

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARA GLASBY,

Claimant,

v.

SUMHA, LLC, dba JIMMY JOHN'S,

Non-Insured Employer,

Defendants.

IC 2021-028628

ORDER

FILED

DEC 16 2022

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 \$10,347.00.
2. Claimant is entitled to recover such reasonable and necessary ongoing and future medical expenses as may be required by her physicians.
3. Claimant is entitled to recover \$1,034.70 as a penalty for Employers' failure to secure payment of compensation as required by the Idaho Workers' Compensation Act, pursuant to Idaho Code § 72-210.
4. Claimant is not entitled to an award of temporary disability benefits.
5. Claimant is entitled to recover reasonable costs and attorney fees, 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).

6. The Industrial Commission shall retain continuing jurisdiction over this matter.

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

DATED this 15th day of December, 2022.

INDUSTRIAL COMMISSION



Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2022, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail and Electronic Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARA GLASBY,

Claimant,

v.

SUMHA, LLC, dba JIMMY JOHN'S,

Non-Insured Employer,
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IC 2021-028628

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION (UPON
DEFAULT)**

FILED

DEC 16 2022

INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel. Michael J. Walker, of the firm Delay, Curran, Thompson, Pontarolo, and Walker, P.S., represented Claimant. Sumha LLC, dba Jimmy John's, a non-insured employer, did not appear and defaulted in answering the Complaint. Rather than undergo a hearing, Claimant chose to present default proof in writing. The matter came under advisement on November 23, 2022.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether and to what extent Claimant is entitled to medical care.
2. Whether Claimant is entitled to temporary disability benefits.
3. Whether and to what extent Employer is liable to Claimant for the penalties set forth in Idaho Code § 72-210, including the 10% penalty set forth in the statute, together with attorney fees and costs.
4. Whether the Industrial Commission should retain jurisdiction of this matter.

CONTENTIONS OF THE PARTIES

Claimant argues that she sustained injuries in the employment of Employer on October 23, 2021. She was employed as a delivery driver and dishwasher when the injury occurred.

Employer defaulted and thus presented no defense to Claimant's allegations.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Application for Default, Award of Benefits, Penalty, Costs and Fees;
3. Claimant's Brief in Support of Application for Default;
4. Affidavit of Michael J. Walker;
5. Affidavit of Mara Glasby; and
6. Exhibits A through H.

COURSE OF THE PROCEEDINGS

Claimant filed a workers compensation complaint with the Commission on March 7, 2022. The Commission sent Claimant and Employer a *pro se* packet on March 8, 2022. Although served with a copy of the complaint, Defendants did not file an answer or otherwise appear and defend this action prior to Default. Claimant filed a Motion for Default on October 5, 2022. The Referee entered an Order of Default on October 25, 2022. Claimant filed her Application for Default, with accompanying documents, on November 22, 2022.

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

FINDINGS OF FACT

1. **Employer.** At all relevant times, Defendants operated a retail food business/restaurant in Lewiston, Idaho. Claimant's Brief at 2.

2. Administrative notice is taken that, at all relevant times, Defendants failed to secure payment of compensation as required by the Idaho Workers' Compensation Act.

3. **Employment of Claimant.** On or about October 23, 2021, Employer employed Claimant as a delivery driver and dishwasher at Employer's Lewiston location. Claimant's Affid. at 1.

4. As of October 23, 2021, Claimant earned gross wages with Employer in the amount of \$500/per week, based upon a 6-hour workday, 5 days per week. *Id.*

5. **Industrial Accident.** Claimant slipped on a wet floor at Employer's premises on October 23, 2021. She was washing dishes when the fall occurred. Claimant fell awkwardly, hit the hard floor, and landed on her left arm/side. *Id.* at 1-2.

6. Immediately after the fall, Claimant felt pain in her back, legs, groin, and left arm/shoulder. *Id.* at 2. She reported the injury to her supervisor, however management informed Claimant that it did not carry worker's compensation insurance. *Id.* Employer's management refused to help Claimant file a worker's compensation claim. *Id.*

7. **Medical Care.** Claimant first sought treatment and evaluation at the Nimiipuu Health Clinic on October 26, 2021. *Id.*; Ex. B.

8. To date, Claimant has received billing from the Nimiipuu Health Clinic in the amount of \$7,673.00. Ex. C.

9. The providers at Nimiipuu Health Clinic took X-rays and referred Claimant to physical therapy. Claimant's Affid. at 3.

10. Claimant underwent physical therapy at Peak Physical Therapy to treat her industrial injury from June 6 through September 8, 2022. Claimant's Affid. at 3; Ex. D.

11. Peak Performance Physical Therapy billed Claimant \$2,674.00 for their services. Ex. E.

12. Due to ongoing symptoms in her left shoulder, Claimant underwent an MRI at St. Joseph Hospital in Lewiston, Idaho on June 7, 2022. Claimant's Affid. at 4; Ex. F.

13. St. Joseph's Hospital has not, to date, provided an invoice for the MRI services. Claimant's Affid. at 4.

14. Bret Paulson, PA-C, of Lewiston Orthopedics, evaluated Claimant on November 17, 2022. Mr. Paulson noted in pertinent part as follows:

The patient is a 50-year-old female who presents with complaints of catching, clicking or triggering, grinding and aching pain in the left shoulder that occurs intermittently. The onset was sudden with injury that occurred in 2021 when she slipped on water at her job and fell into the corner of the counter. The patient's symptoms are aggravated by reaching above the head and reaching behind the back. The patient's symptoms are relieved by rest. The symptoms are worse with activity.

Ex. G.

15. Mr. Paulson elected to treat Claimant's left shoulder with an injection and recommended that she follow-up with physical therapy. *Id.*

16. **Claimant's Work History Since the Accident.** The records provided by Claimant and her Affidavit show the following work history after her industrial accident:

Employer	Time Period	Wages
Jimmy John's	October 23, 2021 – January 8, 2022	\$500 per week
Unemployed	January 9, 2022 – March	\$0 wages

	30, 2022	
Nez Perce Tribe	March 31, 2022 – April 26, 2002	\$16.30 per hour, 40 hour per week
Unemployed	April 27, 2022 – July 10, 2022	\$0 wages
Alternate Nursing Services	July 11, 2022 – October 7, 2022	\$14 per hour, 38-hour work week
Unemployed	October 8 – October 17, 2022	\$0 wages
Sportsman’s Warehouse	October 18, 2022 – November 5, 2022	Unknown/part-time
Happy Day Eats	October 28, 2022 – present	\$5 per hour/part-time
Valley Medical	November 21, 2022 – present	\$15.50 per hour, full-time

Claimant’s Affid. at 6-9; Ex. H

17. Claimant alleges that she is not at MMI and has not been since the accident.

Claimant’s Affid. at 5.

18. Claimant has not provided any medical records in which a physician took her off work full or part-time due to her injury.

DISCUSSION AND FURTHER FINDINGS

19. 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).

20. **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.

21. 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 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).

22. 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).

23. This is a default case; Claimant has not provided the deposition testimony of a physician in connection with her proof. Nevertheless, Claimant has provided sufficient information in her affidavit testimony and the accompanying medical exhibits to show that the medical expenses she incurred while treating her industrial injury were both necessary and reasonable.

24. 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 \$10,347.00, which accounts for the billed services of Peak Physical Therapy and Nimiipuu Health.¹

25. Claimant is entitled to recover from Defendants such further amounts necessary to compensate her for ongoing and future medical care.

Temporary Disability Benefits. 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).

26. Although Claimant argues that she has been in a continuous state of disability, i.e., inability to work, she has not presented medical evidence in which any physicians have

¹ Claimant would be entitled to recovery of more itemized medical costs had she provided such bills and receipts for the record.

opined that she should be restricted from working due to the industrial accident. On the contrary, the record shows that, apart from some brief periods of unemployment, Claimant has worked continuously since the industrial accident.

27. Under the foregoing circumstances, Claimant is not eligible for temporary disability benefits from the date of the industrial accident through the date of her default proof submission. Claimant may be entitled to future temporary disability benefits if she can provide sufficient proof that she is or was in a period of recovery and disabled from working due to the industrial accident.

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 has retained counsel.

29. 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, \$10,347.00 = total compensation, $\$10,347.00 \times 10\% = \$1,034.70$. Claimant is therefore entitled to recover \$1,034.70 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.

30. Furthermore, Claimant is entitled to an award of costs and attorney fees. Claimant argues that she is entitled to recover a contingent attorney fee based upon the total amount of her claimed total compensation. *See*, Claimant's Brief at 10. 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).

31. **Retention of Jurisdiction.** Good cause exists for the Commission to retain jurisdiction 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. Furthermore, Claimant is free to claim additional medical costs and temporary disability benefits if appropriate.

32. For the foregoing reasons, the Commission should retain jurisdiction over this case beyond the applicable statute of limitations.

CONCLUSIONS OF LAW

1. Claimant is entitled to recover medical expenses in the total amount of \$10,347.00.

2. Claimant is entitled to recover such reasonable and necessary ongoing and future medical expenses as may be required by her physicians.

3. Claimant is entitled to recover \$1,034.70 as a penalty for Employers' failure to secure payment of compensation as required by the Idaho Workers' Compensation Act, pursuant to Idaho Code § 72-210.

4. Claimant is not entitled to an award of temporary disability benefits.

5. Claimant is entitled to recover reasonable costs and attorney fees, 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).

6. The Industrial Commission shall retain continuing jurisdiction over this matter.

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 12th day of December, 2022.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2022, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and Electronic mail upon each of the following:

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