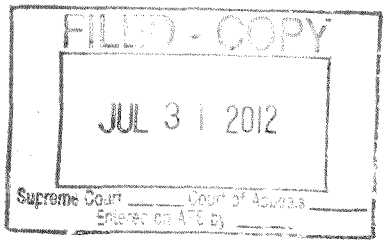
7-31-2012

Izaguirre v. R & L Carriers Shared Services Appellant's Reply Brief Dckt. 39750

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

RUBIO IZAGUIRRE,	)	
	)	
Claimant/Appellant,	)	**SUPREME COURT NO. 39750-2012**
	)	
v.	)	
	)	
R&L CARRIERS SHARED SERVICES, LLC.,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE CO.,	)	
	)	
Surety,	)	
	)	
Defendants/ Respondents.	)	
	)	



APPELLANT'S REPLY BRIEF

Appeal from the Industrial Commission, State of Idaho

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

COMES NOW, Appellant, Rubio Izaguirre, in Reply to the arguments made by Respondents in their brief filed in this matter on the 10th day of July, 2012.

JURISDICTIONAL ARGUMENT

Respondents make the argument that the Order of Industrial Commission appealed from herein is not a final Order and that the Appeal should therefore be dismissed. The Respondents cite to *Hartman v. Double L Manufacturing*, 141 Idaho 456, 457, 111 P.3d 141, 142 (2005) and *The Department of Employment v. Hopper*, 126 Idaho 144, 879 P.2d 1077 (1994).

The problem with the *Hartman* case, cited by Respondents in support of its argument, is that the *Hartman* case is one in which the Industrial Commission "reserved jurisdiction" to make additional findings with regard to the topic it had decided. In that case, the employee Fritz Hartman brought a case against the Industrial Special Indemnity Fund. In its hearing, the Industrial Commission heard testimony and concluded that Mr. Hartman had suffered an injury at work on March 16, 1999, and that he was totally disabled. However, the Industrial Commission could not decide from the record the extent of the liability of the Defendant ISIF and therefore retained jurisdiction to allow the parties to present additional evidence to establish the extent of liability of the Defendant ISIF.

When the ISIF appealed, the Court noted that because the Industrial Commission had retained jurisdiction over the extent to which the ISIF was liable to the Claimant, the Order was not final and appealable.

This Court noted that when the Industrial Commission makes a decision about compensability but fails to make a decision about the extent to which a Claimant may or may not be entitled to benefits, and retains jurisdiction to make that decision, the retention of jurisdiction indicates that there is neither a final determination of the case nor a final permanent award to the

Claimant. In its decision, the Court cited to a number of cases all of which involved the retention of jurisdiction by the Industrial Commission to award benefits after initial determinations had been made regarding compensability.

The Appellant would note that this line of authority does not apply to the instant appeal. The Industrial Commission herein made a final determination about the extent of the subrogation rights possessed by Respondent and set forth all of its findings with regard to the exact monetary extent of these subrogation rights. (*See*, R. pp. 114-116, ¶¶ 60-64). As to these issues, the Industrial Commission certified that pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated. (*See*, R. p. 117).

The Appellant contends that this Court has heard appeals many times over Industrial Commission cases where Industrial Commission rulings make full and final decisions as to some issues but left others for later hearing and decision. Bifurcation of issues before the Industrial Commission has long been recognized and does not prevent an appeal from the issues decided as long as the Industrial Commission makes all findings necessary with regard to the issues actually heard and adjudicated.

For instance in *VerDene Page v. McCain Foods,* 141 Idaho 342, 109 P.3d 1084 (2005), the Court noted that the Claimant's case had been dismissed by the Industrial Commission based upon findings that the Claimant had not given proper notice and that the Claimant had not suffered an accident under the Idaho Worker's Compensation law. The Industrial Commission had made full and final findings as to these two issues and thereafter the Claimant appealed.

After discussing the evidence at length, this Court reversed and remanded to the Industrial Commission noting that the Industrial Commission had additional issues to address.

After additional findings of fact and conclusions of law were made by the Industrial Commission, the Claimant made a motion to present additional evidence and this was denied. Filing yet another appeal, Claimant Page claimed that she should have been awarded additional benefits and that the failure of the Industrial Commission to accept additional evidence was in error. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). The Court herein agreed with Page and found that the Industrial Commission had failed to act when presented with evidence of a manifest injustice and noted that additional evidence should have been received by the Industrial Commission prior to its decision. Again, the Supreme Court remanded the case to the Industrial Commission for the consideration of additional evidence, finding that further proceedings were necessary to fully and finally adjudicate the Claimant's contentions and claims.

The above-cited case is only one of many cases wherein the Industrial Commission has bifurcated issues and appeals have been taken from the bifurcated decisions as long as the Industrial Commission decision contained full and final decisions and findings as to those issues actually adjudicated.

Appellant contends that the Industrial Commission in this case made full and final decisions as to the issues actually adjudicated and the decision herein has all the findings necessary to classify those issues as fully decided. The Industrial Commission did not retain jurisdiction over the issues it had adjudicated but bifurcated the issues actually presented at the request of the parties.

Because these issues are legally important and are sufficient in of and themselves and control much of the future rights of the parties, this appeal is appropriate and should proceed.

CONTRACTUAL INTERPRETATION

Defendants contend that the settlement agreement achieved in this case between the Claimant and the third-party should be interpreted to require Appellant to reimburse the Respondents as they request as a separate and independent basis. The Respondents argue that they are a third-party beneficiaries on the contract and that the contract entitles them to the entirety of the settlement made by the Appellant.

It should be remembered that this argument was not made at the Industrial Commission. The Industrial Commission was not asked to interpret this contract nor was it asked to determine the contractual obligation to the parties as it relates to the issue presented.

Indeed, had the Industrial Commission been asked to interpret this contract, and make a decision about whether or not the contract itself required the result which Respondents request, the Industrial Commission would rightly have declined to exercise its jurisdiction in this regard. Clearly, the Industrial Commission only has jurisdiction to consider questions arising under the Worker's Compensation laws of the State. *See*, *Williams v. Blue Cross of Idaho*, 151 Idaho 51, 260 P.3d 1186 (2011); *Van Tine v. Idaho State Insurance Fund*, 126 Idaho 688, 889 P.2d 717 (1994); *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 106 P.3d 455 (2005).

Because the Respondents request for a purely contractual ruling on its request for relief herein is beyond the jurisdiction of the Industrial Commission and because this issue was not raised below, the Court herein should not entertain it now.

STATUTORY CONSTRUCTION OF § 72-223(3)

As noted in Appellant's Opening Brief, the starting point for the argument in this case comes from the language contained in Idaho Code § 72-223(3), the statute which creates a subrogation right in Respondents favor.

Respondents have argued that the statute contains an express limit on their subrogation right. However, Respondents argue that the limit is not one which applies to the type of benefits from which they may obtain their subrogation rights, but only to the amount of their subrogation right.

Curiously, the statute does not say this nor does it make any implication in this regard of any kind. Appellant would note that the statute contains a limitation on the Defendants subrogation right which limits the Defendants right of subrogation to the extent of the Defendant's obligation for compensation liability.

As Appellant has argued previously, all the terms of this limitation are very carefully and completely defined in Title 72 of the Idaho Code. The term "compensation" is defined in all of its several meanings. These definitions define an obligation both as to type and as to amount. "Compensation" includes medical expenses which may be small and which may be large. "Compensation" includes time loss benefits which may be miniscule or may be substantial in nature. "Compensation" is defined as permanent impairment and permanent disability benefits. Again these range from almost nil to benefits which may last the lifetime of the Claimant. Nowhere within the definitions applicable to this term does any limitation as to type appear.

Clearly, if the Legislature had intended a limited meaning when they use the words "compensation liability," the Appellant contends that this should have been spelled out completely. Because there is no language which limits the compensation liability term to

amount and not to type, Appellant contends that no such limitation should be implied or read into the statute by this Court. This limitation as to the term "compensation liability" should come from the Legislature, and not from this Court.

Respondents attempt to bolster their argument by citing to Idaho Code § 72-223(2) which allows an employer or its surety to participate in or bring an action against the negligent third-party. Respondents also argue the Idaho Code § 72-223(4) supports their argument and means that there is no limitation on their right of subrogated recovery.

Appellant would respond that neither Idaho Code § 72-223(2) or Idaho Code § 72-223(4) bestow the right of subrogation upon the Respondent. These subsections are part of the comprehensive framework which allows a surety to proceed as against a negligent third-party and which require the Respondent and like sureties to pay an attorney's fee from a third-party recovery obtained by an injured employee. However, they do not particularly assist this Court in deciding the issue at hand. Appellant therefore contends that reference to these statutes is not particularly helpful in deciding the issue presented.

Appellant continues to contend that as a matter of statutory construction, the limitation language contained in Idaho Code § 72-223(3) limits the Respondents recovery both as to the type of benefits which it has paid and as to the amount of benefits which it has paid out. That is to say, the plain language of Idaho Code § 72-223(3) limits a surety from recovering against damages for which it did not insure. Any other interpretation of the statute either assumes more than the language implies or rewrites the statute in an impermissible manner.

THE *STRUHS* CASE

As expected, the Respondents have made quite an argument about the impact of the case of *Struhs v. Protection Technologies, Inc.,* 133 Idaho 715, 992 P.2d 164 (1999). The Industrial

Commission ruled that because the *Struhs* court did not remand the case to the Industrial Commission for additional findings, this means, presumably, that the Supreme Court agreed that all of the recovery obtained by *Struhs* in his third-party case was subject to the lien of the worker's compensation surety.

As the Appellant and Amicus Curia have argued, the Industrial Commission is thereby basing its holding in this case upon a presumption or an assumption about what the Court herein meant when it failed to remand the case to the Industrial Commission. Appellant contends that despite the vigorous argument of Respondents in this matter, a case of first of impression should not be based upon an assumption or a presumption about what this Court meant or did not mean in its decision to remand or not to remand the particular case at issue.

It is clear that the *Struhs* court held, in a case of first impression, that a Claimant and a third-party cannot bind a workers' compensation surety without their participation. This is the only legal holding of the case that is pertinent herein.

The parties herein do not dispute this ruling and, indeed, this is the reason that Appellant herein requested a hearing before the Industrial Commission and invited the participation of the Respondent. The parties were both afforded an opportunity to present evidence as to the proper allocation of the third-party settlement obtained by the Appellant and presented the Industrial Commission with sufficient evidence upon which to base such an allocation. This proceeding offered both parties full and fair opportunity to present evidence on this critical issue and the parties joined in requesting that the Industrial Commission make special factual findings allocating the settlement made by the Appellant into appropriate categories so that legal decisions could be made on the basis of those findings.

The Court in *Struhs*, *supra*, was never presented with any request for an allocation nor was the Industrial Commission below asked to allocate the settlement made by the Claimant as against the third-party. In that case, it was apparent that the Claimant had improperly attempted to make that allocation without the participation of the workers' compensation surety and this Court found that that was indeed improper and not binding on the workers' compensation surety.

It seems clear that the issue of allocation was not presented to the Industrial Commission below and because the Supreme Court was not asked to engage in any such allocation, the decision of the Supreme Court not to remand was simply a matter of procedure, not precedent.

Certainly, the Supreme Court is not bound to anticipate issues not raised by the parties in this manner and especially not issues of first impression which were neither argued, briefed or raised by either of the parties. For the Industrial Commission to base its decision upon such a situation is unsound, unwise and unwarranted.

CASES FROM OTHER JURISDICTIONS

As Appellant has argued in his Opening Brief, the statutory basis for the decision requested herein comes from the plain language of Idaho Code § 72-223(3), which the parties agree imposes a limitation on the subrogated right of worker's compensation sureties in this State.

Appellant contends that the statutory framework for this argument imposes a limitation on the type and amount of benefits a workers' compensation surety can attach. Respondents admit that the statute granting them subrogated rights limits their right, but argues that the limitation only applies to the amount of benefits which they can attach.

When examining cases from other states, it is apparent the many different kinds of statutory bases have been enacted and Appellant would note that many of the cases cited by

Respondents are based upon statutory frameworks substantially different than what we have here in the State of Idaho.

For instance, Respondents cite to several federal cases such as *United States v. Lorenzetti*, 467 U.S. 167, 104 S.Ct. 2284, 81 L.Ed.2d 134 (1984). That case concerned a federal government employee injured in an automobile accident in Pennsylvania while on official business. The Supreme Court found that the statute granting subrogation rights to the federal government was not limited in any way and entitled the federal government to obtain recovery from the injured employee regardless of the characterization of the settlement obtained by the employee. It should be noted that the government was not a party to the settlement or suit and did not participate in the characterization of the settlement obtained by the employee. The Supreme Court specifically noted that the language which granted the federal government subrogation rights did not distinguish between benefits which were paid out under the federal workers' compensation program and those which were not and that the federal government had unlimited rights of recovery.

Lorenzetti does not provide any assistance to the Court herein. The statute granting subrogation rights to workers' compensation sureties in Idaho is limited and Respondents have admitted to this limitation. The limiting language found in Idaho Code §72-223(3) distinguishes this case from the federal cases based upon the federal statute interpreted by the court in *Lorenzetti*, *supra*, and the case therefore presents little help to the Court herein.

Likewise, the statute interpreted in the case of *Force v. Dir., Office of Workers' Comp. Programs*, 938 F.2d 981 (9th Cir. 1991) is likewise unlimited and did not restrict the office of workers' compensation programs in its attempt to subrogate against an employee's third-party recovery. In *Force*, *supra*, it appeared that the decedent George Force had been exposed to

asbestos while employed at Keiser Aluminum in the 1940's. Prior to his death in 1984 from asbestos related disease, he filed a claim against Keiser under the Longshoreman and Harbor Workers' Compensation Act for death benefits, medical expenses and disability benefits that had accrued to her husband before he passed away. Mr. and Mrs. Force also sued various third-party asbestos manufacturers as a result of the exposure and asbestos-related death.

Before the Longshoreman and Harbor workers' compensation case went to trial, Mrs. Force settled her third-party case without the participation of the Longshore and Harbor representatives. Upon request, the ALJ presiding over the Longshore and Harbor Worker's case allowed a credit against the liability under the Longshore and Harbor Workers' Act in the amount of the entire settlement because the settlement agreements had not allocated or divided up the settlement into specific categories of damages. The ALJ rejected the allocation suggested by the Claimants finding that any such allocation made subsequent to the settlement would be based on pure speculation.

Upon review, the 9th Circuit Court of Appeals found that the statute granting subrogation rights to the Longshore and Harbor Worker's director was unlimited and did not require any allocation of benefits. Pursuant to 33 U.S.C. § 933(f), the Court noted that the offset applied to the net amount recovered against the third-party without limitations except for litigation expenses and attorney's fees.

Again, Appellant would note that the crucial factor in *Force* is the statute which grants subrogation rights. The Court found that this statute was unlimited in nature and had no language which required an allocation of benefits or allowed recovery or set off against only a portion of the benefits. Based upon the unlimited nature of the statute, the 9th Circuit found that

the Longshore and Harbor Worker's director could offset benefits against the entire settlement obtained by the Claimant in his third-party case.

Again, this case provides little assistance to the Court herein. As noted above, the parties herein have both agreed that the statute granting subrogation rights to Respondents is limited and that distinguishes the Idaho statute at issue herein from the Federal Statute interpreted in *Force*.

Furthermore, reference to the state court cases cited by Respondents, including the States of Michigan, Wisconsin, Indiana, Kansas and Tennessee, reveals that these cases, with rare exception, are all based upon statutory frameworks which are different from the framework here in Idaho.

In Michigan, for instance, the grant of subrogation rights to the workers' compensation surety provides as follows:

> "In an action to enforce the liability of a third-party, the Plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third-party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits."

See, Worker's Disability Compensation Act, MCL § 418.827(5); MSA § 17.237(827)(5).

Based upon this statute, the court found that the clear and unambiguous meaning of the statute required the Plaintiff to reimburse the worker's compensation surety from all of its settlement regardless of the manner in which it was characterized. Again, Appellant contends that this statutory grant of unlimited rights to a worker's compensation surety is different than the statute here in Idaho and that this case therefore provides little support for Respondents

argument.

Respondents also cite to cases from Wisconsin and interestingly, the statutes which grant subrogation rights to a worker's compensation surety in Wisconsin are radically different from those in Idaho and are relatively unique. In Wisconsin Statutes Chapter 102, § 102.29, it appears that a complicated scheme has been enacted by the Wisconsin State Legislature allowing either the worker's compensation surety or the Claimant to bring a third-party case and a scheme of a division of the proceeds of these cases is provided which automatically allows an injured Claimant to obtain one third of any settlement regardless of how it is characterized. The party who brings a third-party case must give the other notice and allow participation so that third-party cases in the State of Wisconsin and the findings of these cases bind the work comp surety if they are given notice.

The statutory framework in Wisconsin, therefore, would allow a third-party recovery to be distributed partially to a Claimant in every case, and this alone distinguishes the Wisconsin situation from that herein.

In the instant case, under the scenario proposed by Respondents, injured Claimants could be completely excluded from any recovery whatsoever from their third-party settlement with all the money going to either the Claimant's attorney or the work comp surety. Wisconsin has seen fit to prevent this outcome statutorily by including clear language in the statute. (Appended hereto for reference as Exhibit A).

Respondents cite *Dearing v. Perry*, 499 N.E.2d 268 (1986), a convoluted Indiana case involving two lawsuits filed on behalf of the Claimant, one lawsuit filed on behalf of the worker's compensation surety, and negotiations which took place without the participation of the work comp surety. Upon settlement of the second suit filed by the Claimant, the trial court

ratified an allocation made by the Claimant and the third-party without participation of the work comp surety in an attempt to avoid the work comp surety's subrogated rights.

In this situation, the Indiana Supreme Court noted that the allocation was invalid and that the statutory language involved Indiana Code 23-3-2-13 applied to "any recovery" obtained by the Claimants.

The Appellants herein contend that the Indiana case presents little assistance in deciding the issue before this Court. *Dearing, supra*, is akin to the *Struhs* case, *supra*, in that the Claimant and the third-party attempted to negotiate and make an allocation of the negotiated settlement without the participation of the work comp surety. The court in *Dearing* had no sympathy for the Claimant or the manner in which the settlement was achieved. In addition, the Indiana Supreme Court noted that the statutory language granting subrogation rights to the work comp surety was without limitation except for attorney's fees and costs and found that the worker's compensation surety could obtain its subrogated interest from the entire settlement after attorney's fees and costs were deducted.

In *Beam v. Maryland Casualty Company*, 477 S.W.2d 510 (Tenn. 1972), the court was once again concerned with a statutory framework which granted subrogation rights to a work comp surety without limitation. It appeared that the statute at issue, TCA 50-941 granted subrogation rights to the surety from the total amount of the "net recovery" without limitation.

As indicated above, the parties hereto agree that the statute granting subrogation rights to Surety herein is limited and Appellant contends that this limitation applies both to the type of benefits paid and to the amount of benefits paid.

The one case cited by Respondents which has a statute with language similar to Idaho is the case of *McGranahan v. McGough*, 820 P.2d 403 (Kan. 1991). In that case, it appeared that

the statute granting subrogation rights to the work comp sureties in Kansas was similar to that in Idaho, in that it allowed the employer subrogation rights to the extent of compensation and medical aid provided by the employer. *See*, K.S.A. 1990 Supp. § 44-504(b).

In that case, the factual background revealed that the Claimant was sitting in his pickup truck on the side of the road when it was struck by another truck driven by a third-party. Both the Claimant and the third-party employee were on the job at the time. The Claimant was paid workman's compensation benefits for an injury to his right knee and later brought suit against the third-party and his employer. The trial court allowed the worker's compensation surety to intervene.

Without participation of the work comp surety, Claimant and the third-party entered into a stipulation and confession of judgment which was presented to the trial court, which attributed and allocated damages for the Claimant's injury. This allocation included medical expense and pain and suffering but contained no allocation for lost wages despite the fact that the injured Claimant had been paid over $9000.00 in wages by the worker's compensation surety.

Despite the objection of the work comp surety, the trial court found that the stipulated facts and judgment were fair and equitable and approved them. Thereafter the trial court allowed the work comp surety to recover $1000.00 in medical expenses less attorney's fees of one-third despite the fact that the worker's comp surety had paid over $3000.00 in medical expenses at that time. The trial court found that the settlement for pain and suffering for the Claimant and the damages for Claimant's wife were not subject to subrogation.

The workers' compensation carrier appealed and in addressing the situation, the Kansas Supreme Court noted that under the statute, the worker's compensation carrier was only allowed to recover benefits if it had been required to pay like benefits out in the first place.

> "The language of K.S.A.1990 Supp. 44-504(b) explicitly states the employer is allowed to subrogate to the extent the employer has paid compensation and medical aid. This indicates a recovery that is not compensable under worker's compensation is not subject to subrogation. Subrogation is not allowed because the award does not duplicate the compensation and medical aid provided by the employer. Subrogation is permitted to prevent double recovery by the employee. This interpretation is consistent with a 1990 court of appeals case *Lemery v. Buffalo Airways, Inc.*, 14 Kan.App.2d 301, 307-308, 789 P.2d 1176, rev. denied 246 Kan. 767 (1990); by adopting K.S.A.1989 Supp. 44-504, the legislature had attempted to achieve two things: (1) to preserve an injured worker's cause of action against third-party tortfeasors and (2) to prevent a double recovery by the employee from both the worker's compensation fund and a third-party tortfeasor."

(*See*, *McGranahan*, 249 Kansas at 334). (Emphasis Added)

As the Respondent has indicated, the Kansas Supreme Court went on to hold that because Kansas Workers' Compensation law does compensate an injured Claimant for pain and suffering, that recovery should have been allowed from the pain and suffering recovery made by the Claimant.

In an attempt to make the favorable analysis of *McGranahan* relevant to the issue now before this Court, the Respondent has cited dicta from a case adjudicated more than seventy years ago as persuasive authority. Citing to the Supreme Court case of *Close v. General Const. Co.*, 61 Idaho 689, 106 P.2d 1007 (1940), Respondents audaciously allege that Idaho Worker's Compensation law is similar to the Kansas statutory scheme, in that both allow systems for the recovery of pain and suffering damages in a workers' compensation claim. A thorough examination, however, reveals that *Close v. General Construction*, and subsequent cases on the issue, does not support the proposition asserted by the Respondents.

In *Close*, it appeared that a worker had suffered an injury when a tree fell on his leg breaking his right leg between the knee and the ankle. After the injured worker healed

sufficiently, he was assessed an impairment rating from the Idaho Code for a partial loss of his leg. After some period of time, Claimant's circulation in his right foot and leg deteriorated and unfortunately, it became necessary to amputate the Claimant's right leg about four inches below the knee. After a sufficient healing process, the Claimant was awarded an additional impairment rating drawn from the Idaho Code based upon the loss of his lower leg. The only question presented to the Supreme Court in that case was whether the previously paid impairment rating should be deducted from the impairment rating for the more serious condition. In other words, did the worker's compensation surety get credit for the first impairment as against the second impairment.

In answering this question, the Supreme Court noted that they did not believe that the Legislature meant to allow a credit in this situation and mentioned in dicta that the Legislature must have intended in fixing the schedules of impairment in the Idaho Code to take into account loss of earning power, pain and suffering and physical and financial losses sustained as a result of the injury.

Appellant would note that this decision does not aid the decision of the Court herein for several reasons. First, the statement from the Court cited above from 1940 is dicta and is not one of the holdings of the decision. Secondly, it is clear that the worker's compensation law definitions do not allow general damages as defined in Idaho law but only allow permanent partial impairment and permanent partial disability benefits as those terms are defined in the Worker's Compensation Act. *See*, Idaho Code §§ 72-424; 72-425; 72-427; 72-428; 72-430.

Moreover, in examining the worker's compensation decisions that address damages for pain and suffering, it is clear that the Industrial Commission does not award impairment rating benefits based solely upon pain and suffering. *See*, *Trapp v. Sage Volunteer Fire Department*,

1994 IIC 1442 (1942). Indeed, as former Commissioner Kerns indicated some time ago in the case of *Roger Davis v. Sunshine Precious Metals, Inc.*, 1997 IIC 0079 (1997), injured Claimant's have given up their common rights to general damages in enacting the Worker's Compensation statutes:

> "The primary goal of the Worker's Compensation Act is to relieve injured workers from adverse economic effects caused by disabling work-related injuries. The injured worker bargained his right to recover pain and suffering from the employer tortfeasor in exchange for sure and certain relief, i.e., his wages. When those benefits continue to be eroded and reduced there is at some point no longer the economic relief bargained for by the injured workers. At that point, the legitimate state interest no long bears any rational relationship to the legislation. The essence of equal protection is fairness."

See, Davis, supra.

It should also be remembered that even if certain permanent partial impairment ratings have some element of pain as a factor, general non-economic damages encompass much more than just pain and suffering. As defined by Idaho Jury Instruction 9.01, non-economic damages include the following elements: (1) the nature of the injuries; (2) the physical and mental pain and suffering, past and future; (3) the impairment of abilities to perform usual activities; (4) the disfigurement caused by the injuries. (*See*, IDJI 9.01).

General or non-economic damages have been interpreted broadly in Idaho and include damages for general categories such as loss of enjoyment of life, *see*, *Carlson v. Stanger*, 146 Idaho 642, 200 P.3d 1191 (Id. App. 2008); Loss of the ability to provide household services, *see*, *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (Idaho 1986); Loss of ability to perform usual functions and enjoy hobbies, *see*, *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986); Anxiety over not being able to work, *see*, *Moeller v. Harshbarger*, 118 Idaho 92, 794 P.2d 1148 (Id. App. 1990); loss of hobbies and recreational activities, *see*, *Sanchez v. Galey*, 115

Idaho 1064, 772 P.2d 702 (Idaho 1989); embarrassment, and many other categories. Indeed, case law has determined that there is no set standard for measuring the value of human health or happiness. *See, Swanson v. U.S. by and through Veterans Administration*, 557 F.Supp 1041 (D.C. Idaho 1983).

Appellant contends that none of these elements are covered by workers' compensation law and that to contend that general damages are included in the Idaho workers' compensation law is simply nonsense. Indeed, as Commissioner Kerns has indicated, these general damages were given up in exchange for the sure and certain relief afforded by the Worker's Compensation Act decades ago.

It therefore appears that the *McGranahan* case, *supra*, appears to be the only case cited by Respondents which interprets language which is almost identical to that found here in Idaho. While both parties herein agree that the language of the Idaho statute does limit the rights of the Respondent as far as its subrogated interest is concerned, it appears that the Court in the *McGranahan*, *supra*, agrees completely. The holding in that case notes that the language of the statute is limiting and limits the Respondent to recover only those benefits for which a recovery is provided under the Worker's Compensation law. Because this Court is faced with language which is identical in Idaho Code § 72-223(3), Appellant contends that this holding is significant and carries substantial persuasive force.

To summarize the cases from other states which have addressed this issue, it is clear that each states decision is based on the specific language of the statute that grants subrogation rights to the worker's compensation sureties in those respective jurisdictions. To make a sweeping generalization, as the Respondents have with regard to which line of authority is the majority or the minority, without reference to the statute upon which the decision is based is unconvincing.

Appellant herein contends that this case should be decided solely upon the language of the statute at issue in this case, and that it is clear that the statute applicable herein does indeed limit the subrogation rights of the Respondent Surety. The Respondent Surety has admitted that the statute contains limiting language and this limiting language is absent from many of the cases cited around the country by the Respondents. For these reasons, the Appellant would contend that this Court should pay specific and close attention to the statute upon which each state decision is made when deciding which states decisions have some persuasive effect.

ALLOCATION OF PAIN AND SUFFERING DAMAGES

Because the Industrial Commission ruled that all of the Appellant's settlement was subject to the subrogation rights of the Respondent, they refused to make any allocation of the Appellant's third-party settlement to pain and suffering damages.

If this Court agrees that the statute granting Respondent subrogated rights, Idaho Code § 72-223(3) limits the Respondent's rights, then remand of this case to the Industrial Commission is necessary and appropriate so that the Industrial Commission can make additional factual findings with regard to how much of the Appellant's third-party settlement is comprised of pain and suffering damages which are exempt from Respondents subrogated rights.

CONCLUSION

This case presents an opportunity for this Court to decide a question of first impression here in Idaho: Does a worker's compensation surety get to take all of the third-party recovery of an injured worker under Idaho Code § 72-223(3).

Respondents would argue that they are entitled to a credit for all of the third-party recovery of any Claimant thereby depriving a Claimant of any recovery whatsoever for his third-party rights.

Appellant contends that given the chance of the Respondents herein to participate in a hearing before the Industrial Commission, present evidence, and participate in the allocation of the Appellant's third-party recovery, that Appellant should be entitled to keep that part of his recovery designated as pain and suffering on the grounds and for the reasons that this is a recovery for which Workmen's Compensation law does not provide any benefit.

The Respondents herein will admittedly never pay Appellant any recovery for pain and suffering, loss of enjoyment of life or any of the other elements of general damages allowed in Idaho. Yet, the Respondents contend that they are entitled to take this recovery from the Appellant even after they have had a chance to litigate the issue and be heard with regard to the proper allocation of the Appellant's third-party settlement.

Based upon the legal authorities cited herein, Appellant contends that the framers of the Idaho Code could not have envisioned such a result and could not have intended that the Appellant herein be deprived of the entire benefit of his third-party recovery.

RESPECTFULLY SUBMITTED.

DATED This 4 day of July, 2012.

Richard S. Owen

David M. Farney
Legal Intern

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 31 day of July, 2012, a true and correct copy of the foregoing document was mailed, U. S. Postage prepaid, to:

Jon Bauman
Kristina Wilson
P.O. Box 1539
Boise, ID 83701

Robyn Brody
P.O. Box 554
Rupert, Idaho 83350

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.

Richard S. Owen

EXHIBIT A

§ 102.29. Third party liability.

Wisconsin Statutes

Regulation of Industry

Chapter 102. Worker's compensation

Current through 2010 Legislative Session

§ 102.29. Third party liability

(1) The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employee shall not affect the right of the employee, the employee's personal representative, or other person entitled to bring action, to make claim or maintain an action in tort against any other party for such injury or death, hereinafter referred to as a 3rd party; nor shall the making of a claim by any such person against a 3rd party for damages by reason of an injury to which ss. 102.03 to 102.64 are applicable, or the adjustment of any such claim, affect the right of the injured employee or the employee's dependents to recover compensation. The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right to make claim or maintain an action in tort against any other party for such injury or death. If the department pays or is obligated to pay a claim under s. 102.81(1), the department shall also have the right to maintain an action in tort against any other party for the employee's injury or death. However, each shall give to the other reasonable notice and opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel. If a party entitled to notice cannot be found, the department shall become the agent of such party for the giving of a notice as required in this subsection and the notice, when given to the department, shall include an affidavit setting forth the facts, including the steps taken to locate such party. Each shall have an equal voice in the prosecution of said claim, and any disputes arising shall be passed upon by the court before whom the case is pending, and if no action is pending, then by a court of record or by the department. If notice is given as provided in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim, the proceeds of such claim shall be divided as follows: After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employee or the employee's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier, or, if applicable, uninsured employers fund shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under this chapter, except that it shall not be reimbursed for any payments made or to be made under s. 102.18(1) (bp), 102.22 , 102.35(3) , 102.57, or 102.60. Any balance remaining shall be paid to the employee or the employee's personal representative or other person entitled to bring action. If

both the employee or the employee's personal representative or other person entitled to bring action, and the employer, compensation insurer, or department, join in the pressing of said claim and are represented by counsel, the attorney fees allowed as a part of the costs of collection shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court or by the department. A settlement of any 3rd-party claim shall be void unless said settlement and the distribution of the proceeds thereof is approved by the court before whom the action is pending and if no action is pending, then by a court of record or by the department.

(2) In the case of liability of the employer or insurer to make payment into the state treasury under s. 102.49 or 102.59 , if the injury or death was due to the actionable act, neglect or default of a 3rd party, the employer or insurer shall have a right of action against the 3rd party to recover the sum so paid into the state treasury, which right may be enforced either by joining in the action mentioned in sub. (1), or by independent action. Contributory negligence of the employee because of whose injury or death such payment was made shall bar recovery if such negligence was greater than the negligence of the person against whom recovery is sought, and the recovery allowed the employer or insurer shall be diminished in proportion to the amount of negligence attributable to such injured or deceased employee. Any action brought under this subsection may, upon order of the court, be consolidated and tried together with any action brought under sub. (1).

(3) Nothing in this chapter shall prevent an employee from taking the compensation that the employee may be entitled to under this chapter and also maintaining a civil action against any physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist for malpractice.

(4) If the employer and the 3rd party are insured by the same insurer, or by the insurers who are under common control, the employer's insurer shall promptly notify the parties in interest and the department. If the employer has assumed the liability of the 3rd party, it shall give similar notice, in default of which any settlement with an injured employee or beneficiary is void. This subsection does not prevent the employer or compensation insurer from sharing in the proceeds of any 3rd-party claim or action, as set forth in sub. (1).

(5) An insurer subject to sub. (4) which fails to comply with the notice provision of that subsection and which fails to commence a 3rd-party action, within the 3 years allowed by s. 893.54, may not plead that s. 893.54 is a bar in any action commenced by the injured employee under this section against any such 3rd party subsequent to 3 years from the date of injury, but prior to 6 years from such date of injury. Any recovery in such an action is limited to the insured liability of the 3rd party. In any such action commenced by the injured employee subsequent to the 3-year period, the insurer of the employer shall forfeit all right to participate in such action as a complainant and to recover any payments made under this chapter.

(6)

(a) In this subsection, "temporary help agency" means a temporary help agency that is primarily engaged in the business of placing its employees with or leasing its employees to another employer as provided in s. 102.01(2) (f).

(b) No employee of a temporary help agency who makes a claim for compensation may make a claim or maintain an action in tort against any of the following:

1. Any employer that compensates the temporary help agency for the employee's services.

2. Any other temporary help agency that is compensated by that employer for another employee's services.

3. Any employee of that compensating employer or of that other temporary help agency, unless the employee who makes a claim for compensation would have a right under s. 102.03(2) to bring an action against the employee of the compensating employer or the employee of the other temporary help agency if the employees were coemployees.

(c) No employee of an employer that compensates a temporary help agency for another employee's services who makes a claim for compensation may make a claim or maintain an action in tort against any of the following:

1. The temporary help agency.

2. Any employee of the temporary help agency, unless the employee who makes a claim for compensation would have a right under s. 102.03(2) to bring an action against the employee of the temporary help agency if the employees were coemployees.

(6m)

(a) No leased employee, as defined in s. 102.315(1) (g), who makes a claim for compensation may make a claim or maintain an action in tort against any of the following:

1. The client, as defined in s. 102.315(1) (b), that accepted the services of the leased employee.

2. Any other employee leasing company, as defined in s. 102.315(1) (f), that provides the services of another leased employee to the client.

3. Any employee of the client or of that other employee leasing company, unless the leased employee who makes a claim for compensation would have a right under s. 102.03(2) to bring an action against the employee of the client or the leased employee of the other employee leasing company if the employees and leased employees were coemployees.

(b) No employee of a client who makes a claim for compensation may make a claim or maintain

an action in tort against any of the following:

1. An employee leasing company that provides the services of a leased employee to the client.

2. Any leased employee of the employee leasing company, unless the employee who makes a claim for compensation would have a right under s. 102.03(2) to bring an action against the leased employee if the employee and the leased employee were coemployees.

(7) No employee who is loaned by his or her employer to another employer and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer who accepted the loaned employee's services.

(8) No student of a public school, as described in s. 115.01(1), or a private school, as defined in s. 115.001(3r), who is named under s. 102.077 as an employee of the school district or private school for purposes of this chapter and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer that provided the work training or work experience from which the claim arose.

(8m) No participant in a community service job under s. 49.147(4) or a transitional placement under s. 49.147(5) who, under s. 49.147(4) (c) or (5) (c), is provided worker's compensation coverage by a Wisconsin works agency, as defined under s. 49.001(9), and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer who provided the community service job or transitional placement from which the claim arose.

(8r) No participant in a food stamp employment and training program under s. 49.79(9) who, under s. 49.79(9) (a) 5., is provided worker's compensation coverage by the department of health services or by a Wisconsin Works agency, as defined in s. 49.001(9), or other provider under contract with the department of health services or a county department under s. 46.215, 46.22 , or 46.23 or tribal governing body to administer the food stamp employment and training program and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer who provided the employment and training from which the claim arose.

(9) No participant in a work experience component of a job opportunities and basic skills program who, under s. 49.193(6) (a), 1997 stats., was considered to be an employee of the agency administering that program, or who, under s. 49.193(6) (a), 1997 stats., was provided worker's compensation coverage by the person administering the work experience component, and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer who provided the work experience from which the claim arose. This subsection does not apply to injuries occurring after February 28, 1998.

(10) A practitioner who, under s. 257.03, is considered an employee of the state for purposes of worker's compensation coverage while providing services on behalf of a health care facility, the department of health services, or a local health department during a state of emergency and who makes a claim for compensation under this chapter may not make a claim or maintain an action in tort against the health care facility, department, or local health department that accepted those services.

(11) No security officer employed by the department of military affairs who is deputed under s. 59.26(4m), who remains an employee of the state for purposes of worker's compensation coverage while conducting routine external security checks around military installations in this state, and who makes a claim for compensation under this chapter may make a claim or bring an action in tort against the county in which the security officer is conducting routine external security checks or against the sheriff or undersheriff who deputed the security officer.

Cite as Wis. Stat. § 102.29

History. 1975 c. 147 ss. 24, 54; 1977 c. 195; 1979 c. 323 s. 33; 1981 c. 92; 1985 a. 83 s. 44; 1985 a. 332 s. 253; 1987 a. 179; 1989 a. 64; 1995 a. 117, 289; 1997 a. 38; 1999 a. 9, 14; 2001 a. 16, 37; 2003 a. 144; 2005 a. 96, 172, 253; 2007 a. 20 ss. 2645, 9121 (6) (a); 2007 a. 97, 185; 2009 a. 42, 154.