BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM S. EBERHART, Claimant, v. KELLY HOWELL, Employer, Defendant.	))))))))))))	Filed June 16, 2006 **IC 04-002454** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on April 18, 2006. Claimant appeared *pro se*. Defendant Employer failed to appear and answer, and an Order Entering Default was filed October 27, 2005. Oral and documentary evidence was presented at the hearing. No post-hearing depositions were taken and no post-hearing briefs were submitted. This matter came under advisement on April 27, 2006.

ISSUE

The sole issue to be decided is whether Claimant has established a *prima facie* case in support of an award or judgment pursuant to Rule 6(B), JRP.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his mother, Karon Eberhart; and
2. Claimant's Exhibits 1-4 admitted at the hearing.

FINDINGS OF FACT

1. On October 23, 2003, while in the course of his employment as a roofer; Claimant fell from a roof onto a concrete driveway. He injured his left wrist and elbow, broke two ribs, and

punctured his left lung. Thinking he would somehow get better, Claimant delayed seeking medical attention for the next few days.

2. On October 27, 2003, Claimant presented to Holy Rosary Medical Center in Ontario, Oregon, where he was examined, x-rayed and diagnosed with rib, left wrist and left elbow fractures as well as a pneumohemothorax. He was to follow-up the next day but he did not.

3. Claimant returned to Holy Rosary on November 3, 2003, when it was noted that he was improving. He was to follow-up with an orthopedic surgeon for his left upper extremity injuries. Claimant testified that he saw an orthopedist by the name of Dr. Peterson; however, there are no medical records from him in evidence, only a bill.

4. On November 13, 2003, Frank Spokas, M.D, authored a note that stated: "It will probably be 2-3 months before Mr. Eberhart is able to perform manual labor." Claimant's Exhibit 4. Claimant testified that he was actually off work for four or four-and-a-half months.

DISCUSSION AND FURTHER FINDINGS

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. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. 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). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

"Probable" is defined as having "more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903,906 (1974).

5. The Referee finds that Claimant suffered a compensable accident resulting in injury on October 23, 2003.

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. 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. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability.

6. The Referee finds that Claimant is entitled to medical benefits in the amount of $2,158.40 less $40.00 paid by Employer for a total of $2,118.40. Claimant's Exhibit 3.

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the 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); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

7. There is no evidence that Employer offered Claimant any type of suitable work during Claimant's period of recovery. Therefore, Claimant is entitled to total temporary disability

benefits in the amount of $3,136.18 (11-13-03 to 12-31-03 @ $237.15/week = $1,660.05 + 1-1-04 to 2-13-04 @ $240.30/week = $1476.13 +$1,660.05 = $3,136.18).

8. Employer was uninsured for workers' compensation purposes on October 23, 2003. Therefore, Claimant is entitled to the statutory penalty provided for in Idaho Code § 72-210 in the amount of $525.46 ($2,118.40 + $3,136.18 = $5,254.58 x 10% = $525.46) for a total award of $5,780.04.

CONCLUSIONS OF LAW

1. Claimant has established a *prima facie* case supporting an award of judgment.

2. Claimant suffered a compensable accident causing injury on October 23, 2003.

3. Claimant is entitled to medical benefits in the amount of $2,118.40.

4. Claimant is entitled to total temporary disability benefits in the amount of $3,136.18.

5. Claimant is entitled to a statutory penalty for Employer's failure to carry workers' compensation insurance in the amount of $525.46.

6. Claimant's total award amounts to $5,780.04.

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 __7th ___ day of June, 2006.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __16th ___ day of __June__, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

WILLIAM EBERHART
389 NW 2ND AVE
ONTARIO OR 97914

KELLY HOWELL
500 ADA RD
NEW PLYMOUTH ID 83655-5201

___/s/_____

ge