6-30-2010

Knowlton v. Wood River Medical Center Appellant's Reply Brief Dckt. 37360

IN THE SUPREME COURT OF THE STATE OF IDAHO

LESIA KNOWLTON,	)	
	)	
Claimant – Appellant.	)	
	)	
v.	)	**Supreme Court No. 37360**
	)	
WOOD RIVER MEDICAL CENTER, Employer, and FREMONT COMPENSATION INSURANCE COMPANY, Surety, and IDAHO INSURANCE GUARANTY ASSOCIATION, Party of Interest,	)	
	)	
Defendants – Respondents.	)	

REPLY BRIEF OF CLAIMANT-APPELLANT

LESIA KNOWLTON

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF DAHO

R.D. MAYNARD, CHAIRMAN

Christ T. Troupis
TROUPIS LAW OFFICE, P.A.
1299 E. Iron Eagle, Ste 130
P.O. Box 2408
Eagle, Idaho 83616

R. Brad Masingill
27 W. Commercial Street
P.O. Box 467
Weiser, Idaho 83672

Attorneys for Claimant

Matthew O. Pappas
ANDERSON JULIAN & HULL, LLP
P.O. box 7426
Boise, Idaho 83707

Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INDUSTRIAL COMMISSION DECISIONS

STATUTES

RULES

ISSUES PRESENTED ON APPEAL

A. **IS THE COMMISSION'S FINDING, THAT LESIA KNOWLTON'S INJURIES WERE MORE LIKELY THE RESULT OF PRE-EXISTING GERD OR ASTHMA THAN THE INHALATION EXPOSURE SHE EXPERIENCED ON SEPTEMBER 12, 2000, SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE?**

B. **IF THE COMMISSION'S FINDING WAS IN ERROR, WAS LESIA KNOWLTON ENTITLED TO AN AWARD OF ATTORNEYS FEES BECAUSE THE CLAIM WAS CONTESTED WITHOUT REASONABLE GROUNDS?**

C. **SHOULD THIS COURT AWARD COSTS AND ATTORNEY'S FEES ON APPEAL TO CLAIMANT?**

CROSS-APPELLANT'S ISSUES PRESENTED ON APPEAL

A. **DID THE COMMISSION ERR IN ITS DENIAL OF DEFENDANTS' MOTION TO STRIKE CLAIMANT'S POST HEARING BRIEF**

B. **WHETHER THE COMMISSION HAS JURISDICTION OVER THE IDAHO INSURANCE GUARANTY ASSOCIATION**

C. **WHETHER THE IIGA IS EXEMPT FROM AN AWARD OF ATTORNEY FEES BY THE COMMISSION**

ARGUMENT

I

THE COMMISSION'S FINDING, THAT LESIA KNOWLTON'S INJURIES WERE MORE LIKELY THE RESULT OF PRE-EXISTING GERD OR ASTHMA THAN THE INHALATION EXPOSURE SHE EXPERIENCED ON SEPTEMBER 12, 2000, WAS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

In her Opening Brief, Lesia Knowlton described the uncontroverted facts submitted to the Referee establishing: (1) her exposure to chemical fumes, corroborated by defense witnesses, (2) the immediate onset of symptoms, (3) medical evidence excluding pre-existing asthma, pre-existing GERD, and allergies to account for her symptoms following the exposure, (4) the RADS diagnosis confirmed by three (3) treating physicians, (5) further confirmation of the RADS diagnosis by eleven (11) Methacholine Challenge Tests, (6) proof that Ms. Knowlton met all of the criteria for a RADS diagnosis, and (7) corroborating testimony of her exposure, and prior and subsequent condition by two (2) defense witnesses and sixteen (16) witnesses called by the Claimant that the Referee admitted gave credible testimony. The Claimant also set out numerous deficiencies in the testimony of defense experts, Dr. Stephen Munday and Dr. Craig Beaver, including reliance on facts not supported in the record.

The Appellant's Opening Brief set out uncontroverted facts, including admissions by defense experts, which established the Claimant's case. The Respondent/Cross-Appellants' brief does not contradict or refute those facts. This Court discussed the treatment of uncontroverted facts by the Industrial Commission in *Pierstorff v. Gray's Auto Shop,* 58 Idaho 438, 447, 74 P.2d 171, 175 (1937) cited by Justice Bistline in dissent

in *Neufeld v. Browning Ferris Industries,* 109 Idaho 899, 712 P.2d 600 (1985). The Court in *Pierstorff* declared:

> "The rule applicable to all witnesses, whether parties or interested in the event of an action, is, that either a board, court, or jury must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable or rendered so by facts and circumstances disclosed at the hearing or trial." *Pierstorff at 447, Neufeld at 904.*
>
> As Justice Bistline noted in *Neufeld, supra, at 907:*
>
> "In Wynn v. J.R. Simplot, 105 Idaho 102, 103, 666 P.2d 629, 630 (1983), this Court in a 4-1 decision reversed the Industrial Commission, stating: "The uncontradicted evidence is contrary to the Industrial Commission's finding that claimant's symptoms were not caused by a ruptured disc." Because the Commission made findings inconsistent with and unsubstantiated by uncontroverted evidence, this Court reversed its denial of benefits to the claimant."

The Claimant will rely upon her Opening Brief with respect to the evidence, legal analysis and factual argument of these issues. This brief will therefore address the Respondent/Cross-Appellants' Additional Issues raised on appeal.

II

THE COMMISSION'S DENIAL OF DEFENDANT'S MOTION TO STRIKE CLAIMANT'S POST HEARING BRIEF WAS NOT ERROR

The Defendants argue that J.R.P. 11(A) which states that "no brief in excess of 30 pages, exclusive of any addendum or exhibit, shall be filed without the Commission's prior approval," limits the Claimant's opening and reply brief to a total of 30 pages, taken together. The Defendants argue that the Rule is clear and unambiguous in this regard, and therefore the Referee erred by denying its' motion to strike Ms. Knowlton's Post-Hearing Reply Brief. In her objection to the Defendant's motion, Ms. Knowlton correctly pointed out that the Rule refers to a "brief," not "briefs" and the Rule specifically allowed the Claimant to file two briefs, an opening brief and a reply brief.

The word "brief", not "briefs", is used in explaining the allowed pages. The rule states in pertinent part: "No *brief* in excess of 30 pages.....". Under the Defendant's construction, the rule would not limit each "brief" to 30 pages, it would limit all *briefs* to 30 pages. The Defendant's interpretation could also be construed that all briefing, Defendants' and Claimants, is limited to 30 pages. As such, the claimant's 30 page brief would preclude any response by the Defendants because all the "briefing" was then completed.

The Defendants claim that the Rule is clear and unambiguous, but then resort to the use of the "Comment" as a means of construction of the rule. This presupposes that the rule is ambiguous and therefore must be interpreted by reference to additional information. In fact, the Rule is not ambiguous, but only becomes ambiguous when the Defendant attempts to use the "Comment" to supplement it. The Comment is not intended to be a method of contradicting the clear wording of the rule, but to advise the claimant and Defendant to avoid duplication and redundancy in their arguments.

Moreover, the words in the Comment i.e. "Subsection A limits briefing to 30 pages" is not consistent with the Defendants' tortuous construction. The word briefing is both "singular" and "plural" as used in the Comment. In other words, the word *"briefing"* can mean the claimant's briefing (either the initial brief or the reply brief, or both). It can mean the Defendant's briefing (Defendant's only brief). It can refer to all of the briefs, both Claimant and Defendant. To torture the words to support a conclusion that it must mean the claimant is limited to only a *total of* 30 pages for both of its briefs, renders the word "reply" (as used in the rule to describe the right of each party to respond to the others brief) meaningless. The Defendants' construction would allow the claimant

to put nothing in its initial brief, leaving the Defendant with nothing to "reply" to. The Rule intended to have the claimant fully set forth its case, the Defendant to attempt to rebut the same, and for the claimant to reply to the Defendant's attempted rebuttal. Defendant's construction would emasculate the intention of the words "reply" when referring to the parties' briefing.

These Defendants made these same arguments in *Marlene Griffith v. Firstbank Northwest, Fremont Compensation, and Idaho Insurance Guaranty Association,* I.C. 1999-031588, decided by the Industrial Commission on June 3, 2010. In *Griffith,* these Defendants presented a motion to Strike Claimant's Post-Hearing Reply Brief, identical to the one filed in this case. The Referee denied the Defendants' Motion, stating:

> "Defendants' Motion/Memorandum to Strike Claimant's Post-Hearing Reply Brief is denied. J.R.P. 11(A) limits each individual brief to 30 pages, absent prior Commission approval. Thus, for purposes of J.R.P. 11, the length of Claimant's 10-page reply brief is considered separately from that of Claimant's 30-page opening brief. Claimants are allowed more briefing opportunity than defendants because claimants bear the burden of proof....Defendants' Motion/Memorandum to Strike Claimant's Post-Hearing Reply Brief is denied." Id at 3-4.

The Industrial Commission adopted the Referee's findings in its Order. The decision by this lower tribunal is not binding on this Court, and does not prevent the Defendants from raising the same issue here on appeal. But the analysis of the Referee and Order of the Commission demonstrate that if the Rule is in fact clear and unambiguous, as argued by the Defendants, then it clearly and unambiguously does not support the Defendants' argument.

In addition to the foregoing, the Defendants have also failed to present any evidence or even made an argument that they were somehow prejudiced by reason of the alleged error of the Referee. They prevailed before the Industrial Commission, and

neither the Findings of Fact, nor the Commission's Order indicate that the length or number of the briefs submitted affected the decision in any respect. I.R.C.P. Rule 61 states that:

> "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

No error was made by the Referee in denying the Defendants' Motion to Strike. But even if there was, it was harmless error and therefore should be disregarded by this Court.

III

THE COMMISSION HAS JURISDICTION OVER THE IDAHO INSURANCE GUARANTY ASSOCIATION

The Defendant Idaho Insurance Guaranty Association (IIGA) makes the argument that: "while the Commission certainly has the authority to establish the amount of any such benefits, it lacks the authority to require the Association to make payment therefor." Resp. Brief, p. 40. This Defendant also contends that "the issue of whether Claimant has exhausted all claims under any other policies or sources of reimbursement (such as Medicare) arises under the Act, not the worker's compensation statutes, and the Commission therefore lacks jurisdiction to assess liability to the Association for any underlying expenses." Resp. Brief, p. 43. These contentions are not supported by Idaho law.

As the cornerstone of its argument, the IIGA cites *Bantz v. Minnesota Insurance Guaranty Association,* 124 Idaho 780, 864 P.2d 618 (1993). That case involved an out of state Insurance Guaranty Association. In *Bantz*, the Court adopted the Minnesota Insurance Guaranty Association's (MIGA) argument that an Idaho Court did not have

jurisdiction to determine whether a claim was covered by MIGA because of the applicability of Minnesota law specific to that issue. The Idaho Supreme Court stated:

> "...Minnesota Statutes §60C.10 [which] provides that 'the board shall determine whether claims submitted for payment are covered claims.' Other provisions in the Minnesota Code provide for an appeal if the boar rejects a claim. The Minnesota Supreme Court has held that unless the statutory procedure for submitting claims is followed, MIGA is not liable to pay the claim...In this case, Bantz has not submitted her claims to the board." Id at 787.

The IIGA relies on this reasoning even though the Idaho Insurance Guaranty Act does not include the statutory provision found in the Minnesota Act. In Idaho, the board is not tasked with the responsibility to "determine whether claims submitted for payment are covered claims." Instead, a "covered claim" is statutorily defined under Idaho law by I.C. §41-3605(7) which states, in pertinent part:

> "'Covered claim' means an unpaid claim, including one for unearned premiums submitted by a claimant, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this act applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this act."

This important statutory difference between the Idaho Insurance Guaranty Act and the Minnesota Insurance Guaranty Act invalidates the IIGA's argument. Moreover, this interpretation of the law is consistent with the Industrial Commission's Findings and Conclusions of Law in the *Griffith* case cited above, in which it noted:

> "45. Alleged statutory limitations on the Association's liability. Claimant correctly asserts that Idaho Code §41-3608(1)(a)(i) requires the Association to pay: "The full amount of a covered claim for benefits under a worker's compensation insurance coverage." However, the extent of a covered claim is statutorily defined. Defendants argue that Idaho Code §41-3605 legislatively exempts the Association from liability for any amount due any other insurer, such as Claimant's private health insurer....
>
> 46. Defendants' assertion ignores one of the tenets of St. Alphonsus Regional Medical Center v. Edmundson, 130 Idaho 108, 937 P.2d 420 (1997), that Idaho Code §72-432(1) does not require direct payment to a health care provider. "The Commission awarded benefits to the injured worker, not payment

to the provider." Edmundson at 111, 937 P.2d at 423. In the present case, Claimant's private health insurer is not a party in this proceeding. Claimant – not Claimant's health care providers or private health insurer – is entitled to payment of medical benefits for medical expenses resulting from her industrial accident. Thus the provisions of Idaho Code §41-3605(7) do not reduce Defendants' obligations for medical benefits otherwise due Claimant." Id at 16-17.

The IIGA also argues that Idaho Code §41-3612 requires Ms. Knowlton to exhaust her rights under other insurance policies that cover her medical bills. But this argument is presented without evidence and only as a hypothetical. While the record shows that Ms. Knowlton qualified for Social Security Disability, there is no evidence that her medical bills were or are being covered by any third party insurer. Nor does the IIGA cite any evidence that Ms. Knowlton's medical bills have been or will be covered by other medical insurance. The IIGA could have presented evidence to the Referee on the subrogation issue prior to submitting the case for decision. As the Court noted in *Idaho State Insurance Fund v. Van Tine,* 132 Idaho 902, 980 P.2d 556 (1999):

> "Pursuant to I.C. § 72-201 and § 72-707, it is clear that the legislature intended, in order for the worker's compensation law to achieve its purpose of providing sure and certain relief for injured workers and their families, that all claims, issues and civil actions relating in any manner to the injury of a worker, whether procedural or substantive, be decided under the worker's compensation act by the Commission. This would also include subrogation issues, I.C. § 72-223(3)..."

The IIGA also made this argument to the Industrial Commission in *Griffith,* which pointed out that such medical expenses are typically excluded from private health insurance policies.

> "47. Defendants also assert that Claimant must exhaust coverage under any other applicable insurance policy, including her private health insurance policy, and that the Association's liability is reduced by that amount. Defendants rely upon Idaho Code §41-3612...
>
> 48. Defendants' assertion ignores the fact that to the extent Claimant's medical expenses are the result of her industrial accident, she may very well have no viable claim for such expenses under her private health insurance

coverage...Treatment for work-related injuries is commonly excluded under private health insurance policies." Id at 18.

IV

THE ASSOCIATION IS NOT EXEMPT FROM AN AWARD OF ATTORNEYS FEES BY THE COMMISSION

Ms. Knowlton has requested an award of attorneys fees and costs for her representation before the Commission at all stages of this proceeding under *Idaho Code § 72-804.* The Idaho Insurance Guaranty Association argues that Idaho Code §41-3605(7) bars a claim for attorneys fees because it provides that a "covered claim" shall not include any amount awarded as "punitive or exemplary damages." The Defendant contends that "The Worker's Compensation Act specifically designates attorney fees as "punitive costs," which was seemingly affirmed by this Court in *Idaho State Insurance Fund v. Van Tine,* 132 Idaho 902, 980 P.2d 556 (1999)." Resp. Brief, p. 48

Contrary to the Defendant's claim, attorney fees awarded under the Worker's Compensation Act are not "punitive costs." In *Van Tine, supra,* the Court did not refer to 'attorney fees' as 'punitive costs,' but listed them separately.

> "We believe that the legislature did not intend for a worker to be able to bring a bad faith tort action against his employer's surety in courts of general jurisdiction, but rather that a worker could receive attorney fees and sometimes punitive costs if the employer or surety acts unreasonably." Id at 909

As with all of the other arguments made by the Idaho Insurance Guaranty Association in this case, this argument as well was made to and rejected by the Industrial Commission in the *Griffith* case. The Commission provided the following legal analysis to support its decision:

> "...Idaho Code §6-1601(9) provides: "Punitive damages' means damages awarded to a claimant, over and above what will compensate the claimant for

actual personal injury and property damage, to serve the public policies of punishing a defendant for outrageous conduct an of deterring future like conduct."

93. It is noteworthy that none of the terms "damages," "punitive damages," or "exemplary damages" appear in Idaho Code §72-804. "An award of attorney fees in workers' compensation cases must be deemed compensation to the injured employee and not as a penalty against the employer or surety." Dennis v. School District No. 91, 135 Idaho 94, 98, 15 P.3d 329, 333 (2000), citing Mayo v. Safeway Stores, Inc., 93 Idaho 161, 457 P.2d 400 (1969). Idaho Code §41-3605(7) does not exempt the Association from Idaho Code §72-804.

94. The question remains whether the Association qualifies as a "surety" pursuant to Idaho Code §72-804. Idaho Code §41-3608(1)(c) provides that the Association shall:
(c) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent including, but not limited to, the right to pursue and retain salvage and subrogation recoverable on paid covered claim obligations."

95. Thus the Association is deemed Claimant's insurer for purposes of Idaho Code §72-804 and is not exempt from an award of attorney fees for unreasonable conduct." Id at 34-35.

V

LESIA KNOWLTON SHOULD BE AWARDED HER ATTORNEY'S FEES ON APPEAL

Ms. Knowlton has requested an award of her attorneys fees pursuant to Idaho Appellate Rule 41 and on the grounds that the employer and surety have contested and refused to pay Ms. Knowlton's claim without reasonable grounds pursuant to *Idaho Code § 72-804.* In its cross-appeal, the Defendant Idaho Insurance Guaranty Association has done nothing more than rehash all of the same arguments that were made in its defense of the *Griffith* case, and rejected by the Industrial Commission in its written decision on June 3, 2010. The *Griffith* case, decided by a lower tribunal, is not binding precedent upon this Court. However, it is persuasive authority and the legal analysis adopted by the Industrial Commission in that case is sound and based upon existing Idaho Supreme

Court case precedent. When the Respondent/Cross-Appellant's brief was filed, this Defendant was certainly aware, not only of the similarity of the arguments, but of the recent adverse decision in the *Griffith* case on the identical issues, including its reasoning and citation to binding precedent, which should have guided its submission here. At the very least, the Defendant should have attempted to distinguish the Idaho Supreme Court cases cited by the Industrial Commission in support of its decision.

VI

CONCLUSION

Appellant-Claimant prays that this Court reverse the decision of the Commission and remand the case to the Commission accordingly. She also requests an order awarding attorney's fees against the Respondents for unreasonably denying workers' compensation at every stage of the proceedings, including this appeal

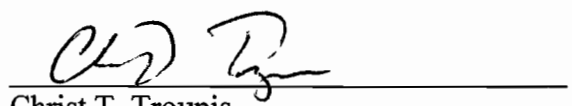
RESPECTFULLY SUBMITTED this 30th day of June, 2010.

Christ T. Troupis
Attorney for Appellant-Claimant

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2010, two (2) copies of the foregoing document was served by U.S. Mail, first class postage prepaid, upon:

Matthew O. Pappas
ANDERSON JULIAN & HULL, LLP
PO Box 7426
Boise, ID 83707



Christ T. Troupis