3-17-2008

Bunn v. Heritage Safe Co. Clerk's Record v. 1 Dckt. 36024

LAW CLERK

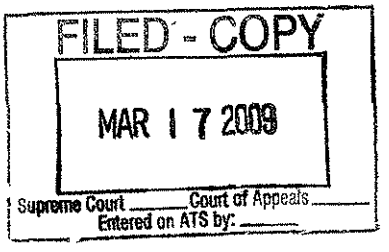
Vol. 1 of 2

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

COPY

QUINTON BUNN, Claimant-Appellant, v. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants-Respondents.	)	**SUPREME COURT NO. 36024-2009** **AGENCY'S RECORD**

BEFORE THE INDUSTRIAL COMMISSION
STATE OF IDAHO



CLAIMANT: QUINTON BUNN

BY: KENT A. HIGGINS
P.O. Box 991
Pocatello, ID 83204-0991

DEFENDANTS: HERITAGE SAFE COMPANY, Employer and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety

BY: E. SCOTT HARMON
P.O. Box 6358
Boise, ID 83707

36024

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

QUINTON BUNN, Claimant-Appellant, v. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants-Respondents.	)	**SUPREME COURT NO. 36024** **AGENCY'S RECORD**

BEFORE THE INDUSTRIAL COMMISSION
STATE OF IDAHO

CLAIMANT: QUINTON BUNN

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DEFENDANTS: HERITAGE SAFE COMPANY, Employer and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety

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P.O. Box 6358
Boise, ID 83707

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1. Claimant's Exhibits QB052908-1 through QB052908-46; ***(No description provided by Claimant)***

DEFENDANTS' EXHIBITS:

A. Notice of Injury dated 4/30/05

B. LNW Denial letter dated 5/4/03

C. Claimant's written response to denial letter

D. Claimant's personnel file

E. Deposition transcript Carol Beckstead taken 5/19/08

F. Deposition transcript Claimant Quinton Bunn taken 12/10/07

G. Brett A. Smith, PA, chart notes dated 5/2/05-5/20/05

H. Vernon S. Esplin, MD, chart notes dated 5/20/05-12/19/06

I. Bear Lake Family Physician ER note

J. Radiology reports dated 5/2/05-8/28/06

K. Operative reports

L. Deposition transcript of Lisa Harvey taken 5/19/08

SEND ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

WORKERS' COMPENSATION COMPLAINT

2005-509704

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME, ADDRESS AND TELEPHONE NUMBER
Quinton Bunn 226 N. 11th Montpelier, ID 83254 TELEPHONE NUMBER: (208) 221-4409	Kent A. Higgins Merrill & Merrill, Chartered P.O. Box 991 Pocatello, ID 83204-0991 (208) 232-2286
EMPLOYER'S NAME AND ADDRESS (at time of injury) Heritage Safe Co. 20 Industrial Park Grace, ID 83241	WORKERS' COMPENSATION INSURANCE CARRIERS (NOT ADJUSTER'S) NAME AND ADDRESS Liberty Northwest 6213 North Clovedale Road, Suite 150 P.O. Box 7507 Boise, ID 83707-7507
CLAIMANT'S SOCIAL SECURITY NO. [redacted] CLAIMANT'S BIRTHDATE	DATE OF INJURY OR MANIFESTATION OF OCCUPA TIONAL DISEASE 04/03/05
STATE AND COUNTY IN WHICH INJURY OCCURRED Caribou County, Idaho	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: $ 10.00 , PURSUANT TO IDAHO CODE § 72-419

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)

Claimant was installing locks on safes. White twisting a screwdrive, Claimant felt something "give way" in his wrist.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

Torn ligament in wrist

WHAT WORKER'S COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?

1. TTD/TPD benefits;
2. PPI benefits;
3. Disability in excess of impairment;
4. Medical bills paid;
5. Payment of travel, meals and lodging expenses for medical treatment;
6. Future medical bills;
7. Attorney fees; and
8. Retraining benefits or total permanent benefits.

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER

04/03/05

TO WHOM NOTICE WAS GIVEN

My boss

HOW NOTICE WAS GIVEN ☒ ORAL ☐ WRITTEN ☐

OTHER, PLEASE SPECIFY

ISSUE OR ISSUES INVOLVED

1. TTD/TPD benefits;
2. PPI benefits;
3. Disability in excess of impairment;
4. Medical bills paid;
5. Payment of travel, meals and lodging expenses for medical treatment;
6. Future medical bills;
7. Attorney fees; and
8. Retraining benefits or total permanent benefits.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☒ YES ☐ NO IF SO, PLEASE STATE WHY

Following claimant's injury the surety arranged for Claimant to obtain treatment. He received medication and x-rays. Later, he received a letter from the surety stating that his injuries were non-compensable. (See attached Exhibit A).

NOTICE: COMPLAINTS AGAINST THE *INDUSTRIAL SPECIAL INDEMNITY FUND* MUST BE IN ACCORDANCE WITH IDAHO CODE §72-334 AND FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Dr. N.E.. Wolff 4536 Washington Street Montpelier, ID 83254-1544	Dr. Kenneth Newhouse 560 Memorial Drive Pocatello, Idaho 83204-4073	Dr. Vernon Esplin 560 Memorial Drive Pocatello, ID 83201	Dr. Pat Farrell 500 S 11th Ave Ste 504 Pocatello, ID 83201

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? In excess of $28,002.35

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? $_____ WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? _$28,002.35_____

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. ☑ YES ☐ NO

DATE 5/25/07 SIGNATURE OF CLAIMANT OR ATTORNEY Quinita Berman

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	DATE OF DEATH	RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?	DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?
☐ YES ☐ NO	☐ YES ☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of_____, 200___, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

(Put in lines)

via ☐ personal service of process
☐ regular U.S. Mail

SURETY'S NAME AND ADDRESS

via: ☐ personal service of process
☐ regular U.S. Mail

_____
Signature

NOTICE:* An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. *If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 84720-0041 (208 334-6000.

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

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INDUSTRIAL COMMISSION
P.O. Box 83720
BOISE, ID 83720-0041

Patient Name: [redacted]
Birth Date: [redacted]
Address: [redacted] Montpelier, ID
Phone Number: (208) 221-4409
SSN or Case Number: [redacted]

(Provider Use Only)
Medical Record Number: _____
☐ **Pick up Copes** ☐ **Fax Copies #** _____
☐ **Mail Copies**
ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTHFORMATION

I hereby authorize _____ to disclose health information as specified
Provider Name - must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

_____
Street Address

_____
City *State* *Zip Code*

Purpose or need for data: _____
(e.g. Worker's Compensation Claim)

Information to be disclosed: **Date(s) of Hospitalization/Care:** **04/03/05 to present**

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☑ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by federal Law (rt CRF Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment enrollment, or eligibility for benefits on my signing this authorization. ***Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.*** Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Quinton Quinn 5/25/07
Signature of Patient ***Date***

_____
Signature of Legal Representative & Relationship to Patient/Authority to Act ***Date***

_____
Signature of Witness ***Title*** ***Date***

Original Medical Record Copy: Patient

3

SEND ORIGINAL TO: INDUSTRIA[illegible]OMMISSION, JUDICIAL DIVISION, P.O. BO[illegible]720, BOISE, IDAHO 83720-0041

AMENDED WORKERS' COMPENSATION COMPLAINT

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME, ADDRESS AND TELEPHONE NUMBER
Quinton Bunn 226 N. 11th Montpelier, ID 83254 TELEPHONE NUMBER: (208) 221-4409	Kent A. Higgins Merrill & Merrill, Chartered P.O. Box 991 Pocatello, ID 83204-0991 (208) 232-2286
EMPLOYER'S NAME AND ADDRESS (at time of injury) Heritage Safe Co. 20 Industrial Park Grace, ID 83241	WORKERS' COMPENSATION INSURANCE CARRIERS (NOT ADJUSTER'S) NAME AND ADDRESS Liberty Northwest 6213 North Clovedale Road, Suite 150 P.O. Box 7507 Boise, ID 83707-7507
CLAIMANT'S SOCIAL SECURITY NO. [redacted] CLAIMANT'S BIRTHDATE	DATE OF INJURY OR MANIFESTATION OF OCCUPA TIONAL DISEASE 04/30/05
STATE AND COUNTY IN WHICH INJURY OCCURRED Caribou County, Idaho	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: $ 10.00 , PURSUANT TO IDAHO CODE § 72-419

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)

Claimant was installing locks on safes. White twisting a screwdrive, Claimant felt something "give way" in his wrist.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

Torn ligament in wrist

WHAT WORKER'S COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?

1. TTD/TPD benefits;
2. PPI benefits;
3. Disability in excess of impairment;
4. Medical bills paid;
5. Payment of travel, meals and lodging expenses for medical treatment;
6. Future medical bills;
7. Attorney fees; and
8. Retraining benefits or total permanent benefits.

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER

04/03/05

TO WHOM NOTICE WAS GIVEN

My boss

HOW NOTICE WAS GIVEN ☒ ORAL ☐ WRITTEN ☐

OTHER, PLEASE SPECIFY

RECEIVED 2005 JUN -4 AM 11:21 INDUSTRIAL COMMISSION

ISSUE OR ISSUES INVOLVED

1. TTD/TPD benefits;
2. PPI benefits;
3. Disability in excess of impairment;
4. Medical bills paid;
5. Payment of travel, meals and lodging expenses for medical treatment:
6. Future medical bills;
7. Attorney fees; and
8. Retraining benefits or total permanent benefits.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☒ YES ☐ NO IF SO, PLEASE STATE WHY

Following claimant's injury the surety arranged for Claimant to obtain treatment. He received medication and x-rays. Later, he received a letter from the surety stating that his injuries were non-compensable. (See attached Exhibit A).

NOTICE: COMPLAINTS AGAINST THE *INDUSTRIAL SPECIAL INDEMNITY FUND* MUST BE IN ACCORDANCE WITH IDAHO CODE §72-334 AND FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Dr. N.E.. Wolff 4536 Washington Street Montpelier, ID 83254-1544	Dr. Kenneth Newhouse 560 Memorial Drive Pocatello, Idaho 83204-4073	Dr. Vernon Esplin 560 Memorial Drive Pocatello, ID 83201	Dr. Pat Farrell 500 S 11th Ave Ste 504 Pocatello, ID 83201

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? In excess of $28,002.35

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? $_____ WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? $28,002.35

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. ☑ YES ☐ NO

DATE 5-31-07

SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	DATE OF DEATH	RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?	DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?
☐ YES ☐ NO	☐ YES ☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 29TH day of May, 2007, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

Heritage Safe Co.
20 Industrial Park
Grace, ID 83241

via ☐ personal service of process
☒ regular U.S. Mail

SURETY'S NAME AND ADDRESS

Liberty Northwest
6213 North Cloverdale Road,Suite 150
P.O. Box 7507
Boise, ID 83707-7507

via: ☐ personal service of process
☒ regular U.S. Mail

Signature

NOTICE:* An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. *If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 84720-0041 (208 334-6000.

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

INDUSTRIAL COMMISSION
P.O. Box 83720
BOISE, ID 83720-0041

Patient Name: Quinton Bunn
Birth Date: [redacted]
Address: 226 N. 11th, Montpelier, ID
Phone Number: (208) 221-4409
SSN or Case Number: [redacted]

(Provider Use Only)
Medical Record Number: _____
❑ **Pick up Copes** ❑ **Fax Copies #** _____
❑ **Mail Copies**
ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTHFORMATION

I hereby authorize _____ to disclose health information as specified
Provider Name - must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

_____
Street Address

_____
City *State* *Zip Code*

Purpose or need for data: _____
(e.g. Worker's Compensation Claim)

Information to be disclosed: **Date(s) of Hospitalization/Care:** 04/03/05 to present

- ❑ Discharge Summary
- ❑ History & Physical Exam
- ❑ Consultation Reports
- ❑ Operative reports
- ❑ Lab
- ❑ Pathology
- ❑ Radiology Reports
- ❑ Entire Record
- ❑ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ❑ AIDS or HIV
- ❑ Psychiatric or Mental Health Information
- ❑ Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by federal Law (rt CRF Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment enrollment, or eligibility for benefits on my signing this authorization. ***Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.*** Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

_____
Signature of Patient ***Date***

_____
Signature of Legal Representative & Relationship to Patient/Authority to Act ***Date***

_____
Signature of Witness ***Title*** ***Date***

6

Send Original To: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000

ANSWER TO AMENDED COMPLAINT

I. C. NO. 2005-509704 **ALLEGED INJURY DATE 04/30/05**

CLAIMANT'S NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
QUINTON BUNN 226 N. 11th Montpelier, ID 83254	KENT A. HIGGINS Attorney at Law P.O. Box 991 Pocatello, ID 83204
EMPLOYER'S NAME AND ADDRESS HERITAGE SAFE CO. 20 N. Industrial Park Rd. Grace, ID 83241	***WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS*** LIBERTY NORTHWEST INSURANCE CORP. 6213 N. Cloverdale Rd., Ste. 150 P.O. Box 7507 Boise, ID 83707-6358
ATTORNEY REPRESENTING EMPLOYER/SURETY (NAME AND ADDRESS) E. SCOTT HARMON (ISB# 3183) LAW OFFICES OF HARMON, WHITTIER & DAY 6213 N. Cloverdale Rd., Ste. 150 P.O. Box 6358 Boise, ID 83707-6358	**ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)**

X **The above-named employer or employer/surety responds to Claimant's Complaint by stating:**
__ **The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:**

IT IS: (Check One)		
Admitted	**Denied**	
	X	1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
X		2. That the employer/employee relationship existed.
X		3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
UNDER INVESTIGATION	UNDER INVESTIGATION	4. That the condition for which benefits are claimed was caused partly __ entirely __ by an accident arising out of and in the course of Claimant's employment.
N.A.	N.A.	5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
	X	6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
N.A.	N.A.	7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
	X	8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: $UNKNOWN
X		9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant? NONE

(Continued from front)

11. *State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.*

A. Defendants deny all allegations of the Complaint not admitted herein.

B. Whether Claimant's action is time barred pursuant to I.C. §72-706.

C. Whether Claimant's condition is causally related to the alleged April 30, 2005 incident or is a result of a pre-existing or subsequent condition.

D. Whether Claimant is entitled to permanent partial impairment and/or disability in excess of impairment and appropriate apportionment.

E. Whether Claimant is entitled to TTD/TPD benefits.

F. Whether Claimant is entitled to additional medical benefits pursuant to I. C. §72-432.

G. Whether Claimant is totally disabled.

H. Whether Claimant is entitled to retraining benefits.

I. Whether Claimant is entitled to any other benefits.

J. Whether Claimant is entitled to attorney fees pursuant to I. C. §72-804.

K. Defendants reserve the right to amend this Answer since discovery in this matter has only just begun.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I. C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. __YES __NO

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

No

Amount of Compensation Paid to Date			**Dated**	**Signature of Defendant or Attorney**
PPI	TTD	Medical	6/11/07	
$-0-	$-0-	$-0-		

PLEASE COMPLETE **CERTIFICATE OF SERVICE**

I hereby certify that on the 11th day of JUNE, 2007, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S ATTORNEY:

Kent A. Higgins
Attorney at Law
P.O. Box 991
Pocatello, ID 83204
via: __*personal service of process*
_X regular U.S. Mail

Signature

E. Scott Harmon
ISB 3183
LAW OFFICES OF HARMON, WHITTIER & DAY
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208)327-7563
FAX 800-972-3213
Employees of the Liberty Mutual Group

Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

Quinton Bunn, *Claimant,* vs. Heritage Safe Company, Employer, and Liberty Northwest Ins. Corp., Surety, Defendants.	I. C. No.: 2005-509704 **REQUEST FOR CALENDARING**

COME NOW, Defendants, Heritage Safe Co., and Liberty Northwest Ins. Corp., Surety, by and through their attorney of record, E. Scott Harmon, and pursuant to Rule VIII(C)(2) of the Judicial Rules of Practice and Procedures of the Industrial Commission of the State of Idaho, submit this Request for Calendaring. Defendants state:

1. That the Defendants will be ready for hearing on or after May 1, 2008.

2. That the desired location of the hearing is Pocatello, ID.

3. The estimated length of the hearing is one-half day.

4. The issue(s) to be heard are:

A. Whether Claimant's action is barred pursuant to the Statute of Limitations §72-706.

5. Defendants unavailable dates for hearing after May 1, 2008, are:

May 1-2; 6-9; 23; 26-29

June 2-6; 13; 23-27

July 3; 7; 21

6. It is unknown whether settlement can be reached in this matter.

7. Defendants do not feel this matter requires a hearing before the full Commission.

8. Defendants are not aware of any other information needed by the Commission before scheduling this case for hearing.

////

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DATED this 11th day of February, 2008.

LAW OFFICES OF HARMON, WHITTIER & DAY

E. Scott Harmon
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2008, I caused a copy of the foregoing document to be served upon the following by first class mail, postage prepaid, at the address identified below:

Kent A. Higgins
Attorney at Law
P.O. Box 991
Pocatello, ID 83204

E. Scott Harmon

E. Scott Harmon
ISB 3183
LAW OFFICES OF HARMON, WHITTIER & DAY
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208)327-7563
FAX 800-972-3213
Employees of the Liberty Mutual Group

Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

Quinton Bunn, *Claimant,* vs. Heritage Safe Company, Employer, and Liberty Northwest Ins. Corp., Surety, Defendants.	I.C. No. 2005-509704 **DEFENDANTS' MOTION TO BIFURCATE ISSUES**

COME NOW the Defendants, Heritage Safe Co. and Liberty Northwest Ins. Corp., by and through their attorney of record E. Scott Harmon, pursuant to Rule III(E) of the Judicial Rules and Practice of Procedure and move for an Order bifurcating the issues in this case for hearing.

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This motion is made for the reason that the initial issue to be determined in the above-entitled case is the issue related to the Statute of Limitations. This issue should be determined prior to Claimant moving forward with any other issues.

This Motion is made and based on the pleadings and documents on file with the Commission herein.

DATED this 11th day of February, 2008.

LAW OFFICES OF HARMON, WHITTIER & DAY

By: _____
E. Scott Harmon
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2008, I caused a copy of the foregoing document to be served by first class mail, postage prepaid, upon the following:

Kent A. Higgins
Attorney at Law
P.O. Box 991
Pocatello, ID 83204

_____
E. Scott Harmon

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

QUINTON BUNN, Claimant, v. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2005-509704** **ORDER TO BIFURCATE ISSUES AND NOTICE OF HEARING** FILED MAR 17 2008 INDUSTRIAL COMMISSION

Pursuant to Defendants' Motion to Bifurcate Issues and Request for Calendaring both filed February 12, 2008, The Referee having reviewed the file herein and being fully advised in the premises,

HEREBY ORDERS that Defendants' Motion to Bifurcate is GRANTED.

FURTHER, NOTICE IS HEREBY GIVEN that a hearing will be held in the above-entitled matter on **JUNE 11, 2008, AT 1:30 P.M. FOR ONE-HALF DAY**, in the Industrial Commission Pocatello Office, at 1070 Hiline, Suite 300, City of Pocatello, County of Bannock, State of Idaho, on the following **bifurcated issue**:

1. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604.

DATED this 17th day of March, 2008.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2008, a true and correct copy of the **ORDER TO BIFURCATE ISSUES AND NOTICE OF HEARING** was served by **UNITED STATES CERTIFIED MAIL** upon each of the following:

Kent A. Higgins
P.O. Box 991
Pocatello, ID 83204-0991

E. Scott Harmon
P.O. Box 6358
Boise, ID 83707

and by regular United States mail to:

Sandra Beebe (Home: 208-785-5056 or Cell #: 680-3241)
P.O. Box 658
Blackfoot, ID 83221

send an e-mail.
sbeebe@cableone.net

db

Dana K. Burke

E-MAIL POCATELLO FIELD OFFICE

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

QUINTON BUNN, Claimant, v. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2005-509704** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Pocatello on June 11, 2008. Kent A. Higgins represented Claimant. E. Scott Harmon represented Defendants. The parties presented oral and documentary evidence and submitted briefs. The case came under advisement on September 30, 2008. It is now ready for decision.

ISSUES

The sole issue to be resolved according to the notice of hearing is:

> Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604.

CONTENTIONS OF THE PARTIES

Claimant contends his Complaint should be deemed timely filed within the statutes of limitation. Employer misled Claimant into believing his claim would be paid. By operation of

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Idaho Code § 72-604 or other equitable means, the limitation of Idaho Code § 72-706 was tolled.

Defendants contend Claimant was not misled because Surety sent an appropriate denial letter. Claimant's Complaint was filed more than one year after the claim.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and a supervisor, Carol Beckstead;

2. Claimant's Exhibits 1 – 46; and

3. Defendants' Exhibits A – L.

After considering the record, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant was hired by Employer on March 14, 2005. On April 25, 2005, Claimant began working as a lock installer. This job required frequent twisting of his wrist as he inserted screws to fasten the locks onto safes.

2. Born [redacted] Claimant was 25 years old when this claim began.

3. On May 2, 2005, Claimant notified Employer of a wrist problem. Employer's records variously report the pain began April 28, 30, or May 2, 2005. He complained of right wrist pain arising from the repetitive motion. He speculated that he suffered carpal tunnel syndrome.

4. Claimant first sought treatment on May 2, 2005. Physician's assistant Brett Smith diagnosed carpal tunnel syndrome and restricted Claimant from using a manual screwdriver. An X-ray showed a normal right wrist.

5. On May 4, 2005, Surety sent correspondence denying the claim. Surety did not pay and has not paid any compensation to Claimant.

6. On May 10, 2005, an MRI showed mild fraying of the triangular fibrocartilage complex without a tear. The radiologist suggested consideration of a vascular cause based upon Claimant's report of "tingling" and the absence of clinically significant findings on MRI.

7. On May 20, 2005, Claimant was examined by K.E. Newhouse, M.D. Claimant's history included numbness, tingling, coldness, and swelling, in addition to the pain alone which he had previously reported to physicians. Dr. Newhouse tentatively diagnosed possible vasospasm secondary to overuse vs. possible reflex sympathetic dystrophy.

8. A May 23, 2005 EMG and nerve conduction velocity study showed no abnormalities.

9. On May 27, 2005, a magnetic resonance angiography failed to indicate a vascular component to Claimant's complaints.

10. On May 30, 2005, Claimant sent a letter to Surety. He denied that his injury was a carpal tunnel syndrome and affirmed that his physicians related the injury – whatever it may be called in diagnosis – to his work. He requested the Surety again review its decision.

11. Claimant continued to seek treatment and eventually underwent surgery.

12. Claimant filed a Complaint in this matter on May 31, 2007, more than two years after any potential date for the accident or manifestation of an occupational disease.

DISCUSSION AND FURTHER FINDINGS OF FACT

13. **Statutes of Limitation.** Idaho Code § 72-706(1) provides a one-year limit on the filing of a Complaint where no compensation has been paid. Where some compensation has been paid and thereafter discontinued, Idaho Code § 72-706(2) provides a five-year limit.

14. Here, Claimant alleges alternatively that Employer somehow provided compensation by authorizing medical treatment or, failing that, the authorization misled him in such a manner as to invoke the tolling statute, Idaho Code § 72-604. Analyzing the latter argument first, Idaho Code § 72-604 applies where an employer "willfully fails or refuses to file" a notice of injury or change of status report. Neither condition has occurred; A Form 1 was filed and a denial letter was sent. Idaho Code § 72-604 does not toll the statute in this matter.

15. Nothing in Employer's actions reasonably served to mislead Claimant about eligibility for workers' compensation benefits. The belief or expectations about payment held by Claimant's treaters do not establish that Claimant was misled. Neither Claimant's nor any physician's hopes or expectations of payment can alter the Idaho Workers' Compensation Law. Below are three reasons why.

16. First, Claimant received a denial letter. His subsequent request for a review does not legally require further response from Defendants. Claimant does not allege that any oral promises were made which may have misled Claimant after he received the denial letter.

17. Second, nothing about Employer's alleged actions in assisting Claimant to see the first physician have created a liability for Defendants. An employer has the right to choose a treating physician whenever the Idaho Workers' Compensation Law may apply. *See*, Idaho Code § 72-435. The designation of an initial physician does not create any liability on Defendants' part. Questions of causation can only be answered by a physician. The speculations of an employee or an employer do not establish a causal link between physical complaints and eligibility under Idaho Workers' Compensation Law. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995).

18. Third, Employer's actions which occurred before Surety's denial letter do not negate the clear expression of the denial of liability expressed therein. In their respective roles, a surety would be expected to have more familiarity with the law than would an employer. A surety, in large part, is primarily engaged in administering claims and benefits according to the law. A business, in large part, is primarily engaged in making and selling a product or service. Thus, by their expected roles, by the clear express wording of the denial letter, and by the fact that the "last word" on the matter came through the denial letter, no reasonable person could have been misled by Employer's alleged statements or actions which occurred upon and immediately after receiving notice of a claimed injury or occupational disease.

19. The Referee finds Claimant was not actually misled into thinking he need not file a timely Complaint.

20. Claimant's alternative argument – that treatment somehow constitutes "compensation" – is unpersuasive. The limitation statute is based upon *payment.* Idaho code § 72-706. By relevant statutory definition, "compensation" equates with "payment of medical benefits." Idaho code § 72-102(7); Bainbridge v. Boise Cascade Plywood Mill, 111 Idaho 79, 721 P2d. 179 (1986). Even Claimant's cited case, Park v. Mountain Valley Timber, 200 WL 2799942 (2000), supports the proposition. In Park, compensation was "paid" because Employer acquiesced to Claimant's self-help method of reimbursement for medical bills. In Park, the receipt of treatment did not trigger the five-year statute; the payment for medical bills incurred did.

21. Eventually, Claimant's argument would lead to the conclusion that every time an employer designated a physician to check out a potential workers'-compensation-related injury or occupational disease, its surety would be automatically liable for benefits regardless

of whether the potential injury or disease met the other statutory requirements as determined by the Idaho Legislature.

22. Claimant failed to show any basis for the application of the five-year statute, Idaho Code § 72-706(2). Thus, the one-year statute, Idaho Code § 72-706(1) applies.

23. Claimant failed to file his Complaint within the time prescribed by Idaho Code § 72-706(1). Claimant failed to show a basis upon which Idaho Code § 72-604 or any other statute or equitable doctrine should be applied to toll the limitation statute or to excuse by some other theory his untimely filing of the Complaint in this matter. Claimant's claim should be dismissed.

CONCLUSION OF LAW

Claimant's Complaint for income benefits was not timely filed. His Complaint should be dismissed.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusion of Law as its own and issue an appropriate final order.

DATED this 22 day of October, 2008.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

ATTEST:

Dena K. Burke
Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

db

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

QUINTON BUNN, Claimant, v. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2005-509704** **ORDER** FILED OCT 10 2008 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant's Workers' Compensation Complaint for income benefits was not timely filed. His Complaint is hereby DISMISSED.

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

DATED this 10th day of October, 2008.

INDUSTRIAL COMMISSION

James F. Kile, Chairman

R. D. Maynard, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Dena K. Burke
Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2008 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Kent A. Higgins
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Pocatello, ID 83204-0991

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Dena K. Burke

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Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

QUINTON BUNN, Claimant, vs. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INS. CORP., Surety, Defendants.	I.C. No. 2005-509704 **MOTION FOR RECONSIDERATION**

Claimant, Quinton Bunn, brings this Motion pursuant to Idaho Code § 72-718 and the Judicial Rules of Practice and Procedure under the Idaho Worker's Compensation Law, Rule 3F.

This Motion is made for the grounds and reasons set forth in the accompanying Brief.

24

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BEFORE THE INDUSTRIAL COMMISSION
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This Motion is made for the grounds and reasons set forth in the accompanying Brief.

25

DATED this 30th day of October, 2008.

MERRILL & MERRILL, CHARTERED

By: _____
Kent A. Higgins

CERTIFICATE OF SERVICE

I, one of the attorneys for the Claimant, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 31st day of October, 2008, served upon the following in the manner indicated below:

E. Scott Harmon	[✓]	U.S. Mail
LAW OFFICES OF HARMON, WHITTIER & DAY	[ ]	Hand Delivery
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Kent A. Higgins

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BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

QUINTON BUNN, Claimant, vs. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INS. CORP., Surety, Defendants.	I.C. No. 2005-509704 **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION**

1. **The Surety "mislead" Quinton, within the meaning of Idaho Code § 72-706.**

Without limiting the scope of Quinton Bunn's disagreement with the referee's determination, for purposes of this Brief, Quinton Bunn focuses on three paragraphs of the determination. First are paragraphs 15 and 16 which read as follows:

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BEFORE THE INDUSTRIAL COMMISSION
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QUINTON BUNN, Claimant, vs. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INS. CORP., Surety, Defendants.	I.C. No. 2005-509704 **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION**

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15. Nothing in Employer's actions reasonably served to mislead Claimant about eligibility for workers' compensation benefits. The believe or expectations about payment held by Claimant's treaters do not establish that claimant was misled. Neither claimant's nor any physician's hopes or expectations of payment can alter the Idaho workers' Compensation law. Below are three reasons why.

16. First, Claimant received a denial letter. His subsequent request for a review does not legally require further response from Defendants. Claimant does not allege that any oral promises were made which may have misled claimant after he received the denial letter.

Referee Donohue, at the both the hearing and in the briefing, was asked to consider whether "mislead" for the purposes of Idaho Code § 72-706 includes innocent misleading, as well as intentional. In other words, where the surety or the employer unintentionally mislead the claimant, by telling him he has no coverage, should the surety or the claimant bear the consequences. This issue was never addressed in the Opinion. Exhibit 12, the letter from Liberty Nothrwest telling Quinton that his claim did not meet the requirements of the Idaho Worker's Compensation Law, is misleading on its face. It implies Quinton's condition is a non-acute occupational disease. The surety, no doubt, was mislead by the diagnosis of the physician's assistant. Granted, the Liberty Northwest's letter to Quinton stating he had no coverage may have been innocent in its intent. But nonetheless, it was misleading. Unlike the opinion of Referee Donohue, other states hold that the employer and the surety stand in a fiduciary relationship to the claimant. The consequences of a mistaken denial fall on the surety and the employer, not on the claimant. For example, in Deere v. Sarasota County School Bd., 880 S9.2d 825 (2005), the Court of Appeals for Florida explained:

> Where an E/C [Employer / Carrier] misleads a claimant about his or her rights or availability of workers' compensation, even unintentionally, resulting in the claimant's failure to file a timely claim, the E/C will be estopped from denying benefits. *Raymond v. Rapid Express Parcel Delivery of Tampa,* 548 So. 2d 278 (Fla. 1st DCA 1989). Because the JCC failed to consider whether Appellant demonstrated estoppel, we REVERSE the denial of the petition for benefits and REMAND for the JCC to make such a determination.

Having advised Quinton that he had no coverage, Liberty Northwest had a duty to Quinton to correct their denial letter when notified that his diagnosis was changed. In some states the misinformation constitutes an estoppel against the surety's defense of Statute of Limitations. In Idaho, the consequences of misleading is a statutory.

2. Heritage safe "paid"compensation for purposes of Idaho Code 72-706(2)

In paragraph 20, Referee Donohue says:

> 20. Claimant's alternative argument – that treatment somehow constitutes "compensation" – is unpersuasive. The limitation statute is based upon *payment*. Idaho code § 72-706. By relevant statutory definition, "compensation" equates the "payment of medical benefits." Idaho code § 72-102(7); Bainbridge v. Boise Cascade Plywood Mill, 111 Idaho 79, 721 P2d. 179 (1986). Even Claimant's cited case, Park v. Mountain Timber, 200 WL 2799942 (2000), supports the proposition. In Park, compensation was "paid" because Employer acquiesced to Claimant's self-help method of reimbursement for medical bills. In Park, the receipt of treatment did not trigger the five-year statute; the payment for medical bills incurred did.

According to the opinion, the exception in Idaho Code § 72-706(2) turns entirely upon the word "payment". Such a rendering is a very strict interpretation, not a liberal interpretation in favor of claimants, as required by the Worker's Compensation Law. By the referee's interpretation Park

v. Mountain Timber , 200 WL279942 (2000), turns purely on the fact that the claimant stole sufficient property from the employer to make a "self help" payment by the employer for the medical benefits. Such is not, nor ought not to be, the Idaho law. By strict interpretation the phrase "when payments of compensation have been made" would not include medical benefits. But the Idaho Supreme Court determined in Bainbridge v. Boise Cascade Plywood Mill Co., 111 Idaho 79, 721 P2d. 179 (1986), that the phrase "payments of compensation" when liberally construed, includes payment of medical benefits. By the same policy, "payment" of medical benefits would also include furnishing of medical benefits, providing of medical benefits, or authorization of medical benefits, as it does in other states.

.In McNeilly v. Farm Stores, Inc., 553 So.2d 1279 (1989), the court reached the opposite conclusion of that of the Referee in Quinton's case. The court explained:

> Here, Dr. Cather was McNeilly's authorized physician at the time of the injury, and remained so at the time of his September 1987 visit, which was within two years of the employer's last payment of benefits. The fact that McNeilly paid for the visit personally is also irrelevant, in that the significant event is the rendition of remedial treatment before the expiration of the two year period, and not the payment of the bill therefore. *Seamco* at 900. Therefore, the JCC erred in holding that the September 1987 visit was not furnished by the employer/carrier so as to revive the limitations period on that date, and the April 10, 1988 claim for benefits was timely filed.

This is not the case, as Referee Donahue implies, where the employer sends the claimant to the doctor to examine. This case has "treatment" written all over it.

CONCLUSION

Other paragraphs of the opinion could be specifically addressed, but since the whole opinion follows the logic of expressed in the three cited above, these illustrate the error in the approach of the opinion.

For these reasons Claimant requests that the opinion be reconsidered. The fact Exhibit 12 is, on its face, misleading in denying claimant benefits because of an occupational disease, and the fact that the treatment received by Claimant was authorized should lead to the opposite result.

DATED this 30th day of October, 2008.

MERRILL & MERRILL, CHARTERED

By: _____
Kent A. Higgins

CERTIFICATE OF SERVICE

I, one of the attorneys for the Claimant, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 30th day of October, 2008, served upon the following in the manner indicated below:

E. Scott Harmon	[ ]	U.S. Mail
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Employees of the Liberty Mutual Group

Attorney for Defendants

**BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO**

QUINTON BUNN, Claimant, vs. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants.	I.C. No. 2005-509704 **DEFENDANTS' OBJECTION TO CLAIMANT'S MOTION FOR RECONSIDERATION**

COME NOW Defendants, Heritage Safe Company and Liberty Northwest Insurance Corporation, by and through their attorney of record, E. Scott Harmon, and, pursuant to J.R.P. Rule 3(F) hereby object and respond to Claimant's Motion for Reconsideration.

I.

INTRODUCTION

On October 2, 2008, I.C. Referee Donohue issued his Findings of Fact, Conclusions of Law, and Recommendation in this case determining that Claimant's filing of a Complaint in the instant matter was governed by the one-year statute of limitations set forth in I.C. §72-706(1) rather than the five-year statute of limitations set forth in I.C. §72-706(2); that Claimant was not misled into thinking that he did not need to file a timely Complaint; and, that the Claimant's May 31, 2007, Complaint regarding the asserted late April or early May, 2005, onset of pain in Claimant's right wrist did not meet the statute of limitations. The Commission unanimously adopted Referee Donohue's recommendation as their own on October 10, 2008.

On October 30, 2008, Claimant filed a Motion for Reconsideration and supporting Brief. This writing constitutes Defendants' response thereto.

II.

ARGUMENT

In a nutshell, Claimant, relying upon two Florida cases[1], renews his arguments previously submitted to and ruled upon by this Commission that either Claimant's misunderstanding of his condition absolves him of any responsibility to timely pursue his claim or that, in the alternative, under the facts presented, the Commission ought somehow construe a "payment of compensation" made in order that the five-year statute

[1]Both *Deere v. Sarasota County School Board*, 880 So.2d 825 (2005) and *McNeilly v. Farm Stores*, 553 So.2d 1279 (1989) explore a Florida judiciary's treatment of Florida's statutory language arising under a Florida scheme of statutes of limitation very different from the formulation provided us by the Idaho Legislature. Of even greater interest, even Florida has limited the scope of its *McNeilly* decision. *See, Continental Can Co. v. Bailey*, 668 So.2d 695 (1996).

of limitations set forth in I.C. §72-706(2) may be applied. In sum, Claimant's Motion for Reconsideration seeks nothing more than a Commission re-weigh of evidence already thoroughly weighed and decided upon.

A. Claimant's Misunderstanding Does Not Excuse His Failure to Timely File a Complaint.

The thrust of Claimant's argument, as it was during initial hearing and briefing in this case, is that Claimant's failure ought be excused because Surety's denial denied coverage for the condition Claimant and his health care provider initially said he suffered from, not the condition he was ultimately found to suffer from. In *Myers v. Quest*, 144 Idaho 280, 160 P.3d 437 (2007), citing *Bainbridge v. Boise Cascade Plywood Mill*, 110 Idaho 79, 82, 721 P.2d 179, 182 (1986), the Court again recognized that:

> Statutes of limitation are clearly creatures of legislative enactment and not within the domain of the judiciary to impose.

Though recognizing that the Legislature had provided various instances under which the statutes of limitation may be tolled, the Court recognized that:

> The Legislature has not provided that the statute of limitations...is tolled by the employer's failure to inform its employees of its requirements of that section.

Myers, 160 P.3d at 438.

Nor are Defendants required to issue iterative denials as Claimant and his health care providers change their diagnoses. In *Ewing v. Holton*, 135 Idaho 792, 25 P.3d 103 (2001), Claimant initially filed a claim for an asserted carpel tunnel syndrome arising out of her repetitive work as a dental hygienist. Through further care, the condition was later potentially diagnosed as fibromyalgia. Following an IME provided by the Employer and

Surety, State Fund denied the claim on the basis that no physician could, on a more probably than not basis, tie her condition to her employment. Nine months after the SIF denial and some 15 months after Claimant's first asserted date of injury, upon yet another physician's diagnosis, Claimant filed a new claim along with a Complaint now asserting her condition to be RSD. Rejecting Claimant's argument that the Commission ought not to have held against her to the fact that she was unaware of the condition she actually suffered until after the one-year statute of limitations on her first claim expired, the Court affirmed the Commission's dismissal of Claimant's Complaint for failure to have filed within the one-hear statute of limitations. *Id.* at 109 – 110, 25 P.3d at 796 – 797.

Claimant has not demonstrated that any action or alleged statement by either Employer or Surety come under these facts, misled him into his prejudice.

B. There Was No "Payment of Compensation" Upon Which to Premise Application of the Five-Year Status of Limitations.

Claimant's reliance on the Florida *McNeilly* case is misplaced. There, the Florida court interpreted an unusual provision in Florida statute under which a previously granted authorization to follow up with a treating physician need not be renewed unless more than two years had elapsed between treatments. *Id.* at 1280. The Florida court determined that, under that statutory scheme, Claimant's entitlement was driven by the date upon which the care was rendered, not the date upon which payment for the care was made. *Id.* at 1281. *McNeilly* has no persuasive impact on the instant matter.

Claimant continues to urge that the phrase "payments of compensation" in §72-706(2) or, presumably, the phrase "no compensation...paid thereon" as used in

§72-706(1), really doesn't require "payment", despite the clear use of the term. Rather, Claimant castigates the Referee and Commission by asserting that the Commission's interpretation of *Park v. Mountain Timber*, I.C. 97-000347, 2000 WL 279942 (Feb. 17, 2000) "turns purely on the fact that the Claimant stole sufficient property from the employer to make a 'self help' payment by the employer for the medical benefit." *Claimant's Brief is Support, pp. 3-4.* Claimant, however, ignored the Referee's language clearly demonstrating that it was not Park's thievery which formed the basis for the determination of "payment" in that case but, rather, employer Mountain Timbers' acquiescence in Claimant's self help methodology which demonstrates the "payment."

III.

CONCLUSION

Apparently conceding that there is no support in either Idaho Statute, Rule, or Case Law to support his unusual argument, Claimant has turned to a Florida court's interpretation of Florida's statute to support his request that the Commission re-weigh evidence previously submitted and ruled upon. Statutes of limitation are, though, as recognized in *Bainbridge* and *Myers*, both *supra*, uniquely creatures of legislative creation. There is no provision in Idaho's Workers' Compensation Law which mirrors the Florida statutory scheme interpreted by the Florida court. Claimant has failed to demonstrate any error in the Referee's Decision of October 2, 2008, which the Commission has fully adopted as its own.

Respectfully submitted this 10th day of November, 2008.

LAW OFFICES OF HARMON & WHITTIER

By: _____
E. Scott Harmon
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2008, a true and correct copy of the foregoing document was served by U.S. Mail, postage prepaid, upon the following:

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Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION

OF THE STATE OF IDAHO

QUINTON BUNN, Claimant, vs. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INS. CORP., Surety, Defendants.	I.C. No. 2005-509704 **REPLY BRIEF ON MOTION TO RECONSIDER**

ANALYSIS

The question to be decided on reconsideration is: Can the Surety or Employer avoid the five year allowance to file a claim, provided for in Idaho Code § 72-706(2) by simply not paying for

treatment the Surety or Employer has authorized. In the Order of October 10, 2008, Referee Donohue says: "Claimant's alternate argument - that treatment somehow constitutes 'compensation' is unpersuasive." **Recommendation, ¶ 20**. Most jurisdictions would disagree with that conclusion by the referee. In contrast, overwhelmingly, the majority of jurisdictions are persuaded that treatment *is* compensation. Thus, when the Supreme Court of the State of Colorado, when posed with the very same question in **Frank v. Industrial Commission of Colorado**, 96 Colo. 364, 43 P.2d 158 (1935), framed the question as follows:

> To obviate this purported defense, and avoid the apparent bar, the claimant relies upon the sentence immediately following the passage just above quoted, namely: 'This limitation shall not apply to any claimant to whom compensation has been paid. He contends that the furnishing of the services rendered by, or under the direction of, the company's physician constituted – in view of the power and authority granted the physician by the company's contract described below – the payment of compensation within the meaning of the language used.

96 Colo. at 369-70.

> In answer to the question the Court said:
>
> Whether the company would have been charged with such responsibility if it had not had actual notice or knowledge need not be now determined or considered. Here such notice or knowledge was proved. And by the express terms of the contract, ***the treatment was to be given just as was done. This, so far as the claimant is concerned, was (at least under the facts shown herein) the exact equivalent of payment;***

96 Colo. at 372. (Emphasis added).

Similarly, in **Oklahoma Furniture Mfg. Co. v. Nolen**, 164 Okla. 213, 23 P.2d 381 (1933), the Oklahoma Supreme Court analyzed:

> In the case at bar, claimant was not paid compensation, but was furnished medical treatment for more than a month. The case therefore presents a question of first impression in this state, viz., whether or not the furnishing of medical treatment alone is sufficient to toll the statute of limitations (section 7301, supra).
>
> We are of the opinion that ***the furnishing of medical treatment recognizes liability and constitutes the equivalent of the payment of compensation***, and is sufficient to toll the statute.

23 P.2d at 382. (Emphasis added).

In the State of New York, the Supreme Court analyzed:

> Even though the usual ***medical care which is regarded as an advance payment of compensation*** is one in which the employer directly retains the physician, or the physician or nurse is in the general employment of the employer, it seems clear that within the intent of the statute, a direction to a claimant to get medical care, which he literally follows, and as a result of which medical care is actually given, can also constitute furnishing of medical treatment.

Colangelo v. B.S. McCarey Company, 13 A.D.2d 592.(1961). (Emphasis added).

In **Cantone v. Health Enterprises Management, Inc.,** 308 A.D.2d 646, 764 N.Y.S.2d 294 (2003), the Supreme Court, Appellate Division of New York explained:

> However, "***remuneration in the form of wages or medical treatment may constitute advance payments of compensation***, rendering inapplicable the limitations period established by workers' Compensation Law 28, where the remuneration is provided in recognition of liability."

397 A.D. 2d at 647. (Emphasis added).

In Arkansas, the Court of Appeals, in **Plante v. Tyson Foods, Inc.,** 46 Ark. App. 22, 876 S.W.2d 723 (1984) expressed the following:

> The supreme court has held that ***the furnishing of medical services constitutes payment of compensation*** in the context of this statute, and that such "payment" suspends the running of the time for filing a claim for compensation.

26 Ark. App. at 24. (Emphasis added.)

In accord is the Missouri Court of Appeals, which, in **McDaniel v. General Motors Assembly Division,** 637 S.W.2d 194 (1982) reasoned as follows:

> As pertinent here, the claim must be filed within one year after the injury or within one year after payment has been made by reason of the injury. ***Medical treatment of a disability has been interpreted as being a payment***, and a claim filed within one year thereafter is timely. Welborn v. Southern Equipment Co., 395 s.W.2d 119, 124 (Mo banc 1965); Lloyd v. County Electric Co., 599 S.W.2d 57, 60 (Mo.App. 1980). The question then, is whether the supplying of salve and directing its application by the employer's nurse constituted medical treatment, for the claim was filed within one year thereafter. Certainly, if an employer's doctor's advice that an employee take warm water soaks for an ankle injury constitutes medical treatment, as in Faries v. ACF Industries, 531 S.W. 2d 93, 99 (Mo.App. 1975), or, similarly, a company nurse supplying an ace bandage for a sore knee tolls the statute as in Morgan v. Krey

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packing Co., 403 S.W.2d 668, 670 (Mo.App.1966), a fortiori the salve prescribed for a bad back likewise tolls the statute. The claim was thereby timely.

637 S.W.2d, at 195-196. (Emphasis added).

The Supreme Court of Tennessee applied the same logical approach in **Universal Underwriters Insurance Co., v. A.J. King Lumber Company,** 553 S.W. 2d 749 (1977). Therein the court reasoned:

> The ***furnishing of medical services by a physician employed by the employer or insurer is such a "voluntary payment of compensation.***" Reed v. Genesco, Inc., Tenn., 512 S.W.2d 1 (1974); Fields v. Lowe furniture Corp., 220 Tenn. 212, 415 S.W. 2d 340 (1967). The fact that no "payments" were made from November 16, 1972, the date of the first payment, until January 21, 1973, when they were resumed did not constitute a "ceasing: within the meaning of the statutory proviso.

553 S.W.2d, at 750. (Emphasis added).

Likewise in **Spencer v. Stone Container Corporation,** 72 Ark.App. 450, 38 S.W.3d 909 (2001), the Court of Appeals of Arkansas Third Division explained:

> Our oft-stated rule is that for purposes of the aforementioned statute of limitations, ***"the furnishing of medical services constitutes payment of compensation . . ."*** Heflin v. Pepsi Cola, 244 Ark. 195, 197, 424 S.W.2d 365, 366 (1968). Moreover, an employer is deemed to be furnishing such services if it has either actual notice of has reason to know of a claimant receiving medical treatment..

72 Ark. App. at 456. (Emphasis added).

In **McGhee v. Oklahoma Metal Heat Treating,** 644 P.2d 127 (1982), the Court of Appeals of Oklahoma Division No. 1 faced the interpretation of a statute which read:

> The right to claim compensation under this act shall be forever barred unless within one (1) year after the injury or death, a claim for compensation thereunder shall be filed with the commission. Provided, however, claims may be filed at any time within one (1) from the date of last payment of any compensation or remuneration paid in lieu of compensation.

644 P.2d, at 128.

In the end, the Court of Appeals of Oklahoma concluded:

> All in all, we conclude on the undisputed facts of this case that the claim was timely filed. It was undisputed that the claimant's employer took him to the hospital and paid his bills following the accident. It was undisputed that the insurance carrier later told the claimant to go to a doctor.

644 P.2d at 129.

Although Referee Donahue found "claimant's argument – "that treatment somehow constitutes 'compensation'– is unpersuasive," that argument seems to have found a good deal of traction in virtually every other jurisdiction that has considered it. In fact, it would seem even the Supreme Court of Idaho would find some persuasion in that argument in light of its following statement in **Ryen v. City of Coeur D'Alene,** 115 Idaho 791, 770 P.2d 800 (1989). There the court said:

> Claimant argues that the definition of compensation supplied by I.C. § 72-102(5) purports to include "all of the income benefits and the medical and related benefits and medical services," and is controlling. We agree. We further view the question to have been clearly answered in *Bainbridge v. Boise-Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986) and *Facer v. E.R. Steed Equipment Co.*, 95 Idaho 608, 514 P.2d 841 (1973). In *Bainbridge* we held that I.c. § 72-706(2) "compensation" includes both income and medical benefits for the purposes of the tolling provisions. There, compensation was viewed to be "a word of art under the Workman's Compensation act and it refers to income and medical benefits..."

115 Idaho, at 793.

Referee Donohue aptly notes that "by relevant statutory definition 'compensation' equates with 'payment of medical benefits'." He addresses the decision of **Park v. Mountain Timber**, 2000 Westlaw 279942 (2000), where the employer never paid for medical care, except through the self-help method of the claimant for reimbursement of his medical bills. Yet, in **Park,** the Commission found that the requirement for payment of medical benefits had been met. Referee Donahue distinguishes **Park** , noting that the compensation was "paid" through the injured employee's self-help method of reimbursing himself through surreptitious removal of his employer's property.

The points where Quinton takes issue with Referee Donohue's opinion are twofold: first, we disagree with his conclusion that treatment for an occupational injury is not a medical benefit of the

Workmen's Compensation Code; and secondly, we disagree with his conclusion that it is the actual *monetary payment* to the medical provider – not the affording of care to the injured employee – that triggers the five year statute of limitations provided for in Idaho Code § 72-706.

Once again, other jurisdictions have looked at these very issues. Other jurisdictions are virtually unanimous in reaching the opposite conclusion; i.e. they universally agree that ***it is*** the furnishing of the care to the employee, – ***it is not*** the payment to the doctor – that constitutes "payment" for the sake of the worker's compensation statute. This is clearly the more logical conclusion for a myriad of reasons. First, as in Idaho Code § 72-706(2), the expression "When payments of compensation have been made. . ." refers to payments to the injured employee. The statute concerns itself with compensation to Idaho's laborers – not their physicians. Since medical benefits are not "paid" to a claimant, the affording to, authorization of, furnishing to, providing for medical benefits to an injured employee is the same as "payment" for the sake of Worker's Compensation Statutes.

In **Heflin v. Pepsi Cola Bottling Co.,** 244 Ark. 195 424 S.W.2d 365 (1968), the Supreme Court of Arkansas addressed a similar statute that also turned on the word "payment" The court then reasoned:

> The opinion in the case points out that the holding of the Ragon case followed the general rule that the furnishing of medical services constitutes payment of compensation within the meaning of s 81-1318(b) and that such ["payment" suspends the running of the time for filing a claim for compensation. The decision is not in any respect based on the time at which the medical bills were paid. ***This holding is sound because the claimant is "compensated" by the furnishing of the services and not by the payment of the charges therefor.***

244 Ark. at 197. (Emphasis added).

In contrast to the analysis of the Arkansas Court of Appeals, Referee Donohue's recommendation or findings in this case concludes: "In **Park**, compensation was "paid" because employer acquiesced to claimant's self-help method of reimbursement for medical bills. In **Park,** the receipt of treatment did not trigger the five year statute; the payment for medical bills incurred did." **Recommendation ¶ 20.** That opinion reaches the opposite conclusion and reasoning of the Supreme Court of Arkansas in **Heflin.**

Other courts that have considered the same issue side with the reasoning of the Arkansas Supreme Court. For example, the District Court of Appeals in Florida decided in **Gilbert v. Pinellas Suncoast Transit Authority,** 674 So.2d 818 (1996), that a worker's compensation claimant's receipt of medical care from an authorized provider for injuries causally related to his industrial accident tolled the running of the statute of limitations, despite the claimant's failure to request the employer or surety to pay the hospital services under worker's compensation.

In **Infante v. Mansfield Construction Company**, 47 Conn.App. 530, 706 A.2d 984 (1998), the Appellate Court of Connecticut explained:

> The exception is, no doubt, based upon the fact that if the employer furnishes medical treatment he must know that an injury has been suffered which at least may be the basis of such a claim [for compensation]. *Gesmundo v. Bush*, 133 Conn. 607, 612, 53 A.2d 392 (1947). ***In the event that a representative or agent of the employer, authorized to send the employee to a physician, does so, that constitutes furnishing medical treatment for purposes of the exception.*** *Id.* It is clear that the defendants were not ignorant of the injury, and do not claim to be prejudiced in any way. ***Even if the employer did not pay for the medical treatment furnished by a physician selected by him, he has "furnished" such treatment within the meaning of the statute if he has sent the claimant for medical treatment, thereby authorizing it.***

47 Conn.App. at 535-36. (Emphasis added).

In **Arvinmeritor, Inc. v. Redd,** 192 P.3d 1261 (2008) the Supreme Court of Oklahoma explained:

> The issue presented in the present matter is ***whether a claimant may, within two years after the last authorized medical treatment,*** when the examination and treatment are allowed by stipulation of the employer, amend the claim to include additional injury from the same cumulative trauma. We answer in the affirmative.
>
> In reasoning its opinion, the court concluded:
>
> [W]e find that Arvinmeritor, by stipulating to the treatment by Dr. Ruffin, including a complete examination as well as allowing for treatment and physical therapy, Redd's continuing medical treatment was authorized. Since this continuing medical treatment was authorized, the state of limitations was tolled.

192 P.3d at 1263. (Emphasis added).

The Supreme Court of Oklahoma relied upon its decision a year previous in 2007 in **American Airlines v. Hickman** 164 P.3d 146 (2007). The court framed the argument in **Hickman,** as follows:

> The employer argues that *Ibarra v. Hitch Farms*, 2002 OK 41, 48 P.3d 802, in construing § 43(A), holds that the operative event in determining whether the statute of limitations has been tolled is not the authorization of medical treatment, but the last payment of authorized medical treatment. Because the employer did not pay for the claimant's examination when he was sent to the MedCenter by his supervisor, the employer claims that the statute of limitations was not tolled.

The Oklahoma Supreme Court then grappled with the same issue that must be grappled with in this case, namely what happens when neither the employer nor the surety actually "pay" for the medical treatment. The Oklahoma Supreme Court then proceeded with its reasoning as follows:

> In *Ibarra* the facts reveal that the claimant, Ibarra, had received medical treatment, and the employer had paid for the authorized treatment. *Ibarra*, 2002 OK 41, ¶2, 48 P.3d 802. In the case now before this Court, no payment was made. The question we must answer is whether the ambiguous statute construed in *Ibarra* excludes tolling the statute of limitations where medical treatment was authorized, but not payment was made for the treatment. ***The claimant answers that the employer should not be able to avoid the tolling of the statute of limitations by simply not paying for treatment if authorized. We do not believe that Ibarra precludes the date of treatment as the operative date for tolling the statute of limitations*** found in § 43(a) of title 85.

164 P.3d at 149. (Emphasis added).

The Supreme Court of Tennessee faced the same issue in **Fields v. Lowe Furniture Corporation**, 220 Tenn. 212, 415 S.W.2d 340 (1967). Treatment had been furnished, but the bills had not been paid. The Supreme Court of Tennessee addressed the issue as follows:

> [T]he question thus presented is whether or not treatment of this employee by the company doctor in May, 1964, tolled the statute, hereinafter to be quoted. There is no showing that these bills for the treatment of this man up until May, 1964, or that the bill of the doctor to whom the company doctor has referred the man to in Nashville, had ever been paid. As a matter of fact the record is rather to the effect that these bills had not been paid by anyone.

415 S.W. 2d at 341.

The Tennessee Supreme Court answered the question as follows:

> There is no doubt that, under the facts appearing in the record, the services rendered for the compensable injury here established by the evidence operated to avoid the bar of the statute. The company's contract recognized its liability to render, or to pay the expense of such services, and conferred upon its physician generally authority for furnishing those services and supplies in all cases. Hence, inasmuch as all the evidence shows that the claimant did not sustain a compensable injury of which the company forthwith received actual notice and knowledge, the treatment given him fell within the class which, under both the statute and the contract, imposed upon the company unqualified financial responsibility. ***This, so far as the claimant is concerned, was (at least under the facts shown herein) the exact equivalent of payment; and he was thereby exempted from the requirement of serving the commission with written notice, because "compensation has been paid"***

220 Tenn. at 217-218. (Emphasis added).

Likewise, in **Seamco Laboratories v. Pearson**,424 So.2d 898 (1983), the District Court of Appeals for Florida reasoned:

> The deputy commissioner in the case *sub judice* correctly noted that even though Dr. Molloy did not submit a bill or a report to the employer/carrier within the two-year period, as the *Vincent* physician did, he rendered remedial treatment before the expiration of the two-year period. ***It is the remedial treatment that tolls the statute, not the report of the treatment.***

424 So.2d at 899-900. (Emphasis added).

Also, the Court of Appeals for Kansas, in **Sparks v. Wichita White Truck Trailer Center, Inc.** 7 Kan. App. 2d 383, 642 P.2d 574 (1982) reasoned:

> As we read the cases, in determining whether medical care is "compensation" under the act ***neither the fact nor time of payment of the bills is determinative***; the issue is whether the medical care was authorized, either expressly or by reasonable implication. If the claimant receives medical care with the reasonable expectation of payment by the employer the care is "compensation" when rendered even though it may never be paid for.
>
> * * *
>
> Once the employer assumed the responsibility of furnishing medical care the workman was entitled to rely on that action; notice of termination to the doctor was not notice to the claimant. In that case it appears the doctor had never been paid for his services, ***but the furnishing of those services under what appeared to the claimant to be the authority of the employer amounted to "payment of compensation" to the claimant.***

7 Kan. App. at 385-386. (Emphasis added).

All of this brings us back to our original question: Whether an employer or the surety can preclude the triggering of the five year statute of limitations of I.C. § 72-706(2) by refusing to pay for medical care or treatment it has authorized. The answer, if rendered in virtually any other jurisdiction, is clearly: "no," they cannot. The determining factor should be whether or not a claimant is afforded medical treatment by the employer or surety, not whether the employer or surety made or withheld payment for the treatment.

2. Was Quinton Bunn Mislead by Liberty Northwest.

The other issue of the decision that Quinton Bunn takes issue with is with is the following language in the opinion:

> Claimant contends his Complaint should be deemed timely filed within the statutes of limitation. Employer misled Claimant into believing his claim would be paid. By operation of Idaho Code §72-604 or other equitable means, the limitation of Idaho Code § 72-706 was tolled.
>
> Defendants contend Claimant was not misled because surety sent an appropriate denial letter. Claimant's Complaint was filed more than one year after the claim.

Recommendation , p.1-2

By way of clarification, Quintons' contention is not that he was mislead into believing his claim would be paid. His contention was that he was mislead when told by Liberty Northwest that Idaho Worker's Compensation laws would do nothing for him. Idaho Code § 706(1), the one year statute of limitations, clearly provides an exception: "unless mislead to his [claimant's] prejudice by the employer or surety." No doubt, the letter from Liberty Northwest was erroneous. It told Quinton he could not be covered. The question to be addressed is not whether Liberty Northwest mislead Quinton to believe he would be covered, but whether the consequences for a surety's error, albeit unintentional, in informing an injured employee that worker's compensation can do nothing for him, or her, should be suffered by the injured employee or the surety.

In **Raymond v. Rapid Express**, 548 So.2d 278 (1989). The First District Court of Appeal for Florida answered the question as follows:

> Where the E/C, [employer/carrier] intentionally or otherwise,

> misleads the claimant as to his rights or the availability of workers' compensation benefits with the result that the claimant fails to timely file his claim, the E/C will be estopped from asserting the statute of limitations as a defense. *Boyd v. Florida Memorial College*, 475 So.2d 990 (Fla. 1st DCA 1985); *Foster Wheeler Energy Group v. Fairhurst*, 405 So.2d 438 (Fla. 1st DCA 1981); *Catalano v. Hillsborough County Board of Public Instruction*, 249 So.2d 24 (Fla.1971); *Jenkins v. M.H. Harrison Construction Company*, 228 So.2d 911 (Fla.1969); *Engle v. Deerborne School*, 226 So.2d 681 (Fla.1969); *Howanitz v. Biscayne Electric, Inc.*, 139 So.2d 678 (Fla.1962); *Baptist Village v. Newton*, IRC 2-3551 (1978), cert. denied, 368 So.2d 1362 (Fla.1979).

548 So.2d at 278.

The Supreme Court of Wyoming also concluded, in **Bauer v. State of Wyoming**, 95 P.2d 1048 (1985) that a surety's innocent – but nonetheless misleading – statements to an injured claimant that the claimant did not have worker's compensation coverage,[1] was sufficient to allow an estoppel to the State from invoking the statute of limitations as a defense. The Wyoming High Court engaged in an lengthy analysis and a survey of the law on the same issues from other jurisdictions. Rather than repeat that lengthy review in this brief, a copy of the opinion is included as an exhibit to this brief.

SUMMARY

In its final analysis, this case is about a young man who suffered a serious disabling injury to his dominant hand while doing his duty of tightening screws with a screwdriver for Heritage Safe Company.

Heritage Safe, through Carol Beckstead, made an appointment with its preferred medical provider, Lakeview Medical Clinic. Carol Beckstead testified, "I tell - - at the time I tell the doctor's office, your know, that it will be billed to Liberty Northwest at that time." All the intake documents at the hospital indicated that Quinton Bunn was seen as a worker's comp case with the responsible party being Heritage Safe. The First report of Injury or Illness prepared by Heritage, Exhibit 1 confirms Quinton was sent for " treatment." The Incident / Accident Investigation form, Exhibit 3 also confirms that "medical attention [was] needed.. No doubt, Heritage Safe "provided' Quinton

[1] Because of the part-time nature of her work.

with medical treatment. No doubt, Liberty Northwest mislead Quinton when it gave as its reason to deny him coverage that: employers are not liable for " nonaccute occupational disease."

Referee Donohue, in conclusion of his recommendation opines that: "Eventually claimant's argument would lead to the conclusion that every time an employer designated a physician to check out a potential worker's compensation related injury or occupational disease, its surety would automatically be liable for benefits regardless of whether the potential injury or disease met the other statutory requirements as determined by the Idaho Legislature." **Recommendation ¶ 21**. But this is not that case. This case is not about the situation where the employer or the surety sends the employee for an examination for the sole purpose of finding whether the employee is entitled to compensation. This is not the case where the employer or surety seeks an examination to see whether an injured employee is capable of returning to work. Neither Quinton, nor Liberty Northwest, nor Heritage Safe made the argument that the Quinton was sent to Lakeview Medical Clinic solely to determine whether he had suffered a compensable injury. He was sent for and did receive treatment, including injections, a splint, icing instructions and pain medication. Idaho Code § 72-432 provides for medical treatment for occupational injuries is a benefit under the worker's compensation law.

When Idaho Code § 72-706(2) refers to "when payments of compensation have been made, it is talking about payments to the claimant, because, by judicial interpretation it includes medical benefits. It is talking about the providing or furnishing or affording of medical benefits to the claimant. It does not mean that if the employer or the surety arrange for the claimant to receive medical benefits, but thereafter stiff the medical provider on its bill, the surety can thereby annul the triggering of the five year statute of limitations under Idaho Code § 72-706(2). That statute is triggered when the injured employee is furnished the treatment.

Finally, Liberty Northwest and other sureties are in the business of workers compensation claims on a daily basis throughout every state in these great United States. They have professionals, with years of experience, who write those denial letters. They have a battery of lawyers and researchers to guide their decisions to send denial letters like Exhibit 12. On the other hand, injured employees such as Quinton Bunn, young, inexperienced, working frequently for at or near minimum wage, will usually encounter no more than one occupational injury in a lifetime.

When the legislature provided that a surety who misleads a claimant cannot benefit from the one year statute of limitations, the legislature did not say that the surety's actions must be criminal, willful, or even negligent. Clearly, the letter written by Liberty Northwest to Quinton Bunn was plainly wrong. Liberty Northwest stood in a superior position to correct the consequences of the error once the error was discovered. Because Liberty Northwest ignored Quinton's helpless and unknowledgeable effort to correct the error, either Quinton or the Surety must bear the consequences: either Liberty Northwest should take responsibility and help Quinton, in the manner that Idaho Workers Compensation laws were intended to help injured employees, or Quinton must go through life with his dominant hand disabled, paying his own medical bills, even though he injured his duties hand performing his duties to his employer.

The question comes down to whether it is true Quinton should bear the loss, instead of Liberty Northwest, because Quinton believed Liberty Northwest was in a superior position to inform him accurately as to whether he had a right to compensation. If such is the law, such ought not to be the law.

For these reasons, Quinton Bunn would ask the commission to reconsider its October 2nd, 2008 Opinion and acknowledge the legitimacy of his claim.

Respectfully submitted this 20th day of November, 2008.

MERRILL & MERRILL, CHARTERED

By: _____
Kent A. Higgins

CERTIFICATE OF SERVICE

I, one of the attorneys for the Claimant, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 20th day of November, 2008, served upon the following in the manner indicated below:

E. Scott Harmon	[X]	U.S. Mail
LAW OFFICES OF HARMON, WHITTIER & DAY	[ ]	Hand Delivery
P.O. Box 6358	[ ]	Overnight Delivery
Boise, ID 83707-6358	[ ]	Telefax

Kent A. Higgins

Supreme Court of Wyoming.
Sherry L. BAUER, Appellant (Employee-Claimant),
v.
STATE of Wyoming, ex rel., WYOMING WORKER'S COMPENSATION DIVISION, Appellee (Objector-Defendant).
No. 84-77.

March 1, 1985.

Claimant who was employed part time by town as member of ambulance service sought worker's compensation benefits for ruptured ear drum and resulting surgery. The District Court, Carbon County, Robert A. Hill, J., determined that claim was barred by statute of limitations, and claimant appealed. The Supreme Court, Cardine, J., held that employer's unintentional-but-misleading statements to claimant that claimant did not have worker's compensation coverage because of part-time nature of her work were sufficient to constitute estoppel and prevent employer and State from invoking statute of limitations as a defense, since claimant had valid, meritorious claim that was not filed because of reliance upon employer's representation.

Reversed and remanded.

Thomas, C.J. and Rooney, J., filed separate dissenting opinions.

West Headnotes

[1] Stipulations 363 ⚿14(10)

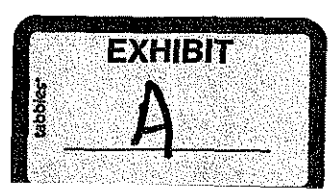
363 Stipulations
363k14 Construction and Operation in General
363k14(10) k. Agreed Statement of Facts. Most Cited Cases
In worker's compensation proceeding, it would be inappropriate to find that employee's supervisor was probably acting as nurse for attending physician at time she suggested that employee was probably not covered by worker's compensation because of minimal part-time nature of employe's occupation as member of town's ambulance service, in light of town's stipulation that town gave such advice to its employee as result of honest mistake.

[2] Clerks of Courts 79 ⚿65

79 Clerks of Courts
79k64 Powers and Proceedings in General
79k65 k. Nature and Extent of Authority. Most Cited Cases
Although statute provides that clerk or his designee shall review reports of injury to ascertain whether worker's compensation case should be docketed, it was not within province of clerk of court to determine whether case was barred by statute of limitations, since procedural protections provided by statute include right to judicial decision on matter. W.S. 1977, § 27-12-601(a), 27-12-602(a).

[3] Workers' Compensation 413 ⚿1283

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(F) Claims for Compensation
413XVI(F)4 Excusing Want Of, or Defect or Delay in Making Claim
413k1283 k. In General. Most Cited Cases



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Statute of limitations for worker's compensation claims, which contains no provision for tolling because of excusable neglect or to relieve hardship in particular circumstances, was absolute bar to claim unless doctrine of equitable estoppel prevented raising of statute of limitations defense. W.S. 1977, § 27-12-503.

[4] Estoppel 156 ⚿52(3)

156 Estoppel
156III *Equitable Estoppel*
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in *Pais*
156k52(3) k. Estoppel by Conduct. Most Cited Cases
Estoppel flows from actual consequences produced by conduct of A on B regardless of whether A intended those consequences; it is immaterial whether conduct falsely misrepresented situation or fraudulently concealed truth.

[5] Workers' Compensation 413 ⚿1300

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(F) Claims for Compensation
413XVI(F)4 Excusing Want Of, or Defect or Delay in Making Claim
413k1300 k. Discretion of Court or Board to Excuse Delay or Waive Strict Compliance. Most Cited Cases
If workers' compensation claimant has valid claim which is lost because of some action by employer or insurance provider reasonably relied upon by claimant to her detriment, relief should be granted.

[6] Workers' Compensation 413 ⚿771

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(E) Defenses Against Claims for Compensation; Misconduct of Employee
413k771 k. In General. Most Cited Cases
Although Worker's Compensation Division of State is granted rights as broad as those of employer, applicable statute does not confer greater rights or permit state to assert defenses not available to employer. W.S. 1977, § 27-12-608.

[7] Workers' Compensation 413 ⚿1114

413 Workers' Compensation
413XIV Waiver and Estoppel as to Right to Claim or to Deny Liability for Compensation
413k1114 k. Estoppel Of, or Waiver By, Employer, or Insurance Carrier. Most Cited Cases
Employer's unintentional-but-misleading statements to claimant that claimant did not have workers' compensation coverage because of part-time nature of her work were sufficient to constitute estoppel and prevent employer and State from invoking statute of limitations as a defense, since claimant had valid, meritorious claim that was not filed because of reliance upon employer's representation. W.S. 1977, § 27-12-503.

***1049** Donald L. Painter, Casper, for appellant.
A.G. McClintock, Atty. Gen., Gerald A. Stack, Deputy Atty. Gen., John W. Renneisen, Sr. Asst. Atty. Gen., and Terry J. Harris, Asst. Atty. Gen. (argued), for appellee.

Before THOMAS,[FN*] C.J., and ROSE, ROONEY,[FN**] BROWN and CARDINE, JJ.

FN* Became Chief Justice January 1, 1985.

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FN** Chief Justice at time of oral argument.

CARDINE, Justice.

[1] The parties in this case stipulated to the following facts: The town of Saratoga had taken over supervision of the ambulance service from Carbon County approximately thirty days prior to this injury. The appellant was employed part time by the town of Saratoga as a member of the ambulance service. She suffered a ruptured eardrum in the course of her employment on December 14, 1981, and sought medical treatment the next day. She was advised by her supervisor that she was not covered by worker's compensation because she was a part-time employee.[FN1]

FN1. The dissenting opinion of Justice Rooney is misleading when it states:

> "It is difficult to treat Ann White's advice, given in the doctor's office while treating appellant on behalf of the doctor, as being given on behalf of the Town of Saratoga * * *."
>
> No one testified in this case. Nowhere in the record is it stated that Ann White's advice was given in the doctor's office while treating appellant. The case was presented to the trial court upon stipulated facts, agreed to by the parties. With respect to this matter, the stipulation states:
>
> "When the subject injury occurred, and thereafter, Employee had considerable conversation and consultation with the same Ann White, who did not believe that Worker's Compensation coverage existed because of the minimal part-time nature of the occupation."
>
> Further, appellee conceded that Ann White was acting on behalf of the town of Saratoga when it agreed in its brief that:
>
> "In the case at bar, the employer, Town of Saratoga, did no more than give bad advice which was the result of an honest mistake as to the existence/non-existence of coverage."
>
> The appellee having stipulated that the town of Saratoga gave bad advice as a result of an honest mistake, it is inappropriate to suggest the contrary by stating that Ann White "was *probably* acting as a nurse for an attending physician at the time" (emphasis added) in a private capacity when she advised appellant concerning coverage under worker's compensation.

[2] Appellant underwent surgery on March 24, 1982. In March 1983, when it became apparent that additional surgery would be necessary, appellant requested that the hospital apply for payment under worker's compensation. The second surgery for the injury that occurred during her employment was performed on April 6, 1983. At that time she again discussed worker's compensation with the chief executive officer of her employer, the mayor of Saratoga, who agreed that she should be covered. Appellant then, during April 1983, attempted to file a worker's compensation***1050** claim. The clerk of court rejected the claim because it was not timely filed.[FN2] Appellant was allowed to file her claim on July 19, 1983. The court, thereafter, determined that the claim was barred by the statute of limitations.

FN2. Section 27-12-601(a), W.S.1977, states in part:

"[T]he clerk or his designee shall review the reports of the injury to ascertain whether the case should be docketed."

However, § 27-12-602(a), W.S.1977, requires that " * * * the judge shall set the case for hearing at the earliest possible date and direct notice of the hearing to be issued by the clerk of the court * * *." In situations where there is a dispute as to the right of the employee to compensation or the amount to be awarded, a right to a hearing is provided. The procedural protections include the right to a judicial decision on the matter. It is not within the province of the clerk of court to determine whether cases are barred by the statute of limitations. See, *R.L. Manning Co. v. Millsap*, Wyo., 687 P.2d 252 (1984), and *Herring v. Welltech, Inc.*, Wyo., 660 P.2d 361 (1983).

We reverse.

The only issue presented by appellant is: "Whether Appellant has a legally, excusable reason for failure to comply with § 27-12-503, W.S.1977." This statute provides in part:

"(a) No order or award for compensation involving an injury which is the result of a single brief occurrence rather than occurring over a substantial period of time, shall be made unless in addition to the reports of the injury, an application or claim for award is filed with the clerk of court in the county in which the injury occurred, within one (1) year after the day on which the injury occurred or for injuries not readily apparent, within one (1) year after discovery of the injury by the employee. The reports of an accident do not constitute a claim for compensation."

We stated in *In re Martini*, 38 Wyo. 172, 265 P. 707 (1928), that the legislature had fixed the applicable time in which a claim could be filed and, therefore, an exception could not be read into the law because the result would be legislation rather than statutory construction. We, however, expressly did not resolve the question here presented, stating:

"Whether the limitation, notwithstanding the fact that it is said to be jurisdictional, may be *waived* under certain circumstances, as is held by some of the courts, *need not be decided,* for the question does not arise here. It is clear that without such waiver, the limitation is, under the authorities already cited, mandatory." (Emphasis added.) *In re Martini*, supra, 265 P. at 708-709.

[3] The question we treat here does not involve statutory construction. The statute is clear and unambiguous. It contains no provision for tolling because of excusable neglect or to relieve hardship in particular circumstances. Thus, the statute here has run and is a bar to this claim unless the doctrine of equitable estoppel prevents raising the statute-of-limitations defense.

It is established policy that worker's compensation statutes and the law applicable thereto should be liberally construed to the end that just claims of workers will be paid whenever possible. Jurisdictions such as ours, with statutes *not* providing tolling for excusable neglect, apply waiver or equitable estoppel to prevent the employer from asserting the statute of limitations as a defense where the lateness was the result of the employer's assurances, misrepresentations, negligence, or fraudulent deceptions. 3 Larson, The Law of Workmen's Compensation § 78.45.

[4][5] There are no jurisdictions which always hold their

statutes of limitation to be a total bar in worker's compensation cases. All jurisdictions allow late filings under some circumstances. These circumstances range from good faith misrepresentations by employers to a requirement of deliberate and actual fraud. Fraud, either actual or legal, will toll the statute of limitations, *Perkins v. Aetna Casualty & Surety Co.*, 147 Ga.App. 662, 249 S.E.2d 661 (1978), as will a reasonable reliance on incorrect information and active misleading conduct. *Cohen v. Industrial Comm'n of Arizona*, 133 Ariz. 24, 648 P.2d 139 (1982). ***1051** Thus, where the failure to file the claim resulted from the direct intervention of the employer's agents and all parties believed that the accident was not covered by worker's compensation, equitable estoppel prevented the defense of statute of limitations. *Levo v. General-Shea-Morrison*, 128 Mont. 570, 280 P.2d 1086 (1955). Estoppel flows from the actual consequences produced by the conduct of A on B regardless of whether A intended those consequences or not. *Pino v. Maplewood Packing Co.*, Me., 375 A.2d 534 (1977). It is immaterial whether the conduct falsely misrepresented the situation or fraudulently concealed the truth. The employer is estopped to plead the statute of limitations. *Cambron v. Co-operative Distributing Co.*, Ky., 405 S.W.2d 687 (1966); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 66 Cal.App.2d 376, 152 P.2d 501 (1944). Where the employer's carrier gave information with no intent to deceive or mislead but his conduct did just that, estoppel applied because the employer, having assisted the employee, could not complain about action taken or not taken. *Robertson v. Brissey's Garage, Inc.*, 270 S.C. 58, 240 S.E.2d 810 (1978). The employer is estopped when the claimant is deceived; the deception occurs when the employee is lulled into a false sense of security. *Taglianetti v. Workmen's Compensation Appeal Board*, 63 Pa.Cmwlth. 456, 439 A.2d 844 (1981); *Ashcraft v. Hunter*, 268 Ark. 946, 597 S.W.2d 124 (App.1980).[FN3] But fraud should not be the ***1052** only basis for relief in worker's compensation cases. The limitation period is short-just one year. The injury resulting to the worker during the course of her employment is our concern. If she has a valid claim which is lost because of some action by the employer or the insurance provider (here the state of Wyoming) reasonably relied upon by the employee to her detriment, relief should be granted.

FN3. Chief Justice Thomas in his dissenting opinion relies upon *Turner v. Turner*, Wyo., 582 P.2d 600 (1978), for his conclusion that this court for all time committed itself to the proposition that the doctrine of equitable estoppel will arise only where action of the employer lulls the employee "into a false sense of security or causes him to believe he will be taken care of without filing a claim." Fraudulently misrepresenting to the employee that he is not covered by worker's compensation, knowing that to be false, for the purpose of causing him not to file a claim would not "lull" him into a false sense of security. And so it would seem that an employee can be "lulled" into a false sense of security only where the employer promises something, such as the payment of a sum of money in settlement or payment of his medical bills thus making it unnecessary for him to file a worker's compensation claim. The Chief Justice, here, is talking about the doctrine of promissory estoppel. 28 Am.Jur.2d Estoppel and Waiver § 48. See also, Anno., Promises to Settle or Perform as Estopping Reliance on Statute of Limitations, 44 A.L.R.3d 482, 488 (1972) wherein it is stated that:

> "One of the broadest generalizations employed by the courts as a starting point is a statement to the effect that one cannot justly or equitably lull his adversary into a false sense of security * * *."

This is the starting point, not the end. In *Turner v. Turner*, supra, parties to the lawsuit were making offers and counter offers of

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settlement, dealing at arms length, when the statute of limitations expired. There was no firm settlement or promise to pay, and plaintiff was not lulled into believing the litigation was settled when the statute expired. *Turner v. Turner*, supra, dealt with offers/promises, not misrepresentations of fact.

In the instant case, no promises were made to the worker, no offers of settlement nor promise to pay her medical bills were made, and she could not be lulled into a false sense of security under these circumstances. She was simply given false information by her employer concerning her right to have her surgery covered by worker's compensation. To say that equitable estoppel will apply if her employer makes a false promise, but will not apply if he makes a false statement, is irrational. That is not the holding of *Turner v. Turner*, supra, which also stated:

" '[A]ctual fraud in the technical sense, bad faith or intent to mislead are not essential to the creation of an estoppel, but it is sufficient that the defendant made misrepresentations or so conducted himself that he misled a party, who acted thereon in good faith, to the extent that such party failed to commence the action within the statutory period * * *.' " At p. 602 (quoting from *In re Pieper's Estate*, 224 Cal.App.2d 670, 37 Cal.Rptr. 46 (1964)).

If we hold as the dissenting opinion suggests now, it would be only a matter of time until we would have before us a case in which an employer falsely and fraudulently misrepresented to an employee his rights under worker's compensation for the express purpose of inducing him not to file a claim within the period of limitation provided by the statute. Better that we lay that matter to rest now. The rule proposed by the dissent is not the majority rule, nor are the cases listed for that proposition the "better reasoned opinions."

Finally, it is stated that the cases cited in the opinion of the court "do not all stand for the propositions for which they are cited * * *." The cases referred to were not cited for their holdings, but are merely illustrative of the approach of various courts of the application of the doctrine of equitable estoppel to raising the bar of the statute of limitations in worker's compensation cases.

In *McKaskle v. Industrial Comm'n of Arizona*, 135 Ariz. 168, 659 P.2d 1313 (1982), the injured employee was told by the employer that he was not covered by worker's compensation because he was an independent contractor and not an employee. Later he learned that he was covered. The court stated:

"The claimant may be equally harmed by his reasonable reliance on either 'positive' or 'negative' assertions. Nor are we persuaded that a characterization of coverage or compensability as a 'question of law' renders the principle of estoppel inapplicable." Id. 659 P.2d at 1317-1318.

In *Levo v. General-Shea-Morrison*, supra, the court stated: "The doctrine of equitable estoppel is a flexible one, founded in equity and good conscience; its object is to prevent a party from taking an unconscionable advantage of his own wrong while asserting his strict legal rights. Seemingly the only strict legal right that we are asked to adhere to is the statute which was passed solely for the benefit of the employer and the insurance carrier, i.e., the Statute of Limitations.

"It is contended that there is involved a question of law as opposed to a question of fact and that the claimant is as responsible for knowing the law regarding the situation as were the insurance company, the employer, the industrial accident board and those others involved. However, even if we were to ascribe to the contention that it is solely a question of law, it would be a very narrow construction of the statutes regarding Workmen's Compensation if this court were to say that a claimant should find it his duty to examine all the technicalities concerning the Workmen's Compensation Act and come to a right conclusion while the employer and the insurance carrier, whose responsibilities are far greater, should be excused because of their misinterpretation of the Act itself, which misinterpretation the employer in turn foisted off upon the claimant." 280 P.2d at 1090.

The State here contends that estoppel is not warranted because the bad advice was merely an honest mistake and cites Larson for the proposition,

"[i]f the employer's bad advice was the result of an honest mistake due to the uncertain state of the law at the time, estoppel is not warranted." 3 Larson, The Law of Workmen's Compensation § 78.45.

The basis for that statement is a California case which held that the city's advice was reasonable when given "due to the uncertain state of the law" at that time. *City of Los Angeles v. Industrial Accident Commission*, 63 Cal.2d 255, 46 Cal.Rptr. 105, 404 P.2d 809 (1965). In the instant case, the state of the law is not uncertain. The worker here was covered by worker's compensation. That is not disputed. And had she, contrary to the advice of her employer, filed a claim, it would have been paid.

[6] The State also contends that even if estoppel should be applied to the town of Saratoga,

" * * * it would not be appropriate as to the Appellee State of Wyoming, as the Appellee State of Wyoming not only administers and defends the Town of Saratoga's industrial accident account, but also all the monies in the worker's compensation fund."

Section 27-12-608, W.S.1977, provides:
"The director or his designee may for any reason appear in the district court and defend against any claim and *shall in all respects have the same rights of defense as the employer.* Failure to contest***1053** a claim does not constitute waiver by the director of his right to reopen an award where he does not appear and defend at the original trial." (Emphasis added.)

The purpose of this statute is to establish the rights of the State "as broad as the right of the employer and employee, so as to give the state full measure of protection." *Wyoming State Treasurer, ex rel. Worker's Compensation Div. v. Svoboda*, Wyo., 573 P.2d 417, 420 (1978), quoting *Marsh v. Aljoe*, 41 Wyo. 220, 227, 284 P. 260 (1930). Although the worker's compensation division of the state of Wyoming is granted rights as broad as those of the employer, there is nothing in the statute which confers greater rights or would permit the State to assert defenses not available to the employer.

[7] Appellant had a valid, meritorious claim that was not filed because of reliance upon her employer's representation that she was not covered by worker's compensation. We hold that the employer's misleading statements, although unintentional, were sufficient to constitute estoppel and prevent the employer and the state of Wyoming from invoking the statute of limitations as a defense. This case is, therefore, reversed and remanded for further proceedings consistent with this opinion.

THOMAS, Chief Justice, dissenting.

I must dissent from the decision of the majority of the court in this instance. In *Turner v. Turner*, Wyo., 582 P.2d 600 (1978), this court dealt with the question of estoppel to assert the bar of the statute of limitations. That case did not involve a claim for worker's compensation, but my examination of the law in this area does not disclose any distinction between worker's compensation cases and other cases with respect to the application of equitable estoppel.

It appears that Ann White's role at the time that she spoke with the appellant may have been equivocal. Even assuming that she was acting as an agent of the Town of Saratoga, the strongest interpretation that can be given to the stipulated information is that she stated there was no coverage. I am satisfied that the better reasoned opinions, which I believe represent a majority rule, dealing with the denial of coverage or liability hold that the employer is not estopped from asserting the defense of the statute of limitations. *Lee v. Kimberly-Clark Corporation*, Ala.Civ.App., 418 So.2d 164 (1982); *Joyce v. Paul Hayes Amoco Service Station*, 161 Ga.App. 373, 288 S.E.2d 266 (1982); *Miller v. Olinkraft, Inc.*, La.App., 395 So.2d 902 (1981); *Drane v. City of New Orleans*, La.App., 328 So.2d 752 (1976); *Kohlbeck v. City of Omaha*, 211 Neb. 372, 318 N.W.2d 742 (1982); *Kushner v. Strick Trailer Co.*, 10 Pa.Cmwlth. 518, 312 A.2d 471 (1973); and *Trzoniec v. General Controls Co.*, 100 R.I. 448, 216 A.2d 886 (1966). These cases distinguish between the denial of liability and conduct which lulls the employee into a false sense of security or causes him to believe he will be taken care of without filing a claim.

With respect to the authorities relied upon by the majority opinion, my reading of several of those cases persuades me that a strict application of the concept of ratio decidendi results in a conclusion that they do not all stand for the propositions for which they are cited, although there is broad language included which could lead one to the interpretation placed upon them by the majority. In *Taglianetti v. Workmen's Compensation Appeal Board*, 63 Pa.Cmwlth. 456, 439 A.2d 844 (1981), for example, the court held that estoppel did not prevent the assertion of the statute, because while the employee was confused, the employee was not lulled by the employer's conduct.

The decisions in those cases which have limited estoppel to instances in which the employee was lulled in such a way that the claim was not asserted, but do not permit estoppel where the employee was informed that there was no coverage, are consistent with what we said in *Turner v. Turner*, supra. The statement by White that there was no worker's compensation coverage would not be conduct which would justify ***1054** an estoppel against the town to raise the statute of limitations.

For these reasons I would affirm the judgment of the trial court.

ROONEY, Justice, dissenting.

The majority opinion correctly accepts the fact that the statute of limitations, without more, would bar appellant's claim. The legislature has so provided:

"(a) No order or award for compensation involving an injury which is the result of a single brief occurrence rather than occurring over a substantial period of time, shall be made unless in addition to the reports of the injury, an application or claim for award is filed with the clerk of court in the county in which the injury occurred, within one (1) year after the day on which the injury occurred * * *." Section 27-12-503(a), W.S.1977.

Appellant recognized that she had suffered a compensable injury on December 14, 1981. The claim was not filed until April, 1983. See *Baldwin v. Scullion*, 50 Wyo. 508, 62 P.2d 531, 108 A.L.R. 304 (1936); *Bemis v. Texaco*, Wyo., 401 P.2d 708 (1965). The statutory time limit in which to file a claim had expired.

Nor does appellant's situation afford to her the exception to the limitation period provided by the legislature:

"If an injured employee is mentally incompetent or a minor, or where death results from the injury if any of his dependents are mentally incompetent or minors, at the time when any right or privilege accrues under this act [§§ 27-12-101 through 27-12-804], no limitation of time provided for in this act shall run so long as the incompetent or minor has no guardian." Section 27-12-505, W.S.1977.

Nonetheless, the majority opinion finds an exception to the statute of limitations in a waiver by the employer or an estoppel through the acts of the employer. With this, I disagree.

In the first place, I question the assumption that the employer was involved in any waiver or estoppel. Appellant does not contend for any fraudulent or intentionally deceptive action on the part of the employer. In her brief, appellant states, " * * * we do not contend the Employee was deceived any more than negligently by Ann White * * *." Ann White was a Nurse Practitioner in the office of Dr. John Lunt, M.D., in Saratoga. Carbon County maintains an airplane ambulance for flights from Carbon County to Laramie, Denver, etc. Ann White and appellant worked part time on the ambulance EMT crew. Ann White was the supervisor of the crew. About thirty days before appellant suffered a ruptured eardrum on a flight of the airplane ambulance, the Town of Saratoga had taken over the operation of the airplane ambulance from the county. The day after her injury, appellant sought medical attention from Dr. Lunt, where she was treated by Ann White. It was Ann White's statement that she did not believe worker's compensation coverage existed for the injury because of the part-time nature of the employment which is the basis for the claimed estoppel or waiver against the Town of Saratoga.

Was Ann White speaking as a nurse for Dr. Lunt? Or was she speaking as a part-time employee supervisor of the EMT unit on Saratoga's airplane ambulance? And, if the latter, did she have authority to waive the statute of limitations on behalf of Saratoga or to act or speak on behalf of Saratoga in this matter so as to estop Saratoga from application of the statute of limitations? It is difficult to treat Ann White's advice, given in the doctor's office while treating appellant on behalf of the doctor, as being given on behalf of the Town of Saratoga under these circumstances.

" * * * The doctrine of implied agency or ostensible authority applied to private parties or corporations is limited very much, so far as municipal corporations are concerned * * *." S. Goldberg & Co. v. City of Cedar Rapids, 200 Iowa 139, 204 N.W. 216 (1925).

***1055** The Iowa court pointed out that the extent of authority is a matter of record in statutes and ordinances for municipal matters and not known only to the principal and agent as is the case with private parties.

The only reasonable appraisal of the situation is that appellant could not have relied on Ann White's comments as those of the town. She should be charged with knowledge contained in the placard which is required to be posted by every employer, and which she is taken to have read. It notified her of the necessity of filing a timely claim. She should not be allowed to rely on advice received from another part-time employee, albeit a supervisor of a limited and special activity who was probably acting as a nurse for an attending physician at the time, for a waiver of the statute of limitations by the employer or to establish an estoppel against the employer to assert such statute.

Inasmuch as the privilege of the statute of limitations is personal, a waiver, in this instance, can only be by the

Town of Saratoga or someone empowered to act for it. *Stryker v. Rasch,* 57 Wyo. 34, 112 P.2d 570, 136 A.L.R. 770,reh. denied 113 P.2d 963 (1941). The power to act for a municipality in most respects is statutorily given to the governing body of the municipality. Section 15-1-103, W.S.1977. See §§ 15-2-201 and 15-2-202, W.S.1977; re restrictions on acceptance of claims by governing bodies of towns.

Finally, the advice given by Ann White pertained to a matter of law.

"The well-recognized rule is that a representation as to a matter of law will not ordinarily support an action for fraud or deceit, nor constitute an estoppel to rely upon the statute of limitations, the reason for the rule being that representations as to matters of law are ordinarily considered as expressions of opinion, and justifiable reliance cannot be had upon the mere opinion of another. * * * " 51 Am.Jur.2d Limitations of Actions § 451, p. 913 (1970).

I would affirm.

Wyo.,1985.
Bauer v. State ex rel. Wyoming Worker's Compensation Div.
695 P.2d 1048

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

QUINTON BUNN, Claimant, v. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2005-509704** **ORDER DENYING RECONSIDERATION**

Pursuant to Idaho Code § 72-718, Claimant moves for reconsideration of the Commission's October 10, 2008 decision in the above-referenced case. Claimant objects to the Commission's finding that Claimant was not misled by Defendants for purposes of Idaho Code § 72-706(1). Claimant also objects to the Commission's finding that Claimant did not receive compensation from Defendants within the meaning of Idaho Code § 72-706(2). Defendants reply that Claimant's motion constitutes a request to re-weigh evidence and arguments already considered and ruled upon. Defendants ask the Commission to deny Claimant's motion.

The Commission agrees with Defendants that Claimant's arguments on both issues have already been considered. The Commission carefully examined and weighed all evidence and arguments before rendering its original decision and remains unpersuaded by Claimant's arguments.

Accordingly, the motion for reconsideration is hereby DENIED.

DATED this 17th day of December, 2008.

INDUSTRIAL COMMISSION

James F. Kile, Chairman

R.D. Maynard, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2008 a true and correct copy of **Order Denying Reconsideration** was served by regular United States Mail upon each of the following:

KENT A HIGGINS
PO BOX 991
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E SCOTT HARMON
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eb

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IAN C. JOHNSON
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FOUNDED IN 1913

January 2, 2009

Industrial Commission
Judicial Division
P.O. Box 83720
Boise, ID 83720-0041

Re: Quinton Bunn v. Heritage Safe Co. and Liberty Northwest
I.C. No. 2005-509704

Dear Sirs:

Enclosed for filing is Notice of Appeal. Thank you.

With best regards,

MERRILL & MERRILL, CHARTERED

Kent A. Higgins
KAH/mb/6943

Enclosure

2009 JAN -5 A 11:58
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INDUSTRIAL COMMISSION

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Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION

OF THE STATE OF IDAHO

QUINTON BUNN, Claimant/Appellant, vs. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INS. CORP., Surety, Defendants/Respondents.	I.C. No. 2005-509704 **NOTICE OF APPEAL** **Idaho Code § 72-724** **IAR 17**

TO: THE ABOVE NAMED RESPONDENTS
Heritage Safe and Liberty Northwest Ins. Corp.
AND ITS ATTORNEY
E. Scott Harmon
LAW OFFICES OF HARMON, WHITTIER & DAY

P.O. Box 6358
Boise, ID 83707-6358
AND THE CLERK OF THE IDAHO INDUSTRIAL COMMISSION

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Quinton Bunn, through his attorney, Kent A. Higgins, appeal against the above named respondent to the Idaho Supreme Court from the Order entered in the above entitled matter on the 10th of October, 2008, and the Order Denying Reconsideration riled December 17, 2008.

2. The parties have a right to appeal to the Idaho Supreme Court, and the judgment or order described in paragraph 1 above are appealable pursuant to Rule 11(a)(1) and 14 (b) of the Idaho Appellate Rules.

3. The issues of this appeal are as follows:

(a) Whether the commission erred in deciding that medical treatment is not compensation.

(b) Whether the commission erred in finding that an erroneous denial letter to a claimant is not misleading.

(c) Whether the commission erred in finding the statute of limitations for filing Claimant's claim expired.

(d) To the extent, if any, the commission's findings may be construed to imply that medical treatment was not obtained for claimant by his employer, whether any such findings are based in law or fact.

4. A reporter's transcript is requested of the trial, however a transcript has already been obtained.

5. The appellants request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: **Briefs on Motion to Reconsider.**

6. I certify:

(a) That a copy of this notice of appeal and any request for additional transcript have been served on the reporter, or the rules requirements of I.C. § 72-725 are met.

(b) That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(c) That the estimated fee for preparation of the clerk's or agency's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

Dated this 2nd day of January, 2008.

MERRILL & MERRILL, CHARTERED

By: _____
Kent A. Higgins

CERTIFICATE OF SERVICE

I, one of the attorneys for the Claimant, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 2nd day of January, 2008, served upon the following in the manner indicated below:

E. Scott Harmon	[✓]	U.S. Mail
LAW OFFICES OF HARMON, WHITTIER & DAY	[ ]	Hand Delivery
P.O. Box 6358	[ ]	Overnight Delivery
Boise, ID 83707-6358	[ ]	Telefax

_____
Kent A. Higgins

08

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

QUINTON BUNN, Claimant-Appellant, v. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants-Respondents.	**SUPREME COURT NO.** 36024 **CERTIFICATE OF APPEAL (QUINTON BUNN)**

Appeal From:	Industrial Commission Chairman James F. Kile presiding.
Case Number:	IC 2005-509704
Order Appealed from:	FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION AND ORDER ENTERED OCTOBER 10, 2008; AND ORDER DENYING RECONSIDERATION ENTERED DECEMBER 17, 2008
Attorney for Appellant:	Kent A. Higgins P.O. Box 991 Pocatello, ID 83204-0991
Attorney for Respondents:	E. Scott Harmon P.O. Box 6358 Boise, ID 83707
Appealed By:	QUINTON BUNN, Claimant
Appealed Against:	HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety,
Notice of Appeal Filed:	January 5, 2009
Appellate Fee Paid:	NONE

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Name of Reporter:	Sandra Beebe P.O. Box 658 Blackfoot, ID 83221
Transcript Requested:	The entire standard transcript has been requested. The standard transcript has been prepared and is on file with the Industrial Commission.
Dated:	January 5, 2009

Dena K. Burke
Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATION

I, the undersigned Assistant Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the **NOTICE OF APPEAL FILED JANUARY 5, 2009; FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION AND ORDER ENTERED OCTOBER 10, 2008; AND ORDER DENYING RECONSIDERATION ENTERED DECEMBER 17, 2008, RE: QUINTON BUNN'S SUPREME COURT APPEAL,** herein, and the whole thereof.

Dated the 5TH day of JANUARY, 2009.

Dena K. Burke
Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATION OF RECORD

I, the undersigned Assistant Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record on appeal by Rule 28(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the Certificate of Exhibits (i). Said exhibits will be lodged with the Supreme Court upon settlement of the Transcript and Record herein.

DATED at Boise, Idaho this 10TH day of MARCH, 2009.

INDUSTRIAL COMMISSION

Dena K. Burke

Dena K. Burke
Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

QUINTON BUNN, Claimant-Appellant, v. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants-Respondents.	)	**SUPREME COURT NO. 36024-2009** **NOTICE OF COMPLETION**

TO: STEPHEN W. KENYON, CLERK OF THE COURTS; AND KENT A. HIGGINS, ESQ., FOR CLAIMANT QUINTON BUNN; AND E. SCOTT HARMON, ESQ., FOR DEFENDANTS HERITAGE SAFE COMPANY, EMPLOYER AND LIBERTY NORTHWEST INSURANCE CORPORATION, SURETY.

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date, and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

Kent A. Higgins
P.O. Box 991
Pocatello, ID 83204-0991

E. Scott Harmon
P.O. Box 6358
Boise, ID 83707

You are further notified that, pursuant to Rule 29(a), Idaho Appellate Rules, all parties have ***twenty-eight days*** from this date in which to file objections to the Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed ***within the twenty-eight day period***, the !Transcript and Record shall be deemed settled.

DATED at Boise, Idaho this 10TH day of MARCH, 2009.

INDUSTRIAL COMMISSION

Dena K. Burke

Dena K. Burke
Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

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