3-6-2008

# Wernecke v. St. Maries Joint School District No. 401 Appellant's Reply Brief Dckt. 34539

**IN THE SUPREME COURT OF THE STATE OF IDAHO**



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| PATSY WERNECKE,<br><br>Claimant-Appellant,<br><br>v.<br><br>ST. MARIES JOINT SCHOOL DISTRICT #401, Employer, and STATE INSURANCE FUND, Surety,<br><br>Defendants,<br><br>and<br><br>STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,<br><br>Defendant-Respondent. | ) | Supreme Court No. 34539 |

**APPELLANT'S REPLY BRIEF**

Appeal from the Industrial Commission
of the State of Idaho
Chairman James F. Kile Presiding

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Other Authorities

## A. ARGUMENT

This case requires the Supreme Court to interpret a statutory scheme, the Worker's Compensation Law ("Law"), that compels employers to compensate their employees for injuries or disease incurred in the course of their employment and, in cases of total and permanent disability where an employee's pre-existing injury or medical condition combines with a new injury or disease to render her totally and permanently disabled, obligates the Industrial Special Indemnity Fund ("ISIF") to compensate the employee for total and permanent disability.

ISIF asks this Court to interpret the Law in a way that allows it to avoid its statutory obligation to fully compensate injured workers for total and permanent disability by entering into lump sum settlements in disputed cases in which ISIF denies the claimant is totally and permanently disabled, as it did here. Such agreements reflect long-standing practice but are contrary to the careful wording of the relevant provisions of the Law.

### 1. The Lump Sum Settlement Agreement between Ms. Wernecke and ISIF is void under Idaho Code § 72-318(2).

This case turns on the Court's interpretation of Idaho Code § 72-318(2). ISIF contends, erroneously, that this Court "has clearly stated that § 72-318 only prohibits an agreement by an employee to relieve an employer of an obligation that the employer has because of the worker's compensation laws." *Respondent's Brief, p. 8 (emphasis in original)*. The cases ISIF cites, *Osick v. Public Employee Ret. Sys.*, 122 Idaho 457, 835 P.2d 1268 (1992) and *Burdick v. Thornton,* 109 Idaho 869, 712 P.2d 570 (1985), don't support this

contention.

Both *Osick* and *Burdick* deal only with the first subpart of § 72-318, which prohibits an employer from entering into an agreement with its employee that relieves the employer from its obligations under the Law. It is the second subpart, § 72-318(2), that is at issue here. This section prohibits *any* agreement, not just an agreement with the employer, by which an employee waives her rights to compensation under the Law. "*No* agreement by an employee to waive his rights to compensation under this act shall be valid." Idaho Code § 72-318(2).

ISIF has no answer for Ms. Wernecke's contention that if § 72-318(2) is held to apply only to agreements between employees and employers, and not to agreements with, for instance, ISIF, it is mere surplusage. Contracts between *employers* and employees are specifically addressed in § 72-318(1), which prohibits any agreement "or any contract ... designed to relieve the employer in whole or in part from any liability created by this law." In adding § 72-318(2), the legislature evidently thought it needed to address not just agreements or contracts with employers, but any other agreement by an employee to waive her rights to compensation. And so it did.

Nor does ISIF even attempt to convince this Court that its lump sum agreement with Ms. Wernecke was somehow not a waiver of her rights to compensation for total and permanent disability. Instead, it appears to contend that if there was consideration for the waiver, all is well and there's no violation of § 72-318(2). Its argument goes essentially like this: "We denied Ms. Wernecke was totally and permanently disabled but we paid her $6,500 anyway. She accepted our money, signed the lump sum agreement waiving her right

to ever sue us again, and she's stuck with it. A deal is a deal." What ISIF can't get past, however, is that the "deal" is prohibited by § 72-318(2) and it's invalid; it's void.[1] (ISIF acknowledges that it isn't an employer, Respondent's Brief, p. 8, but doesn't recognize the significance this has for its case. The Law, at § 72-404, only allows *employers* to discharge their liability for total and permanent disability by lump sum payment, the common practice notwithstanding. ISIF's practice is thus contrary to the express language of the Law. If it wants a change, it must go to the legislature.)

If this Court accepts that Ms. Wernecke's waiver was void, then the Industrial Commission had no authority to approve it and its order is also void. *See e.g. Martin v. Soden,* 81 Idaho 274, 285, 340 P.2d 848, 855 (1959) ("'If a court grants relief which under no circumstances it has any authority to grant, its judgment is to that extent void.'" (quoting *Gile v. Wood,* 32 Idaho 752, 188 P. 36 (1920)). *See also Hunter v. Superior Court of Riverside County,* 36 Cal. App. 2d 100, 113, 97 P.2d 492, 499 (1939) ("If the contracts [in restraint of trade] upon which the judgment is based are to that extent void, they cannot be ratified either by right, by conduct, or by stipulated judgment.")

Moreover, "'[a] void judgment is a nullity, and no rights can be based thereon; it can be set aside by motion or collaterally attacked at any time.'" *Andre v. Morrow,* 106 Idaho

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[1] Ballentine's Law Dictionary defines "invalid" as "illegal, having no force or effect or efficacy; void; null." *Ballentine's Law Dictionary* (3rd ed. 1969). This Court uses the words "invalid" and "void" seemingly interchangeably. *See e.g. Nalder v. Crest Corp.,* 93 Idaho 744, 750, 472 P.2d 310, 315 (1970) ("It is also fundamental that a writ of execution based on an invalid or void judgment is also invalid.")

455, 459, 680 P.2d 1355, 1359 (1984) (quoting *Prather v. Loyd,* 86 Idaho 45, 50, 382 P.2d 910, 915 (1963)); *Burns v. Baldwin,* 138 Idaho 480, 486, 65 P.3d 502, 508 (2003). These cases are consistent with the *Restatement (Second) of Judgments*, Section 80 (1982), which provides that when, as here, a void judgment is relied upon as the basis of a defense in a subsequent action, "relief from the judgment may be obtained by appropriate pleading and proof in that action if other means of obtaining relief from the judgment are unavailable to the applicant or the convenient administration of justice would be served by determining the question of relief in the course of the subsequent action." *Id.*

ISIF's contention that Ms. Wernecke should not be permitted to reopen the judgment of the Commission, Respondent's Brief, p. 12, is therefore answered by this Court's precedents; a void judgment can be collaterally attacked at any time.

**2. If the Lump Sum Agreement and the Industrial Commission's Order are void, Ms. Wernecke's claim based on her subsequent injury cannot be barred by res judicata, waiver, or estoppel.**

The doctrines of collateral estoppel and res judicata presuppose a valid underlying judgment. If Ms. Wernecke's Agreement with ISIF and the Industrial Commission's approval of it were invalid, the issue of whether she could ever again make a claim for benefits against ISIF arising out of a future injury could not have been "conclusively decided." Likewise, if the "final judgment on the merits in the prior litigation," *Ticor Title Co. v. Stanion,* 2007 Ida. LEXIS 63, 157 P.3d 613, 618 (2007), is void, Ms. Wernecke cannot be precluded from raising the issue in her current claim.

The case cited by ISIF in support of its collateral estoppel argument, *Jackman v. Industrial Special Indem. Fund,* 129 Idaho 689, 931 P.2d 1207 (1997), does nothing to advance ISIF's position. In *Jackman,* the Supreme Court held that the claimant was collaterally estopped from bringing a claim against ISIF because he had taken an inconsistent position in a lump sum agreement (approved by the Industrial Commission) between claimant, the employer, and its surety. The validity of the underlying lump sum agreement and of the Industrial Commission's order approving it were not at issue.

Nor can ISIF reasonably contend that the purpose of res judicata in protecting the finality of an Industrial Commission decision is served by applying the doctrine to a void judgment. The decision is a nullity; it can have no prospective effect.

With respect to ISIF's arguments that Ms. Wernecke waived her right to make this claim against ISIF and that it would be unconscionable to allow her to pursue it, Ms. Wernecke simply reiterates that § 72-318(2) prohibits waiver of her right to compensation for permanent and total disability. It is not unconscionable for her to rely on the statute.

Nor is it unconscionable, as ISIF suggests, for Ms. Wernecke to keep the $6,500 ISIF paid her in 1994 and to now seek more if the 1994 Agreement was void. Interestingly, ISIF doesn't try to convince this Court that $6,500 compensated Ms. Wernecke for total and permanent disability, which it clearly didn't. She was only 42 years old, R. 59, and her life expectancy was more than thirty years. The value of benefits for total and permanent disability for the rest of her life was many times more than the sum ISIF paid her.

Ms. Wernecke does not expect a double recovery. She fully expects that if this Court allows her to bring her present claim against ISIF, and if she succeeds in convincing the Industrial Commission that she is indeed totally and permanently disabled, ISIF's liability for total and permanent disability will be properly apportioned under *Carey v. Clearwater County Rd. Dep't.*, 107 Idaho 109, 686 P.2d 54 (1984) and it will be credited for the $6,500 it has already paid.

**3. Idaho Code § 72-324 does not allow ISIF's manager to settle claims by lump sum agreement in cases where it denies liability.**

ISIF argues strenuously that its manager is empowered under Idaho Code § 72-324 to adjust claims made against ISIF and to make agreements, including lump sum settlements, with claimants like Ms. Wernecke. § 72-324 does not, however, say this and ISIF misreads Ms. Wernecke's argument. Ms. Wernecke does not contend that ISIF should be entirely precluded from entering into agreements with claimants or that it should be forced to litigate every disputed claim. She simply contends, and a careful statutory analysis supports her, that ISIF cannot settle claims with claimants whom it denies are totally and permanently disabled. It is only when it denies liability that it will it be forced to litigate the issue.

The *Drake* case, cited at page 5 of Respondent's brief, involved exactly the kind of agreement between ISIF and a claimant that Ms. Wernecke contends is appropriate and contemplated by § 72-324. There was no dispute in *Drake* that the claimant was totally and permanently disabled. ISIF admitted liability and the agreement it made with the claimant simply dealt with the correct rate of compensation. *Drake v. Industrial Special Indem. Fund,*

128 Idaho 880, 881, 920 P.2d 397, 398 (1996). If ISIF accepts liability for total and permanent disability, as it did in *Drake*, it is of course entitled under §72-324 to enter into agreements resolving disputes relating to the correct wage rate and to structure payments based on a claimant's life expectancy and needs.

What Ms. Wernecke challenges is ISIF's all-too-common practice of buying out of its obligation to compensate for total and permanent disability when it denies the claimant is in fact totally and permanently disabled. To allow this practice defeats the legislature's purpose in creating the Industrial Special Indemnity Fund and subverts the policy expressed in Idaho Code § 72-201. The Law exists to provide "sure and certain relief," § 72-201, and its provisions "are to be liberally construed in favor of the employee." *Sprague v. Caldwell Transp.*, 116 Idaho 720, 721, 779 P.2d 395, 396 (1989).

Finally, the fact that Ms. Wernecke was represented by another lawyer in the same firm as her current lawyer has nothing to do with the issue before the Court, contrary to ISIF's suggestion. If the 1994 Agreement and the Industrial Commission's order approving it are void, it doesn't matter whether the lawyer who represented her at the time was across the hall, across the street, or across town. Her current lawyer has not taken inconsistent positions, and has certainly not employed tactics, as ISIF implies, calculated to gain an unfair advantage for his client.

## B. CONCLUSION

If Ms. Wernecke's prior agreement with ISIF and the Industrial Commission's order approving it are void, they cannot stand. And if, as Ms. Wernecke contends and hopes to

prove to the Industrial Commission, she is totally and permanently disabled due to the combined effects of her most recent injury and her pre-existing medical condition, the Worker's Compensation Law requires that she be fully compensated. She should be permitted to make her case to the Industrial Commission.

Respectfully submitted this 3rd day of March, 2008.

LANDECK, WESTBERG, JUDGE & GRAHAM, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2008, I caused two true and correct copies of Appellant's Brief to be served upon the following individual in the manner indicated below:

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