BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KYLE VILLENEUVE, Claimant, v. CARL'S INC., Employer, Defendant.	**IC 2019-015428** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed 8/5/2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson. Claimant was represented by Paul Curtis and Andrew Adams of Idaho Falls. Claimant filed his Complaint on July 23, 2019, to which Defendant did not respond. On October 4, 2019, Claimant filed his Notice of Intent to Take Default, to which Defendant did not respond. On October 30, 2019, an Order of Default was entered against the Defendant. On May 5, 2020, Claimant submitted documentary evidence and argument to prove his *prima facie* case pursuant to JRP 6(C). The matter came under advisement on May 19, 2020 and is ready for decision.

ISSUES

The issues to be decided are:

1. Whether Claimant was an employee of employer at the time of the accident;
2. Whether Claimant suffered a personal injury arising out of and in the course of employment;
3. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;
4. Whether Claimant is entitled to reasonable and necessary medical care as provided

for by Idaho Code § 72-432, and the extent thereof;

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

6. Whether Claimant is entitled to permanent partial impairment (PPI) benefits, and the extent thereof;

7. Whether Claimant is entitled to permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof; and,

8. Whether Claimant is entitled to attorney fees and a 10% penalty pursuant to Idaho Code § 72-210.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits (CE), pp. 1-164;

3. Claimant's Amended Affidavit.

The Referee has submitted proposed findings of fact and conclusions of law for the approval of the Commission. The Commission has reviewed the same, along with the testimony and evidence of record. The Commission declines to adopt the proposed decision and hereby issues these findings of fact and conclusions of law and order.

FINDINGS OF FACT

1. Claimant was an employee of Defendant, Carl's Inc., on December 13, 2017. Clt's Affidavit. On that date, Claimant was in the rafters/attic of an industrial building working on a heating unit, when he fell approximately 26 feet and hit a hydraulic press. CE:4, 9. Claimant was transported by ambulance to Bingham Memorial Hospital and accompanied by a co-worker. *Id.*

There is no evidence Carl's Inc. reported the injury to the Industrial Commission, and Claimant's complaint alleges he gave notice of the accident, both written and oral, to his supervisor.

2. Claimant was admitted and diagnosed with "traumatic laceration to the right upper thigh" which was approximately 17 cm by 5 cm, and "traumatic abrasion injury to the right chest wall" which was approximately 15 cm by 2 cm. CE:12. Claimant underwent CT scans of his head, neck, chest, abdomen and pelvis; the only abnormalities noted were mild cervical spine scoliosis, a right chest wall contusion, and mild dextroconcave thoracic scoliosis. CE:63-64. Claimant's wounds were debrided and closed, and he was discharged on December 14 with instructions to follow-up with wound care the following day. CE:12, 17.

3. On December 15, 2017, Claimant's wounds were drained and re-dressed. CE:19.

4. On December 17, 2017, Claimant presented to the Eastern Idaho Regional Medical Center Emergency Department complaining of shortness of breath, right-sided abdomen pain, and left testicle pain. CE:67. He was treated by Matthew Griggs, M.D. *Id.* Claimant underwent CT scans of his abdomen/pelvis and chest, ultrasounds of his scrotum and renal artery, and blood/urine work. CE:73-74. Claimant was ultimately diagnosed with a kidney stone, and he was discharged that same day. CE:74-77.

5. Claimant returned for wound care on December 18, 2017. RN Tressell noted Claimant's pain had increased "secondary to being seen and treated in the ER yesterday for kidney stones" and noted Claimant was on Flomax to treat his kidney stones. CE:24-25.

6. Claimant followed-up again with wound care on December 21, 2017; his wounds were drained, debrided, and re-dressed. CE:29. Claimant followed-up again on December 27, 2017, and his wounds were drained, debrided, re-dressed, and his sutures were removed from his groin wound. CE:34. RN Tressell recorded: "patient states overall he is feeling much better… [he]

has not had any more kidney pain. Does not know if he passed kidney stones or not but the pain is gone so likely he did." CE:35. Claimant was cleared to return to light duty on January 2, 2018 and to return to regular duty on January 9, 2018. CE:39.

7. Claimant returned for wound care on January 2, 8, 15, and 22, 2018. CE:40-55. Claimant was discharged from wound care services on January 22 because his wounds had closed, and RN Tressell noted that "patient has a serious tendency to keloid formation..." CE:55.

8. Claimant signed an attorney fee agreement on May 17, 2019 agreeing to compensate his attorney 25% of the gross recovery if a suit was filed. CE:160. On May 29, 2019, Claimant's attorney called the State Insurance Fund and the Industrial Commission and verified that Carl's Inc. did not have insurance at the time of injury. CE:156; Clt's Motion for Default, p. 2. On May 30, 2019, Claimant's attorney sent a letter to Carl's Inc. inquiring about worker's compensation coverage on the date in question and received no response. CE:158; Clt's Motion for Default, p. 2.

9. On July 1, 2019, Dr. Griggs submitted a health insurance claim form for Claimant's December 17, 2017 ER visit to treat his kidney stone for $1,144. CE:135. Dr. Griggs checked the box indicating that the patient's condition was related to an accident and to his employment. *Id.* Dr. Griggs listed the insurance plan name as "workers compensation." *Id.*

10. Claimant underwent an IME by Gary Olaveson, DC, on April 20, 2020. Dr. Olaveson found that Claimant was entitled to 4% permanent partial impairment, and permanent restrictions as follows:

> Kyle has reduced right hand over head motion caused by the scarring of the skin on the right anterior thorax breast area. He cannot pull and brace an object to his chest without developing pins and needle sensations in his right breast and rib cage area. Example: reaching over the side of a pickup truck placing his chest on the side of the truck to get a tool box out of the back of the bed of the truck.

> He has lost flexibility and mobility while squatting and/or maneuvering his leg and body into positions required for his work.
>
> Kyle notices restrictive skin tightness, pins and needle sensations in his chest area and general reduced motion in his leg, interrupting his normal workday flow at least 25% of each day.

CE:146-147. Dr. Olaveson predicted Claimant would need follow-up medical care and "even surgery during his lifetime as a result of the scarring that will tighten the adjacent tissues." *Id.* He estimated this future cost at approximately $5,500. *Id.* Dr. Olaveson added that Claimant could not work outside without his leg going numb or "work long time frames with his right arm above his head," in addition to the above noted restrictions. CE:147.

DISCUSSION AND FURTHER FINDINGS

11. The provisions of the 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). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993). A claimant's burden of establishing a prima facie case by probable, not merely possible evidence should not be disregarded simply because the uninsured employer was defaulted by order of the Commission. *See State v. Adams*, 22 Idaho 485, 126 P. 401 (1912).

12. **Employer/Employee Relationship.** The issue of whether an employee/employer relationship exists is to be decided from all the facts and circumstances established by the evidence. *Ledesma v. Bergeson*, 99 Idaho 555, 559, 585 P.2d 965, 969 (1978). Uncontradicted testimony of

a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). Claimant submitted a sworn affidavit that he was an employee on the date of the accident. Clt's Affidavit. The ambulance medical record lists "Carl's Inc." as the closest relative/guardian; further, Claimant reported his fall happened at work to all his providers. *See* CE:2-60. There is no evidence Claimant was an independent contractor or volunteer. Claimant has proven he was an employee of employer at the time of the accident.

13. **Accident/Injury.** An "accident" means 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(18)(b). 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(18)(a). The medical evidence supports that Claimant fell 26 feet and suffered a laceration and abrasion while working on a heating unit on the date in question. Claimant has proven an accident and injury.

14. **Medical Care.** 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). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). Idaho Code § 72-432(1) requires an employer to provide 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. The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Eacret v. Clearwater Forest Indus., Inc.*, 136 Idaho 733, 40 P.3d 91 (2002).

15. Claimant's ambulance ride, his December 13, 2017 ER visit and related imaging, and his subsequent wound care visits were all required by Claimant's physicians after the accident and reasonably related to Claimant's accident-caused lacerations and abrasions. Claimant has proven his entitlement to this medical care in the amount of $24,871.54. *See* CE:100-129;141-143.

16. On December 17, 2017, Claimant returned to the ER complaining of shortness of breath, abdominal pain and left testicle pain. CE: 67. After a physical evaluation, lab results and ultrasound, the diagnosis was a kidney stone. Although the ER physician was aware that Claimant had been recently hospitalized for his industrial injuries, there is little in the way of medical evidence to suggest that any physician has related either the need for diagnostic workup, or the eventual diagnosis of kidney stones, to the subject accident.

17. The health insurance claim form does not explain or provide a medical opinion relating Claimant's December 17th emergency room visit to the industrial accident. At best, the form has a check-box mark listing "workers compensation" as the insurance plan. The form also lists "other" as a responsible party, without any elaboration. This form does not meet the Claimant's burden of proving causation because it does not explain how the kidney stone is related to the Claimant's accident. Further, no other physician, including Claimant's own IME physician, related the kidney stone treatment to Claimant's industrial accident.

18. Further, the Commission recognizes that efforts to diagnose a claimant for the effects of his industrial accident may be considered required and reasonable, even if such diagnostic testing ultimately reveals an injury unrelated to the industrial accident. *See David Domka v. Ruan Transportation and Indemnity Insurance Company of North America and State of Idaho, Industrial Special Indemnity Fund*, 2014-024321 (Filed Feb. 2019). However, here the record lacks a persuasive medical opinion that Claimant's December 17th evaluation was undertaken out of concern that Claimant was suffering from an undiagnosed symptom or complication of his fall. While it would not be unreasonable to suppose that a relationship between the subject accident and Claimant's new symptoms might have been entertained by the evaluating physician, the evidence is insufficient to show that the December 17 evaluation was performed out of a concern that Claimant might have additional undiagnosed injuries or complications from the fall. To rule otherwise would require the Commission to make assumptions and rely on speculation. Claimant has not met his burden of proof for the treatment he received on December 17th.

19. Claimant seeks an award of $5,500 for future medical care. When Claimant was discharged from wound care, his physician wrote: "No follow up visit scheduled as patient is healed." CE:55. Claimant's treating physician released him with no referrals, follow-up, or ongoing medications prescribed.

20. Claimant's IME doctor, Dr. Olaveson, wrote: "It is reasonable that Kyle will require medical attention and even surgery during his lifetime as a result of the scarring that will tighten the adjacent tissues. $5,500" CE:147. Having found Claimant to have suffered a work-related injury, it follows that Claimant is entitled to not only past care related to the accident, but also to such future medical care as he may require pursuant to I.C. § 72-432. There is no medical testimony

that Claimant currently requires the care discussed by Dr. Olaveson. Nor does Dr. Olaveson's report allow the Commission to understand whether Claimant will require only "medical attention" in the future versus "surgery". Finally, even though Dr. Olaveson's treatment prognostications are vague, he inexplicably assigns a specific dollar value to the need for future care. We need not unravel this recommendation. It is sufficient to say that having established a compensable work injury, Claimant is entitled to such future medical care as may be payable under Idaho Code § 72-432. If his employer will not pay for such care if and when it is required, Claimant may pursue the matter with the Commission.

21. **TTD/TPD**. The medical records show that Claimant was off work from the date of the accident until January 2, 2018, when he was cleared for light duty work; there is no evidence Claimant was offered a light duty position. Claimant was therefore totally disabled from work from December 13, 2017 to January 9, 2018, a period of three weeks and six days. Claimant is entitled to total temporary disability benefits for this time frame. Claimant made $11 an hour, for an average weekly wage of $440. Idaho Code § 72-408(1) generally establishes Claimant's total temporary disability benefits at 67% of his average weekly wage, which equates to $294.80. However, Claimant's temporary disability benefits are subject to a 90% maximum and 45% minimum of the currently applicable average weekly state wage pursuant to Idaho Code § 72-409. The 45% average state wage minimum in 2017 was $327.60 and was $338.35 in 2018. For 2017, Claimant is entitled two weeks and five days at the 2017 rate, which is equivalent to $889.20. Claimant is entitled to one week and one day at the 2018 rate, which is equivalent to $387.19. Claimant's entitlement to TTDs is therefore $1,276.39.

22. **Permanent Impairment (PPI).** Claimant alleges entitlement to permanent partial impairment benefits. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss is considered stable at the time of evaluation. Idaho Code § 72-422. Dr. Olaveson rated Claimant at 4% whole person impairment according to the AMA Guides to Permanent Impairment, 6th Edition. Claimant is entitled to 4% PPI, which equals $8,008.[1]

23. **Permanent Partial Disability (PPD).** Claimant argues he is entitled to 4% PPD, in excess of his impairment based upon the restrictions imposed by Dr. Olaveson. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced Claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

24. Dr. Olaveson's restrictions are best summarized as follows: restrictive skin tightness in his chest, pins and needle sensations in his chest when braced, reduced range of motion in his leg, inability to work outside in the cold without his leg going numb, and inability to work long time frames with his right arm extended above his head. CE:147.

25. At the time of Dr. Olaveson's April 2020 examination, Claimant wrote that he worked as an operator/laborer for DL Beck in Rexburg, Idaho. CE:148. Claimant's attorney explained that Claimant earns approximately the same amount of money as he did at the time of injury. *See* Clt's Motion in Support of Default, p. 4. Claimant was 19 years old at the time of injury

[1] 4% of 500 weeks = 20. 400.40 was the PPI rate in 2017. 400.40 multiplied by 20 = $8,008.

and 22 years old at the time of this proceeding. It is unknown if Claimant is a high school graduate or if Claimant has any other relevant, non-medical vocational factors. The components of his pre-injury and post-injury labor markets are unknown. In support of his claim for an additional 4% disability over impairment, Claimant argues that based on Dr. Olaveson's restrictions "we have concluded that [claimant] has suffered at least an additional 4% disability in excess of impairment..." Clt's Motion in Support of Default, p. 5. Nothing else is offered in support of the claim for disability. The Commission is unable to conclude that Claimant has established disability over the PPI which we have awarded him.

26. **Attorney's Fees and Penalties.** Idaho Code § 72-210 provides:

> 72-210. 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.

Claimant has provided proof that Carl's Inc. was uninsured at the time of the accident and an attorney fee agreement entitling Claimant's attorney to a 10% of the total amount of his compensation, together with costs, if any, and reasonable attorney's fees. Claimant has proven his entitlement to $24,871.54 in medical care + $1,276.39 in TTDs + $8,008.00 in PPI = $34,155.93. Claimant is entitled to a 10% penalty on his compensation of $34,155.93, which totals $3,415.59. Claimant's attorneys requested 25% attorneys' fees on the compensation obtained. The Commission has discretion to fix a reasonable attorney fee award under the statute. The Commission is further guided in determining reasonableness by the cases of *Clark v. Sage*, 102 Idaho 261, 629 P.2d 657 (1981), and *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). Taking into consideration the factors set forth in the aforementioned cases, the

Commission finds that a 25% fee on the compensation obtained is reasonable. The amount of compensation obtained is $34,155.93; 25% of $34,155.93 is $8,538.98. Claimant's costs in the matter total $1,024.70. See CE:162-164.

27. Therefore, Claimant is entitled total compensation of $34,155.93; a 10% penalty for Employer's failure to insure, amounting to $3,415.59; attorneys' fees of $8,538.98; and costs of $1,024.70.

CONCLUSIONS OF LAW AND ORDER

1. Claimant was an employee of Carl's Inc. on December 13, 2017.

2. Claimant suffered an accident and injury in the course and scope of his employment on December 13, 2017.

3. Claimant's medical care, including his ambulance ride, ER visit, and wound care is all compensable medical care pursuant to Idaho Code § 72-432, totaling $24,871.54. Claimant is entitled to future medical care as may be required by Idaho Code § 72-432.

4. Claimant has not proven entitlement to medical care for his kidney stone.

5. Claimant is entitled to TTDs in the amount of $1,276.39.

6. Claimant is entitled to 4% permanent partial impairment (PPI), in the amount of $8,008.

7. Claimant has not proven his entitlement to permanent partial disability (PPD) in excess of impairment.

8. Claimant is entitled to a 10% penalty for Employer's failure to insure amounting to $3,415.59.

9. Claimant is entitled to reasonable attorneys' fees of $8,538.98 and costs of $1,024.70.

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

DATED this 5th day of August, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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