support a finding that there was an accident. Dr. Robinson's chart notes support a finding that Claimant's knee injury and the need for surgery were the result of the November 18, 2002 accident. In sum, this was a work-related accident that arose out of and in the course of Claimant's employment with Defendant.

14. **Medical Benefits.** An 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 required by the employee's physician or needed immediately after an injury or disability from 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. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116

Idaho 720, 779 P.2d 395 (1989).

Here, Claimant has established by a preponderance of the evidence that he will need medical treatment as a result of his work-related accident. Dr. Robinson has made a compelling argument for an ACL reconstruction as well as medial and lateral partial meniscectomies. Dr. Robinson has further explicated the need for physical therapy and pain medication following such surgery. The Commission finds that Dr. Robinson's proposed treatment of Claimant's right knee injury is reasonable. Employer shall provide such reasonable medical care, including surgery, medications, physical therapy, or other modalities prescribed by Dr. Robinson.

Claimant has also established entitlement to $1,407.00 in medical costs that he has accrued to date. *See* Exhibit 3, pp. 14B, 15, 19, and 20.

15. **Temporary Disability Benefits.** Idaho Code § 72-102 (10) 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 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 is still within the period of recovery from the original industrial accident, he is entitled to temporary disability benefits unless and until such evidence is presented that he has been released for light-duty 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) (emphasis in original).

Here, Claimant has established that his hourly wage was $8.00 at the time of the injury. Although Claimant stated that he worked full-time, his pay stubs do not reflect a forty-hour work week as typical. Further, the record includes pay stubs for only thirty-four of the preceding fifty-two weeks, making it inappropriate to calculate Claimant's average weekly wage to be $320.00. Based on Claimant's pay stubs for the 13-week period of November 11, 2001 through February 20, 2002,[1] his average weekly wage is calculated to be $124.66 ($1,496.00 ÷ 11). Claimant is entitled to TTD benefits at the rate of $112.19 per week (90% of his average weekly wage) for 52 weeks from November 18, 2002 through November 16, 2003 ($5,833.88). Thereafter, through December 31, 2003, Claimant is entitled to $237.15 per week (45% of the ASW) ($1,524.54). For the period of January 1, 2004 through December 31, 2004, his compensation rate is $240.30 per week ($12,495.60). Beginning January 1, 2005 the compensation rate is $244.35 per week. Claimant will continue to be entitled to TTDs at the statutory rate until he has been released to light-duty work *and* 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 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.

16. **Penalty.** Idaho Code § 72-210 provides for a penalty of 10% of the total

compensation awarded as a penalty for failing to carry required coverage. Defendant was uninsured at the time of Claimant's injury. The January 29, 2003 letter from the State Insurance Fund to Claimant's attorney establishes that Defendant did not have a policy at the time of Claimant's work-related accident, said policy having been cancelled on November 11, 2002. Exhibit D of Motion for Default.

The Claimant is entitled to the statutory penalty. The total amount of the penalty cannot be calculated at this time, because the amount of future medical care and income benefits cannot be calculated with specificity. At the time the decision is issued, however, it is clear that Defendant owes TTDs through December 31, 2004 in the amount of $19,854.02 together with past medical costs of $1,407.00 for a total of $21,261.02. The penalty on this sum is $2,126.10.

17. **Attorney Fees and Costs**. Idaho Code § 72-210 provides for the award of costs and reasonable attorney fees if an employer fails to provide workers' compensation insurance as required by law. Claimant has requested the sum of $3,495.00 for attorney fees and legal assistant fees and costs of $260.58. The Commission finds this request reasonable.

18. **Interest.** Interest shall accrue on the unpaid liquidated benefits set out in paragraphs 14 through 17 herein. Idaho Code § 72-734 provides that once a decision has been entered by the Commission awarding compensation of any kind to a Claimant, such award:

> shall accrue and the employer shall become liable for, and shall pay, interest thereon from the date of such decision pursuant to the rates established and existing as of the date of such decision . . ."

The Referee takes judicial notice that the statutory rate of interest as of the date of this decision is 7.125%.

19. **Retention of Jurisdiction.** Finality is one important goal of the Commission's

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[1] This is the 13 week period with the most data (11 weekly pay stubs).

adjudication process—so is "sure and certain relief" for Idaho's injured workers. Idaho Code § 72-201. Here, Claimant has asked for, and received, future medicals, future income benefits and statutory penalties. Only past medicals and income benefits through December 31, 2004 are liquidated amounts. Because this is a default judgment, and because Defendant has refused to participate or cooperate in the proceedings, the Referee believes that it is important for the Commission to retain jurisdiction so that future medicals and income benefits can be calculated with certainty, and a final liquidated amount, including the statutory penalty, can be reduced to a Commission Order. Retention of jurisdiction by the Commission is the most viable means by which Idaho's Workers' Compensation Law can be best administered and Claimant paid the total amount that is due him.

CONCLUSIONS OF LAW

1. Claimant has established a *prima facie* case in support of his Application for Judgment.

2. Claimant is entitled to necessary medical treatment, including payment of $1,407.00 for past medical care, together with the cost of future medical care reasonably related to his work-related accident, including, but not limited to, the surgery recommended by Dr. Robinson.

3. Claimant is entitled to past TTD benefits in the amount of $19,854.02 through December 31, 2004. Beginning January 1, 2005, Claimant is entitled to TTD benefits at the rate of $244.35 per week. Claimant will continue to be entitled to TTDs at the statutory rate until he has been released to light-duty work *and* 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 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.

4. Employer shall pay a statutory penalty in the amount of 10% of the total compensation due Claimant. The statutory penalty for past TTDs and medical care through December 31, 2004 is $2,126.10.

5. Claimant is entitled to attorney fees and costs, to the date of this decision, of $3,755.58.

6. Claimant is entitled to interest on the unpaid liquidated medical and income benefits, penalty, and attorney fees from the date of this decision until paid in full.

7. The Commission shall retain jurisdiction for the purpose of ensuring proper calculation of the future income and medical benefits, statutory penalties and attorney fees and costs due Claimant, and to allow such sum to be entered by an Order of the Commission.

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 _13th day of January, 2005.

INDUSTRIAL COMMISSION

_/s/_____
Rinda Just, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _25_ day of January, 2005 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:

RACHAEL M O'BAR
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MIKE HAMLIN
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djb ____/s/_____