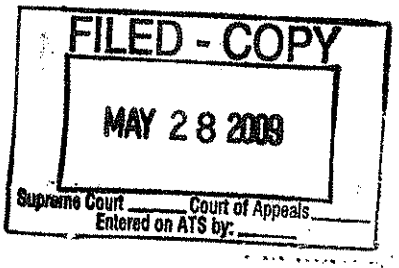
5-28-2009

Bunn v. Heritage Safe Co. Respondent's Brief Dckt. 36024

IN THE SUPREME COURT FOR THE STATE OF IDAHO

QUINTON BUNN Claimant, Appellant, vs. ROCHE MOVING & STORAGE, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants, Respondents.	)	Supreme Court No. 36024 **RESPONDENT'S RESPONSIVE BRIEF**



RESPONDENT'S BRIEF

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTE	PAGE CITED
Idaho Code §72-706(1)	13, 14, 15
Idaho Code §72-706(2)	9, 15, 16, 17, 18, 21

STATEMENT OF THE CASE

Appellant, Quinton Bunn ("Claimant"), is represented by Kent A. Higgins of Pocatello, Idaho. Respondents-Defendants, Heritage Safe Co. ("Heritage") and Liberty Northwest Insurance Co. ("LNW" or "Surety"), are represented by E. Scott Harmon of Boise, Idaho.

Findings of Fact, Conclusions of Law and Recommendations were entered by Referee Douglas A. Donohue on October 2, 2008 and an Order adopting those findings and conclusions was unanimously entered by the Industrial Commission on October 10, 2008. The Idaho Industrial Commission ("Commission") specifically found Claimant had not filed his Workers' Compensation Complaint within the time limitations set forth in Idaho Code §72-706 and, thereupon, dismissed Claimant's Complaint.

Claimant moved to reconsider and, on December 17, 2008, the Commission unanimously denied Claimant's Motion, finding that, by his Motion to Reconsider, Claimant had merely asked the Commission to reweigh evidence already considered in its earlier decision.

STATEMENT OF THE FACTS

Claimant, Quinton Bunn, was 28 years old on the date of hearing in this matter. *Exh. A, 1; Bunn dep., 6:19-21.*[1] But for a two year church mission in

[1] Though Claimant's pre-hearing deposition is fully contained at Defendants' Exhibit F, citation to the deposition will be made to the deposition page and lines. The same practice will be accorded the deposition of Lisa Harvey contained at Defendants' Exhibit L and the Carol Beckstead deposition contained at Defendants' Exhibit E.

Canada, Claimant has lived his whole life in Southeastern Idaho and Northern Utah. *Bunn dep., 6 – 7.* He is a high school graduate. *Id., p. 7:13-16.* He is a certified gunsmith and ardent shooter. *Id., 46-49.* In the two years prior to commencing employment with Defendant Heritage Safe, in addition to his extensive hand gun use, Claimant had performed hand intensive work as a butcher. *Id., 17:15-18:14.*

On or about March 14, 2005, Claimant obtained employment with Heritage. *Id., 18:19-19:3.* He was hired to glue precut sheetrock and carpeting to the interior of gun safes. *Id., 23:15-24:3.* On April 25, 2005, Claimant was moved to a lock installation position. *Exh. D, 9.* To perform his duties as a lock installer, Claimant attached locking mechanism and a face plate to gun safes at approximately chest height, inserting half inch long screws into pre-drilled holes using a manual screwdriver.[2] *Tr., 42:16-18; Bunn dep., 24:19-26:4.* On April 28, 2005, give or take his fourth day installing locks and his 28th work day at Heritage, Claimant asserts that, by the end of the day, he felt weakness in his wrist, like a pulled muscle. *Tr., 19:14-20.*

Claimant did not mention to anyone at work that he had any pain or problems, let alone that he believed any such pain or problems arose as a result of his employment; rather, he proceeded home for the three day weekend and iced his wrist. *Tr. 21:9-20.* The following Monday, at commencement of the

[2] Despite Appellant's unsubstantiated comment in his brief, as below, that "Tightening the screws required intensive twisting pressure with the wrist" (*App. Br. p. 2*), the record does not reflect the amount of pressure required, but does demonstrate, instead, only that the screws are applied to pre-drilled holes.

workday, Claimant's hand was swollen and numb. He informed a Ms. Johnson that he had a problem, but again made no mention that he thought, surmised, or even speculated that the "problem" had any causal relationship with Heritage or his work. *Tr., 21:21-22:5.* Claimant requested that Carol Beckstead, Safety Manager for Heritage, make him a medical appointment. *Id., 22:22-23:9; Beckstead dep., 10:21-25.* Ms. Beckstead acquiesced and made an appointment on Claimant's behalf at Lakeview Clinic, the only medical facility with a branch office in Grace, the very small town in which Heritage is located. *Id., 11:9-12:19.* Ms. Beckstead regularly makes medical appointments for Heritage employees, both for non-work related and work related concerns. *Id., 13:18-14:3.*

Ms. Beckstead testified that, a number of years after this routine telephone conversation to set an appointment for Mr. Bunn, she simply does not recall what she may have said during that phone conversation with Lakeview Clinic. *Beckstead dep., 14:16-15:22.* Similarly, the parties are unable to identify or locate who may have taken Ms. Beckstead's call at Lakeview Clinic to see if they have any recollection of what transpired during that conversation. *Harvey dep., 9:21-10:11.* We are not, though, left without a clear demonstration of the impact of the telephone conversation; as a result of the phone call, as demonstrated by Lakeview Clinic's regularly kept business records, Lakeview Clinic understood that neither Heritage nor its workers' compensation surety was responsible for the cost of the visit, but rather that the appointment was being made with the understanding that any associated cost was to be borne by Mr. Bunn, and

specifically not by either Heritage or its workers' compensation Surety. *Harvey dep., 28:18-29:1, 31:8-17.*

Claimant presented to PA-C Brett Smith on May 2, 2005, pursuant to the appointment made at his request by Ms. Beckstead. *Exh. G, p. 21.* PA-C Smith diagnosed right wrist carpal tunnel syndrome, instituted medications and icing, and suggested that Claimant limit his use of a manual screwdriver. *Id.* After arriving at Lakeview Clinic and during the intake process, Claimant completed a "patient information" form upon which he identified Heritage as the responsible party. *Exh. 45; Tr., 25:19-26:1; Harvey dep., 10:21-11:7.* Upon that representation by Mr. Bunn, and not upon any representation by either Heritage or its Surety, on May 5, 2005, Lakeview Clinic altered its regularly kept business records to reflect that the cost of the appointment was to be borne by Heritage or its Surety. *Id. 31:15-17.*

Claimant returned to Heritage on March 3, 2005 and presented them a copy of his work release. Thereupon, Heritage convened an investigation in which Claimant participated. *Exh. D, 6-7; Tr., 34:14-35:11.* On the same day, Heritage completed and faxed a Notice of Injury to its Surety, Liberty Northwest. *Exh. A, 1.* The following day, May 4, 2005, Liberty mailed its denial of the claim. *Exh. B, 2.* Claimant admits receiving the denial letter. *Bunn dep., 38:1-4.* Mr. Bunn did not again present himself for work at Heritage. *Exh. G, 10.*

Additional follow-up was taken with PA-C Smith (*Exh. G*) until, on his own, Claimant presented to Dr. Wolf (*Exh. I, 42*), was referred to Dr. Newhouse and then on to Dr. Esplin. *Exh. H.* On May 26, 2005, Dr. Esplin questioned the carpal

tunnel syndrome diagnosis upon negative nerve conduction studies, and started a search for a vascular explanation for Claimant's symptoms. *Exh. H, 6.*

On May 30, 2005, Claimant wrote Liberty Northwest and requested another review of his claim. *Exh. C.* He did not confirm that the letter was ever received by Surety and Surety did not respond. The May 30, 2005 correspondence represents the last pre-Complaint communication between Claimant and either Liberty Northwest or Heritage management. *Tr., 31:3-17.*

Since that time, Dr. Esplin has conducted two surgeries on Claimant's right wrist. *Exh. K.* From the asserted date of injury through Claimant's medical care, neither Heritage nor its Surety have paid any benefits to Mr. Bunn or on his behalf, nor have they informed Claimant or any of his medical providers that he was entitled to any such benefits. *Tr., 31:1-11.*

On May 25, 2007, some two years and 21 days after his claim was denied, Claimant filed his first Complaint in this matter.

ISSUES ON APPEAL

Urging a change in settled Idaho law, Claimant contests the determination of the Commission that his Complaint was not timely filed within the meaning of Idaho Code §72-706. Respondents contend that the Commission's determination comports with settled Idaho statutory and case law and that such determination is based upon substantial and competent evidence on the record presented. The issues presented are, specifically:

1. Whether Surety's denial letter of May 4, 2005, in light of changing diagnoses by his various physicians, misled Mr. Bunn to reasonably

believe that his workers' compensation Complaint need not be filed within the statutory time limits; and,

2. Whether the telephone call by Ms. Beckstead to Lakeview Clinic, made at Claimant's request, constitutes "payment of compensation" within the meaning of Idaho Code §72-706(2) such that the five (5) year statute of limitations there contained is invoked.

ARGUMENT

On appeal from a decision of the Idaho Industrial Commission, the Supreme Court gives great deference to the Commission's Findings of Facts and Conclusions of Law. This Court exercises free review over questions of law, but not over the questions of fact. As restated in *Sunquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005):

> When reviewing a decision of the Industrial Commission, this Court exercises free review over questions of law. *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). The question of when a claimant's medical condition becomes "manifest" and "preexisting" relative to later events is a question of fact. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). **The factual findings of the Industrial Commission will be upheld provided they are supported by substantial and competent evidence**. *Uhl*, 138 Idaho at 657, 67 P.3d at 1269. "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Id*. The conclusions reached by the Industrial Commission regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. *Hughen v. Highland Estates*, 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002). We will not re-weigh the evidence or consider whether we would have drawn a different conclusion from the evidence presented.

Id.,(emphasis added).

This Court has also stated:

> The Industrial Commission's legal conclusions are freely reviewable by this Court; however, its **factual findings will not be disturbed on appeal so long as they are supported by substantial and competent evidence**. Idaho Const. Art. V, §9; I.C. §72-732; *Obenchain v. McAlvain Constr., Inc.*, 143 Idaho, 56, 57, 137 P.3rd 443, 444 (2006). The Court construes the record most favorably to the party prevailing below, and does not try the matter anew. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997).

Wichterman v J.H. Kelly, Inc. 144 Idaho 138, 158 P.3d 301, 303 (2007), *(emphasis added).*

> "Unless clearly erroneous, this Court will not disturb the Commission's conclusions on the credibility and weight of evidence." *Painter v. Potlatch Corp.*, 138 Idaho 309, 312; 63 P.3d 435, 438 (203) ... This Court will not "re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented." *Id.* (citing *Warden v. Idaho Timber Corp.*, 132 Idaho 454, 457, 974 P.2d 506, 509 (1999)).

Stolle v. Bennett, 144 Idaho 44, 156 p.3D 545, 550 (2007).

Claimant has not made an argument that the Commission did not have sufficient evidence to reach the decision that it did, but, rather, wishes this Court to reweigh and reapply the evidence, in defiance of *Sunquist, Wichterman* and *Stolle,* engrafting thereupon a gloss repeatedly rejected by this Court.

The statute here at issue, Idaho Code §72-706 provides, in pertinent part as follows.

> **§ 72-706. Limitation on time on application for hearing.** (1) When no compensation paid. When a claim for compensation has been made and no compensation has been paid thereon, the claimant, unless misled to his prejudice by the employer or surety, shall have one (1) year from the date of making claim within which to make and file with the commission an application requesting a hearing and an award under such claim.

> (2) When compensation discontinued. When payments of compensation have been made and thereafter discontinued, the claimant shall have five (5) years from the date of the accident causing the injury or date of first manifestation of an occupational disease within which to make and file with the commission an application requesting a hearing for further compensation and award.
>
> . . .
>
> (6) Relief barred. In the event an application is not made and filed as in this section provided, relief on any such claim shall be forever barred.

Claimant has the burden of proving facts necessary to demonstrate that that the statute of limitations has been tolled. *Dunn v. Silver Dollar Mining Co.*, 71 Idaho 398, 233 P.2d 411 (1951).

A. NOTHING IN THE SURETY'S DENIAL LETTER MISLED MR. BUNN TO HIS PREJUDICE.

The kernel of Claimant's contention is that, having denied him compensation upon the diagnosis rendered by his then treating physician, Heritage and its Surety ought stand the risk that the diagnosis may, thereafter, be changed rather than Mr. Bunn standing that risk. He asks the Court to invoke equitable estoppel to reach such result.

Here, the Commission has determined that "Nothing in Employer's actions reasonably served to mislead Claimant about eligibility for workers' compensation benefits." *FOF/COL, 4.* This Court has held that a Commission decision as to whether a Claimant has been misled is a factual finding rather than a conclusion of law. *Swenson v. Estate of Craner*, 117 Idaho 57, 785 P.2d

(1990). In reviewing findings of fact, as noted above, this Court has historically limited itself only to determining whether there is substantial competent evidence on the record to support the Commission's determination.

Further, this Court has systematically rejected invitations, such as the one here given by Appellant, to engraft equity upon the clear legislative language setting out the various statutes of limitation in workers' compensation actions. Writing for a Court majority in *Petry v. Spaulding Drywall*, 117 Idaho 382, 788 P.2d 197 (1990)[3], Justice McDevitt noted:

> [Claimant] argues that it is unjust to require an injured worker to file a claim within the statutory time limit where the extent of the injury is not discovered until after the time has expired; especially, as in this case, where the employer had actual notice of the injury at the time it occurred and is not prejudiced by the delay.
>
> This argument is compelling to the conscience, but this Court is constrained by the clear words of the statute. Aristotle said that, "equity is the idea of justice which contravenes the written law." **This Court is not free to impart equity where, as in the case of Worker's Compensation, the law in question derives its existence solely from the printed words of the statutes.**
>
> . . .
>
> Although the result is harsh and arbitrary, it is for the legislature to re-examine its policies, and not for this Court to fabricate new laws where explicit statutory directives already exist.

Id. at 383-384, 788 P.2d at 198-199, *(emphasis added)*.

In *Ewing v. Holton*, 135 Idaho 792, 25 P.3d 105 (2001), this Court was faced with a case very similar to the case currently at bar. There, Claimant

[3] Respondents recognize that *Petry* is a case in which the Court was required to construe the statutes of limitation regarding notice and claim in Idaho Code §72-701 and not the statutes of limitation governing time for filing an application for hearing (Complaint) set forth in Idaho Code §72-706. Justice McDevitt's logic, though, remains applicable.

sought relief from the provisions of Idaho Code §72-706(1) upon the basis that, at the time her claim was filed, the physicians treating her were unsure of her diagnosis. Claimant Ewing argued that, because she didn't have a definitive diagnosis for her condition, it was unfair to require her file a Complaint within the one (1) year following the filing of her claim. In affirming the Commission's dismissal of Claimant's claim pursuant to Idaho Code §72-706(1), the Court stated:

> Once the notice of claim has been filed, I.C. §72-706 requires that an application for injury *[sic, hearing]* be filed within one-year of that date where benefits were not paid. Unfortunately, this mandatory language of the worker's compensation statute was not followed.

Id., at 797, 25 P.3d at 110; *see, also, Smith v. IML Freight, Inc.*, 101 Idaho 600, 619 P.2d 118 (1980)[4].

This Court has previously discussed the type of conduct by an employer/surety which are sufficient to mislead Claimant within the meaning of Idaho Code §72-706(1). In *Bottoms v. Pioneer Irrigation District,* 95 Idaho 487,

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[4] *Smith* also arises under Idaho Code §72-701 rather than §72-706. Again, though, the strength of Court's language, and the fact that, despite such gilded invitation, the Legislature has not, though given nearly three decades, retreated from the language of the statute, bears notice.

> This result is harsh and seemingly contrary to the public policy surrounding the workmen's compensation statutes. Using the date of 'accident' as the point from which the limitation period is to run has been severely criticized by Larson in his treatise on the Law of Workmen's Compensation, Vol. 3, §78.42(b), saying:
>
> 'It is odd indeed to find, in a supposedly beneficent piece of legislation, the survival of this fragment of irrational cruelty surpassing the most technical forfeitures of legal statutes of limitation. Statutes of limitation generally proceed on the theory that a man forfeits his rights only when he inexcusably delays assertion of them, and any number of excuses will toll the running of the period. But here, no amount of vigilance is of any help. The limitation period runs against a claim that has not yet matured; and when it matures, it is already barred.'

101 Idaho at 603, 619 P.2d at 121.

511 P.2d 304 (1973), the Court comprehensively reviewed such sufficient conduct, including:

- Continuing requests for medical examination and reports along with authorizing and paying for back braces (*citing*, *Lindskog v. Rosebud Mines, Inc.*, 84 Idaho 160, 369 P.2d 580 (1962));
- Continued investigation, further hospital and medical treatment and discussions as to the payment therefore (*citing*, *Harris v. Bechtel Corp.*, 74 Idaho 308, 261 P.2d 818 (1953));
- Engaging in consultations and negotiations concerning the claim, arranging meetings between Claimant and company officers, making settlement offers (*citing*, *Frisbie v. Sunshine Mining Company*, 93 Idaho 169, 457 P.2d 408 (1969)).

Ewing, though, teaches that a denial upon a missed or erroneous diagnosis is not sufficient to mislead a Claimant to his prejudice, thereby avoiding the one (1) year statute of limitation set forth in Idaho Code §72-706(1). Appellant's urgings that he was misled by the fact that Surety denied him compensation on exactly the condition he claimed and exactly the condition his then treating physicians had diagnosed, though such diagnosis was later determined to be in error, misses the mark.

The Commission's finding of fact that there was nothing in the conduct of either Heritage or its Surety which would have reasonably served to mislead Mr. Bunn into a belief that he need not comply with the one (1) year statute of

limitations set forth in Idaho Code §72-706(1) is based upon substantial and competent evidence and ought not be disturbed upon this appeal.

B. THERE HAVE BEEN NO "PAYMENTS OF COMPENSATION" WITHIN THE MEANING OF IDAHO CODE §72-706(2) UPON WHICH THE FIVE (5) YEAR STATUTE OF LIMITATIONS MAY BE INVOKED.

Claimant further urges that Ms. Beckstead's telephone call to Lakeview Clinic to set a medical appointment for him, made at his request and for which he was to pay, somehow constitutes a "payment of compensation" invoking the five (5) year statute of limitations set forth in Idaho Code §72-706(2). Respondents, and the Idaho Industrial Commission, disagree.

In making his argument, Appellant veers from the path established by the record from the very beginning; he presupposes that Heritage either "sent" Mr. Bunn to obtain medical care at Lakeview Clinic or, in the alternative, that Lakeview's late arising determination that Mr. Bunn wanted Heritage or its Surety to pay for the visit, somehow constituted medical treatment. Neither presupposition is supported by the record.

(1) Claimant was not "sent" for medical treatment by Heritage or its Surety.

First, Claimant is unable to point to any evidence on the record to establish that, at any point before he first walked into Lakeview Clinic, he had mentioned to anyone at Heritage that he thought, surmised or even speculated that the swelling, discoloration and numbness in his right hand had anything to do with his employment at Heritage and was not the result of some unrelated event occurring over the immediately preceding three day weekend. Rather, the

record reflects that, having uttered not a word to anyone on the prior Thursday (the alleged date of injury) Claimant showed up for work Monday morning unable to prosecute his work. *Tr., 21:21-22-5.* With those symptoms, and unable to work, Claimant, requested that a medical appointment be set for him. *Tr., 22:2-23:11; Beckstead dep., 10:21-25.* Ms. Beckstead acquiesced to Claimant's request[5] and first tried to set an appointment for Wednesday (two days later) at the only medical clinic in Grace, a Lakeview Clinic branch office. When Claimant determined that was not soon enough, Ms. Beckstead, again at Claimant's request, set an appointment at the Lakeview Clinic in Soda Springs. *Tr., 22:7-23:11.*

Rather than being "sent" for medical care by Heritage as Claimant suggests, the record is clear that, here, Ms. Beckstead performed nothing more than a friendly, secretarial, function by placing a telephone call to set a medical appointment Claimant, not Heritage, requested.

(2) Neither Heritage nor its Surety ever paid or "provided for" any medical care obtained by Mr. Bunn; there have been no "payments of compensation" within the meaning of Idaho Code §72-706(2).

Second, Claimant relies upon Lakeview Clinic records and the testimony of Lakeview's billing clerk to suggest that "payments of compensation" within the meaning of Idaho Code §72-706(2) have somehow been made or provided for such as to invoke the five (5) year statute of limitations there contained.

[5] While a more urbane mind may find this action by Ms. Beckstead to be unusual, in this very rural enclave and with this small employer, it was par for the course. Ms. Beckstead testified that she regularly makes medical appointments for employees, both for work related and non-work related conditions. *Tr., 35:23-36:2; Beckstead dep., 13:18-14:3, 23:5-16.*

Appellant again, though, ignores the record in reaching his erroneous conclusion.

Claimant does not contest the determination by the Commission, upon a clear record, that neither Heritage nor its Surety ever "paid for", in the usual sense of the term[6], any medical care Mr. Bunn received; nor does Claimant suggest that he ever received, either from Heritage or its Surety, funds representing reimbursement for any medical care undertaken or any income benefit pursuant to Idaho's Workers' Compensation Law (*e.g.*, TTD/TPD, PPI, PPD or retraining). Rather, Claimant constructs a convoluted verbal contraption seeking, it appears, to demonstrate that Ms. Beckstead's telephone call is the equivalent of "payments of compensation" as used in Idaho Code §72-706(2).

As noted in the factual recitation, *supra, pg. 6*, Ms. Beckstead, understandably, does not have current recall of the exact words used in this routine, ministerial telephone conversation occurring more than three (3) years earlier. *Beckstead dep., 14:16-15:12.* Similarly, whether unknown, unavailable or simply not offered up, we have no testimony from the Lakeview Clinic employee on the other end of the phone line during that conversation. Hence, the precise words spoken during the telephone conversation between Ms. Beckstead and Lakeview Clinic in which the appointment Mr. Bunn requested are forever lost to history.

We do, though, have a clear indication of what the receptionist at Lakeview Clinic understood as a result of the telephone conversation. When the

[6] No money, check or money order was forwarded to Lakeview; no money ever changed hands.

appointment was first entered into the regularly kept business records of Lakeview Clinic, the appointment was coded, by a Lakeview employee, upon the information provided by Ms. Beckstead, as an appointment for which Mr. Bunn, not Heritage or its Surety, was to pay. *Harvey dep., 28:19-29:1, 31:1-14.* Certainly, given that action by Lakeview Clinic, it cannot be surmised that Ms. Beckstead, Heritage or LNW either paid, or suggested or implied that they would pay, for Mr. Bunn's medical visit; that is, they never provided any medical care, treatment or benefit to Mr. Bunn.

Though Claimant would have it otherwise, it is clear, as set forth above, that this Court has strictly construed the language of the statutes of limitations applicable to workers' compensation claims, including provisions regarding "payments of compensation". *See, Petry* and *Smith,* both *supra.*

In line with that strict construction, in *Williamson v. Whitman Corporation/Pet, Inc.,* 130 Idaho 602, 944 P.2d 1365 (*rehrg. denied, 1997*), this Court affirmed a Commission determination that there had been no "payments of compensation" within the meaning of Idaho Code §72-706(2) when Surety had actually paid for medical care upon a mistaken belief that treatment rendered related to an old accepted claim rather than to a new claim upon which Claimant had failed to make timely notice. Similarly, in *Bainbridge v. Boise Cascade Plywood Mill,* 111 Idaho 79, 721 P.2d 179 (*rehrg. denied,* 1986), this Court affirmed a determination that payments made to an injured employee under a group health or group disability policy were not payments "made under the

provisions" of the workers' compensation law and, consequently, did not invoke the IC §72-706(2) extended statute of limitations:

> Secondly, and more importantly, 72-706(2) only extends the statute of limitations "when payments of *compensation* have been made and thereafter discontinued...." (Emphasis added.) There has been no payment of "compensation" in this case by the employer. "Compensation" is a word of art under the Workmen's Compensation Act and refers to income and medical benefits "made under the provisions of this law," I.C §72-702(5), (12) and (15). Payments made to an employee under group health policies or group disability policies are not payments "made under the provisions of this law," and accordingly the medical and insurance benefits paid under the group policies provided by the employer are not "payments of compensation" within the meaning of 72-706(2), and for this additional reason I.C. §72-706(2) is inapplicable on the facts of this case.

Id. at 83, 721 P.2d at 183. If neither payments actually made upon a mistaken belief that the treatment related to a compensable event (*Williamson, supra)* nor payments actually made pursuant to a group health or disability policy rather than pursuant to the Workers' Compensation Act *(Bainbridge)* constitute "payment of compensation" within the meaning of Idaho Code §72-706(2), then, certainly, a telephone call made at Claimant's request to set a medical appointment for which he was to pay is neither a "payment of compensation."

Claimant would have this Court believe that there ought not be anything magical about the transfer of money when considering the phrase "payments of compensation" in Idaho Code §72-706(2) and that, therefore, the Commission's decision below is in error. This Court's decision in *Figueroa v. Asarco, Inc.*, 126 Idaho 602, 888 P.2d 381 (1995), however, leads to a different conclusion. Facts as found by the Commission in proceedings below demonstrate that Claimant

Figueroa injured his knee in 1986. The injury was accepted and time loss benefits were paid. On January 27, 1987, the treating physician rated Claimant at 5% PPI and corresponded with Asarco to that effect. Asarco received the rating but, due to personnel changes, payment for the rating fell through the cracks. Asarco did, though, continue to provide medical benefits through May 14, 1987. On February 5, 1988, the Commission contacted Asarco and, attempting to put the case in a closure posture, instructed Asarco to pay the outstanding PPI award. Asarco assured the Commission that it would pay the PPI as soon as it found out where Claimant was living. Claimant's PPI again fell through the cracks and it was not until some four years later that Asarco finally remitted the 5% PPI to Claimant, without interest. On August 12, 1992, one year beyond the five year statute of limitations, Claimant filed a Complaint. Upon Asarco's motion, the Industrial Commission dismissed Figueroa's Complaint as not filed within the statute of limitations. Though recognizing that Asarco's actions were dilatory, the Court, asserting that "workers' compensation is purely a statutory creation", upheld the Commission's dismissal. *Id.* at 603, 888 P.2d at 382.

Then, in *Salas v. J. R. Simplot Co.*, 138 Idaho 212, 61 P.3d 569 (2002), the Court put to rest any argument that *Figueroa* was an outdated ruling based upon a prior statute by reaffirming its earlier stand.

Having demonstrated that neither Heritage nor its Surety paid, offered to pay, or implied it would make any "payments of compensation" within the meaning of Idaho Code §72-706(2), it is clear that the Industrial Commission had it right here: to determine whether there have been "payments of compensation"

within the meaning of Idaho Code §72-706(2), there must be not only a demonstration of actual payment (money changing hands), but additionally that such actual payments were "made under the provisions of" the Worker's Compensation Act.

CONCLUSION

Claimant/Appellant has not carried his burden of proof that the Commission erred in determining that he failed to file a Complaint within the time set forth in Idaho Code §72-706. The Commission found that Claimant was not misled to his prejudice by the employer or surety so as to avoid application of the one (1) year statute of limitations set forth in Idaho Code §72-706(1) and that there had been no "payments of compensation" within the meaning of Idaho Code §72-706(2) upon which the extended five (5) year statute of limitations there contained may be invoked. Thereupon, Respondents, Heritage and its Surety, pray this Honorable Court reject Claimant's appeal and affirm the decision of the Industrial Commission filed on October 10, 2008.

Respectfully submitted this 27th day of May, 2008.

LAW OFFICES OF HARMON,
WHITTIER & DAY

E. Scott Harmon
Attorney for Defendants-Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 27th day of May, 2008, a true and correct copy of the foregoing document was served upon the following by the method indicated:

Kent A. Higgins
Merrill & Merrill, Chtd.
P.O. Box 991
Pocatello, ID 83204

☒ First class mail, postage prepaid
☐ Hand delivery
☐ Express mail
☐ Fax transmission

E. Scott Harmon