BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FRANK CAMPBELL, Claimant, v. CALIFORNIA TANK LINES, INC., Employer, and HDI GLOBAL INSURANCE COMPANY, Surety, Defendants.	**IC 2018-011741** **ORDER** FILED MAY 15 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Sonnet Robinson submitted the record in the above-entitled matter, together with her 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 recommendation 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 was injured in the course and scope of employment on April 6, 2018 as alleged.

2. Claimant is entitled to attorney's fees for Defendants' unreasonable denial of his claim.

3. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of this Order, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, plus an affidavit in support thereof. In particular, the parties must discuss the factors set forth by the Idaho Supreme Court in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

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

DATED this 12th day of May, 2023.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May 2023, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail and by *E-mail transmission* upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FRANK CAMPBELL, Claimant, v. CALIFORNIA TANK LINES, INC., Employer, and HDI GLOBAL INSURANCE COMPANY, Surety, Defendants.	**IC 2018-011741** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED MAY 15 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson. A hearing was conducted on November 22, 2022. Claimant, Frank Campbell, was represented by Robert Beck of Idaho Falls. Nathan Gamel of Boise represented Defendants. The matter came under advisement on March 17, 2023 and is ready for decision.

ISSUES

1. Whether and to what extent Claimant suffered an injury arising out of and in the course of employment;
2. Whether Claimant is entitled to attorney's fees as a result of Defendants' denial.

CONTENTIONS OF THE PARTIES

Claimant contends that he was not the "aggressor" in the altercation/accident which is the result of this claim. Claimant argues Defendants have not presented any evidence that Claimant

was the aggressor and had no evidence he was the aggressor at the time of the July 2018 denial. Claimant argues that he is entitled to attorney's fees for Defendants' unreasonable denial of his claim.

Defendants reply Claimant was the aggressor because even though he did not throw the first punch, he willfully engaged in 'fight starting' conduct. Defendants maintain that the fight was personal and non-industrial, and it would be against public policy to allow workers compensation benefits in this scenario. Defendants maintain their denial was reasonable because their investigation continued after the initial denial, and they found further support for their denial.

Claimant responds Defendants had and still have no evidence Claimant was the aggressor. Claimant is entitled to attorney's fees for Defendants' unreasonable denial.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Joint exhibits[1] (JE) 1-11.

All outstanding objections are OVERRULED.

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

FINDINGS OF FACT

1. Claimant was fifty-four years old at the time of hearing and a resident of Blackfoot, Idaho. Tr. 11:5-7; IIC Legal File.

[1] Claimant's assertion that the Commission "has insisted that the parties submit joint exhibits" is contradicted by the record. Clt's Reply, p. 2. The Order Governing Preparation of Exhibits issued October 27, 2022 states that "Joint exhibits should be prepared whenever feasible" and then gives instructions on how to prepare exhibits if joint exhibits are not feasible. (Emphasis supplied). Regardless, Claimant is correct that joint exhibits do not amount to stipulations of fact.

2. Employer hired Claimant to drive truck in November of 2014. Tr. 13:6-9. Claimant hauled chemicals related to food production. *Id.* at 13:12-18. Claimant transported liquid loads from the Simplot facility regularly. *Id.* at 13:19-24.

3. On April 6, 2018, Claimant was on his usual route to the Simplot facility to pick up a load. Tr. 22:13-20. Claimant admitted he was having a bad day and felt impatient. *Id.* at 80:23-81:5. Claimant wrote a statement, dated the day of the accident, which was received by Surety on May 2, 2018. JE 5:11. Claimant's statement reads:

> Checked in at guard shack[.] Was informed that there were two trucks back in liquid plant waiting to load. I was told if I passed one truck on my way back there I could proceed to liquid plant to load PPA. I passed a phos [sic] truck while going in and knew I had room to park behind Matt Everland – the other driver picking up phos. acid. I got to Ammo 1 and there were 2 trucks parked in alleyway one being loaded one parked about 30' behind him. I proceeded across the tracks believing I could get around 2nd truck but my trlr [sic] wouldn't make it around 2nd truck's pup. I saw the driver of the 2nd truck walking down the stairs from Ammo 1 loading control room and motioned with my hands to move his truck fwd [sic] so that I could get around him. Driver looked like he ignored me and went about his business untarping trlrs [sic]. I then got out of my truck and asked driver if he could pull forward so that I could get around him. He then said "there is a truck ahead of me." I said "I see that there is a truck ahead of you, could you move up so that I can get around you? The driver then started saying something about he couldn't pull fwd again because of the truck that was least 30' ahead of him. Driver was getting more ignorant so I asked if he was a rookie and how long had been driving? He then grabbed the front of my jacket + sweatshirt and started pounding on my collar bone and pushing me backwards. I could see he was becoming more worked up every time he hit me so I side stepped and put him to the ground. I then went and found somebody to call back a supervisor and security. Supervisor Mel Parks and security officer Mario came to the scene. My left shoulder is sore from driver thumping on my collar bone as well as the extra force I applied on my side step to throw driver to the ground.

Id.

4. Claimant admitted at hearing to cussing and calling Mr. Garner a "fucking rookie." JE 5:12, 9:54; Tr. 33:20-34:7. Claimant was upset that Mr. Garner was not observing a professional courtesy. JE 9:55; Tr. 32:1-35:19. Claimant testified at the time of the altercation he was afraid of

getting his "ass whipped" by Mr. Garner, that he was he was just trying to shake Mr. Garner off in self-defense, and he had "no intention of hurting anybody or himself." *Id.* at 36:8-37:5. Claimant later elaborated: "I did not intend to get into a fight. Again, I'm at work, obviously. That would be like completely uncivilized. I don't know what frame of mind he was in or why he thought it was okay to start an altercation." Tr. 56:16-20.

5. Mr. Garner's written account is similar to Claimant's written account. Mr. Garner wrote:

> He started [to] honk[2] his horn and exited his truck to confront me. He proceed[ed] to tell me that I was in his way and [to] move up. I told him he was not supposed to go across [the] tracks until it was clear. He started swearing at me and insulting me and I told him to go sit in his tk [sic – truck] before he got his ass kicked. He got more verbal and in my face. I put my hands on his shirt to keep him away from me and he threw me to the ground.

JE 6:17.

6. No one else saw the altercation, the only witnesses are Claimant and Mr. Garner.[3] Mr. Garner did not testify at hearing.

7. Claimant went into the control room and reported he had been assaulted. JE 6:19. Claimant also called the Sherriff, who investigated. See JE 7. The officer's report is different from Claimant's and Mr. Garner's written statements in two respects. First, the officer wrote Claimant told him that Claimant had "done Judo for many years so I just swept his arms away and dropped Garner to the ground." JE 7:22. Second, Mr. Garner admitted that he (Mr. Garner) walked over and grabbed Claimant's shirt but reported that Claimant "went ballistic" and grabbed Mr. Garner's arms throwing him to the ground. *Id.*

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[2] Defendants' assertion that Claimant honked his horn despite knowing Mr. Garner was not in his truck finds no clear support in the record. See Tr. 84:24-85:25. 90:9-12; JE 9:49; "Like I said, after honking the horn, I realized he wasn't in the cab and he was coming down from the control room." Tr. 27:3-5.

[3] Defendants' assertion that Claimant "stared down" Mr. Garner finds no clear support in the record.

8. Claimant reported the injury and altercation to his Employer that day. JE 4:10. A first report of injury was prepared on May 1, 2018 and listed Claimant's accident as "physical altercation due to employee asking another individual to move his truck." *Id.*

9. Claimant's claim was accepted by letter on June 8, 2018 for an injury to Claimant's neck/shoulder. JE 3:6. Six weeks later Claimant's claim was denied by letter on July 16, 2018. JE 3:8-9. The examiner wrote that Claimant's claim was denied per Idaho Code § 72-208 because: "[o]ur investigation reveals that according to the statements received you were the aggressor in the altercation between you and Mr. Garner." *Id.*

10. On July 27, 2022, Christine Wilson was deposed. Ms. Wilson supervised Ms. Roepker at the time of the denial but did not recall anything about this case. Roepker Depo., 20:13-21:4; see JE 10.

11. On September 27, 2022, Vicky Roepker was deposed. Ms. Roepker was the claims adjustor when the claim was denied and signed all correspondence to Claimant. See JE 3, 11. Ms. Roepker no longer had access to the claim file in this case because a different third-party administrator now serviced the claim, but she was shown documents from the claim file over Zoom. Roepker Depo., 6:6-7:1; 19:10-20:12. Ms. Roepker did not have any recollection of this case specifically, but acknowledged it was her signature on all the letters. *Id.* at 8:23-13:4. Ms. Roepker did not recall any details of the investigation into the claim; she did not recall reviewing a police report or interviewing witnesses or what information she had at the time of the denial to indicate Claimant was the aggressor:

> Q: [By Mr. Beck] Other than these letters in this file, you can't think of any person that you talked to to gather information to reach any conclusion on the decision to deny this claim?
>
> A: Unless there's any witnesses noted in the claims file that I may have reached out to, that would be the only other thing I could think of, but honestly, I don't

recall it.

Id. at 16:18-25; see also 13:24-16:25.

12. Ms. Roepker noted that any denial would require management approval, so she would have worked with Ms. Wilson or another supervisor in denying the claim. *Id.* at 20:13-21:4.

13. **Credibility.** There are minor differences in Claimant's account of the altercation that do not have an impact on his overall credibility. Claimant's contemporaneous written statement is given more weight than his later recollections at hearing and at deposition. Claimant testified credibly.[4]

DISCUSSION

14. 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). A worker's compensation claimant has the burden of proving, by a preponderance of evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934 (1993). 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). 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).

[4] The Referee did not observe "aggression" or a display of "temper" from Claimant as described by Defendants in briefing, Claimant cussed and was frustrated with Defendants' questions. Def's Brief, p. 11-12, fn. 60.

15. **Idaho Code § 72-208(1).** Idaho Code § 72-208(1) provides: "No compensation shall be allowed to an employee for an injury proximately caused by the employee's willful intention to injure himself or injure another." This is an affirmative defense; the burden of proving willful intention rests with the employer. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2.d 1192 (1996).

16. Defendants' argument focuses on the meaning of willful. Defendants argue that Idaho Code § 72-208 applies to this situation because Claimant willfully provoked a fight which is functionally the same as a 'willful intent to injure' because fights result in injuries. Defendants argue the statute does not require intentional conduct to apply, but merely "willingness" or "purpose" to injure another and that the injuries were proximately caused by that willingness or purpose. Defendants cite to *Austin v. BioTech Nutrients*, IIC 2008-038504 (Issued March 26, 2018), which discussed "willful" in the context of Idaho Code § 72-604 ("willfully fails"), not Idaho Code § 72-208.

17. Defendants' argument that "willful intention to injure" does not mean intentional conduct meant to injure is unsupported by the plain language of the statute and the case law discussing Idaho Code § 72-208.

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

Stanley v. ISIF, 481 P.3d 731 (2021). The plain and ordinary meaning of "willful intention to injure" within the context of the statute is intentional conduct for the purpose of injuring. This

reading gives effect to all words of the statute and makes sense when reading the statutory provision as a whole. Defendants' interpretation focuses exclusively on the word "willful" and then interprets that word on the basis of cases that do not discuss Idaho Code § 72-208. In other words, Defendants have read a word in isolation and finessed it with case law to mean something other than its plain meaning.

18. This plain language reading of the statute is in line with the case law[5] as well. In *Seamans*, defendants denied an accident occurred because they claimed that claimant intentionally fell off a roof for the purpose of killing himself. *Seamans* at 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). In *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), the ISIF attempted to argue that Idaho Code § 72-208 prevented claimant from claiming disability or impairment related to a prior suicide attempt because her suicide attempt was intentional conduct. In *Whetzel v. Truckers Corp.*, IIC 1989-672247 (May 28, 1992), the claimant was denied benefits because he testified he did intend to hurt his co-combatant when he swung at him, in other words, intentional conduct. In *Berry v. Kona Grill*, IIC 2014-007634, defendants argued that the claimant intentionally punched a wall when claimant made a claim for benefits for his hand; in rejecting the claim, the referee observed "[e]ven if one were to find that [c]laimant intentionally struck a wall, it does not follow that he willfully intended to injure himself." Lastly, in *Cahala v. OK Tire Stores*, IIC 1984-476452 (Issued July 31, 1986), the claimant swung his fist at his co-employee, but testified he was not trying to hit his co-employee, merely trying to scare him; the Commission declined to apply Idaho Code § 72-208 as requested by defendants because claimant testified his intent was not to injure, but to scare.

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[5] Idaho courts have interpreted "willful intention" in a criminal law context similar to the meaning discussed here. See *State v. Crowe*, 135 Idaho 43, P.3d 1256 (Ct. App. 2000); *State v. Larson*, 158 Idaho 130, 344 P.3d 910 (Ct. App. 2014).

19. All these cases, but *Berry* and *Cahala* in particular, illustrate that the intentional conduct must be married with the purpose to injure for Idaho Code § 72-208(1) to apply. In *Berry* and in *Cahala*, merely intentional conduct (punching a wall and swinging a fist at someone) was not enough; intentional conduct married with the intent to injure, either themselves or another, was required to prove "willful intention to injure" according to the Commission.

20. *Larson's Workers' Compensation Law* also agrees:

> "The words "willful intent to injure" obviously contemplate behavior of greater deliberateness, gravity, and culpability than the sort of thing that has sometimes qualified as aggression… profanity, scuffling, shoving, rough handling, or other physical force not designed to inflict real injury do not satisfy [willful intent to injure.]"

Larsons's § 8.01.5.a. In sum, to avail themselves of the affirmative defense, Defendants must prove that Claimant's conduct was intentional, and his intent was to injure.

21. This case is markedly similar to the case of *Whetzel*, discussed *supra*. In that case, the claimant was a truck driver. While driving, claimant attempted to pass another truck, and according to him, the other truck driver (Kehm) kept speeding up so claimant could not pass and deliberately sprayed rocks at claimant's truck, breaking the front window. The claimant and Kehm were strangers. Claimant arrived at the same truck stop as Kehm and started yelling at and insulting Kehm. The confrontation continued for about five to ten minutes until Kehm and claimant stepped outside. Claimant hit Kehm first and claimant testified that when he struck Kehm, he intended to injure him. The Commission held claimant willfully intended to hurt Kehm within the meaning of Idaho Code § 72-208(1), and that claimant's injuries were caused by claimant's intentional actions: "[c]laimant's intent to injure Kehm was the proximate cause of the injuries [c]laimant sustained." *Id.* In this case, defendants met their burden of showing claimant intended to hurt another and claimant was denied benefits.

22. The facts of this case are readily distinguishable from *Whetzel*. At no point did Claimant testify he intended to hurt Mr. Garner; Claimant testified he had no intention of hurting anyone or himself. Claimant did not start the physical aspect of the confrontation. Claimant asked Mr. Garner to move his truck at least twice before losing his temper and yelling. Claimant was certainly unprofessional when he yelled at Mr. Garner and called him "a fucking rookie," but Claimant's behavior does not support the inference that he was trying to hurt Mr. Garner or himself. Claimant did not hit Mr. Garner first, did not fight back, and promptly ended the fight[6] when given the opportunity. When Mr. Garner was on the ground, Claimant did not continue the fight. Claimant immediately reported the altercation to Simplot, the police, and his Employer. Defendants have not met their burden of showing Claimant had a willful intention[7] to hurt himself or another.

23. **Accident/Injury.** This is an assault case. In Idaho, assault cases are generally divided into three classes:

> First, there are those assaults which are inherently related to the employment, such as assaults arising out of work disputes, and which generally result in award of compensation. Second, there are those assaults which are inherently personal and private in origin, which assaults arise from disputes imported by the employee from outside the sphere of employment, the only connection with the employment being the location at which the assault occurs. This class of assaults is generally considered as being noncompensable. The third classification … is the "neutral" assaults, wherein the cause of the assault can neither be assigned to the employment nor to the personal disputes with the employee. Neutral assaults include assaults by lunatics and completely unexplained assaults.

Mayo v. Safeway Stores, Inc., 93 Idaho 161, 457 P.2d 400 (1969).

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[6] Defendants' assertion that Claimant threw Garner to the ground "for the purpose of injuring him" finds no clear support in the record. Def's Brief, p. 22.

[7] Even assuming Defendants are correct regarding the legal standard, Defendants have not proven Claimant was trying to provoke a fight.

24. Defendants state that the first category does not apply because that classification generally applies to co-workers and "does not apply" here because Claimant's fight was with a total stranger. Def's Brief, p. 23. Defendants argue that this altercation falls under the second category of assault cases because it was caused by Claimant's temper and impatience, a cause personal and non-industrial in origin.

25. As noted in the quote from *Mayo*, the focus of the inquiry is whether the assault 'arose out of' work related cause or 'arose out of' a personal cause, not the identity of the combatants as asserted by Defendants. In *Garcia v. Simplot Meats*, IIC 1998-034630 (June 30, 1999), the claimant was attacked by a former co-worker's brother for insulting his sister's work ethic; however, because the dispute was related to work and not imported from outside the workplace, the injury was compensable despite only one of the combatants being employed with employer.

26. In *Cahala v. OK Tire Store*, 112 Idaho 1020, 739 P.2d 319 (1987), the employer denied benefits despite the fight being between coworkers, and the Commission and Supreme Court affirmed. Claimant and his co-worker, Kemp, had friction at work; Kemp regularly called claimant obscene names. On August 10, 1984, Kemp called claimant a child molester and claimant swung at Kemp, intending to scare him; Kemp tackled claimant and, as a result, claimant's leg was broken. Claimant filed for workers compensation benefits and the Commission denied his claim. The Commission found, and the Court agreed, that even though Kemp and claimant were coworkers, the fight itself was imported into the workplace and did not arise out of their work duties but was due to personal animosity between the two. *Id.* at 321, 1022.

27. This altercation arose out of a work dispute, not a personal dispute or neutral origin. Mr. Garner was a stranger to Claimant. Both Claimant and Mr. Garner claimed the other was not

following Simplot's rules: Claimant claimed Mr. Garner was not supposed to "double stack," i.e., park behind another truck getting a dry load, and Mr. Garner claimed Claimant was not supposed to try to go around the trucks and/or go across the tracks until it was clear. Claimant was trying to get Mr. Garner to move his truck so he could continue to do his job and get off the train tracks, and the conversation devolved into an argument and altercation. Here, Claimant, even according to Mr. Garner, was trying to get Mr. Garner to move his truck so Claimant could continue working. There is no support for the proposition that Claimant would have been in an altercation absent the work-related issue.

28. An injury is received 'in the course of' the employment when it comes while a workman is doing the duty which he is employed to perform. It arises 'out of' the employment when there is apparent to the rational mind a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Eriksen v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951).

29. Defendants argue that Claimant's injury is not compensable because Claimant's injury did not arise out of his employment. As noted above, in an assault case, an injury "arises out of" employment when the fight is work-related. Defendants argue that this did not arise out of employment because Claimant's "intention changed" from trying to get Mr. Garner to move his truck to trying to start a fight. As noted above, there is no evidence Claimant intended to start a fight. Defendants' argument that Claimant's injury was not "in the course of" employment because he was provoking a fight, which is not a work-related duty, fails for the same reason.

30. **Public Policy.** Defendants argue this injury should not be compensable because of public policy. Defendants' public policy argument relies on their rendition of the facts, which paint

Claimant as trying to start a fight and then claiming workers' compensation benefits when the fight injures him. Defendants have not proven Claimant was trying to start a fight.

31. **Attorney's Fees.** Claimant claims Defendants unreasonably denied this claim for benefits. Attorney fees are not granted as a matter of right under the Idaho Workers Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> 72-804. ATTORNEY'S FEES — PUNITIVE COSTS IN CERTAIN CASES. If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976). It is axiomatic that a surety has a duty to investigate a claim in order to make a well-founded decision regarding accepting or denying the same. *Akers v. Circle A Construction, Inc.*, IIC 1998-007887 (Issued May 26, 1999). Defendants' grounds for denying a claim must be reasonable both at the time of the denial and in hindsight. *Bostock v. GBR Restaurants*, IIC 2018-008125 (Issued November 9, 2020).

32. Defendants denied this claim by way of letter dated July 15, 2018. Defendants argue that Claimant's narrow focus on the investigation before the letter denying his claim is fatal to his claim for attorney's fees because Defendants' investigation continued past that denial and found further reasons to support that initial denial. Defendants also take issue with Claimant's phrasing

of this issue, namely whether Defendants have established they had "significant facts" or "sufficient evidence" to support Defendants' denial of the claim. Defendants are correct that this is not the legal standard, Claimant is responsible for proving every element of his claim, including attorney fees. However, Claimant is in the uniquely difficult position of proving a negative: Claimant is claiming that there was no investigation and that Defendants had no evidence that Claimant was the aggressor at the time of the July 2018 reversal and denial.

33. Defendants produced the claims file for Claimant through the course of discovery[8] and Ms. Roepker was examined regarding certain portions of that file. See IIC Legal File; Roepker Depo. Surety had Claimant's written statement by at least May 2, 2018 documenting that he had been in a fight. See JE 5:11. Claimant's claim was accepted via notice of claim status a month later on June 8, 2018 and denied six weeks later on July 16, 2018. JE 3:6, 8. In their letter, Defendants explicitly denied this claim due to "statements received" pursuant to their "investigation" which showed Claimant was the aggressor, but none of the exhibits admitted contain such statements (besides Claimant's) or otherwise document any kind of investigation that was relied upon to issue the denial.

34. The complete lack of documented investigation is troubling. Defendants have explained that this claim was transferred between third party administrators, which is why neither Ms. Roepker nor Ms. Wilson retained any access to the claims file at the time they were deposed, but Defendants have not claimed documents were lost. Claimant asserts that Surety had no evidence that Claimant was the aggressor when it reversed course and denied the claim and

[8] The claim file was subject to a motion to compel. Defendants had inadvertently mistyped Claimant's email in serving discovery responses but had provided the entire claims file by the time of Ms. Roepker's deposition. See IIC Legal File, Def's Response to Exclude Witnesses and Documents and Motion for Attorneys' Fees, p. 5; see also JE 11:98 and JE 10:86.

Defendants have produced no evidence of statements or other investigations which were considered by Surety at the time of denial suggesting that Claimant was the aggressor.

35. Defendants' framing also seems to admit this is the case. Defendants argue that Claimant's focus on July 2018 is fatal to his argument for attorney's fees, because **after** this timeframe, Defendants investigated and found "additional reasons" to maintain the denial. *See* Def's Responsive Brief, p. 14-16. As noted above, any denial must be reasonable at the time and in hindsight.[9]

36. Defendants have a duty to investigate a claim. Defendants accepted this claim after receiving a written statement from Claimant on May 2, 2018. There is no evidence that demonstrates what investigation Defendants undertook between claim acceptance in June of 2018 and when they reversed course and denied the claim in July of 2018. The record is silent regarding what "statements" prompted Surety's conclusion that Claimant was the aggressor. It is unreasonable for Defendants to assert they have statements, rely on those statements to deny an already accepted claim, and then fail to produce those statements. The fact that Defendants belatedly found "additional reasons" to deny the claim does not cure the initial unreasonable denial. Nor do Defendants offer an explanation about when or how these additional reasons formed a reasonable basis for denial; Defendants allude to legal considerations and additional support from Claimant's deposition and discovery responses without identifying what about that evidence supports that Claimant was the aggressor or that the denial was reasonable for other reasons.

[9] In *Salinas v. Bridgeview Estates*, 162 Idaho 91, 394 P.3d 793 (2017), the Commission determined that the claimant had failed to establish that she was entitled to the benefits she sought, but nevertheless awarded attorney fees to the claimant because of the "[s]urety's prolonged discontinuation of medical benefits without a reasonable ground." The Idaho Supreme Court reversed the award of attorney fees on appeal holding that the statute directs that "there must be payment [of compensation] that is justly due and owing to allow an award of attorney's fees, no matter how unreasonably an employer or surety acted." *Id.* at 93, 795. However, *Salinas* is distinguishable to the instant matter, because here, unlike the claimant in *Salinas*, Claimant has met his burden to demonstrate that he was injured in the course and scope of employment and is therefore entitled to compensation.

Claimant has proven by a preponderance of the evidence that Defendants denied this claim without a reasonable basis. Claimant is entitled to attorney's fees for Defendants' unreasonable denial of the claim.

37. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof, with appropriate elaboration on *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

CONCLUSIONS OF LAW

1. Claimant was injured in the course and scope of employment on April 6, 2018 as alleged;

2. Claimant is entitled to attorney's fees for Defendants' unreasonable denial of his claim.

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 26th day of April, 2023.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail and *E-mail transmission* upon each of the following:

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