5-4-2009

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

Kent A. Higgins
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Idaho State Bar #3025
Attorneys for Claimant

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

QUINTON BUNN,, Claimant, vs. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INS. CORP., Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**SUPREME COURT DOCKET NO. 36024**

APPELLANTS' BRIEF

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

Kent A. Higgins
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, Idaho 83204-0991
Attorney for Appellants

E. Scott Harmon
LAW OFFICES OF HARMON,
WHITTIER & DAY
P.O. Box 6358
Boise, ID 83707-6358
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

I. Nature of the case.

This case is a fairly straightforward worker's compensation case. The issue, simply put, is whether Idaho will adopt the majority or minority view on two worker's compensation legal issues that have been well discussed in other states. The first: Whether a claimant has a legally excusable reason for failure to meet the one year limitation of Idaho Code §72-706(1), when the employer or surety gives bad advice, even if it is as the result of an honest mistake, as to the existence or non-existence of coverage. Moreover, does the claimant have such a right if the surety fails to correct the mistaken advice once the surety learns the truth.

The second issue is whether the five year limitation of Idaho Code §72-706(2), which is triggered when a claimant receives compensation, is also triggered when an employer or surety provides the claimant with medical treatment.

This case stems from the misdiagnosis of a scapholunate ligament tear as carpal tunnel syndrome. Quinton Bunn worked for Heritage Safe installing locking mechanisms. His work entailed the tightening of screws with a Phillips screw driver. Quinton sustained an injury to his right wrist, at first diagnosed as carpal tunnel syndrome, but later diagnosed as an scapholunate ligament tear. When he reported the injury to his employer, his employer called the Lakeview Clinic in Soda Springs, and arranged a medical appointment for Quinton. He was sent for and did receive treatment, including injections, a splint, icing instructions and pain medication. The physician's assistant who treated Quinton determined Quinton suffered from carpal tunnel syndrome. As soon as Liberty Northwest Mutual learned of the diagnosis of carpal tunnel, it mailed a letter Quinton, stating that Quinton's occupational disease would not be covered under worker's compensation. Simultaneously, Liberty sent a copy of the letter to Lakeview Clinic.[1]

---

[1] Referee Donahue went straight to the legal issues in his opinion, thus bypassing the relevant findings, because based on his legal conclusions, many findings were not relevant. For instance, some of the hearing dealt with whether the appointment made for Quinton by Carol Beckstead was made in behalf of the company or in behalf of Quinton just as a courtesy from Carol. Under the Referee's holding that "payment" is all that matters it would make no difference why the appointment was made. However, under the majority rule that providing medical treatment triggers an extended limitation, it is important to note Liberty Northwest's immediate letter, copied to the Lakeview Clinic, removes all doubt about whether the surety knew Clinton was being seen by a physician for an alleged work-related injury

When Clinton's wrist did not improve, he sought a second opinion. Eventually, Dr. Vermon Esplin performed exploratory surgery and diagnosed Quinton with scapholunate ligament tear. Quinton notified Liberty Northwest of the second diagnosis, but Liberty Northwest did not respond.

Dr. Esplin attempted to correct the torn ligament with surgery, but was unsuccessful. Dr. Esplin told Quinton that he must try a second surgery, but the prospects of success were doubtful. By the time Quinton learned the severity of the circumstances, his one year to file a claim under Idaho Code § 72-706 had expired.

COURSE OF PROCEEDINGS

On April 30, 2005, Quinn Bunn sustained an occupational injury which was promptly reported to his employer, Heritage Safe. Heritage Safe promptly filed Form 2635 with the Industrial Commission. On May 5, 2005, the Surety, Liberty Northwest Mutual Insurance, wrote Quinton Bunn notifying him that his injury was not covered under worker's compensation. On or about May 25th of 2007, Quinton Bunn filed his complaint with the Industrial Commission. Defendants filed their answer raising as a defense the time strictures of Idaho Code § 72-706. The matter was then bifurcated to deal first with the Idaho Code § 72-706 issues. On June 11, 2008, Referee Douglas A. Donohue conducted a hearing on the statute of limitations issues, and Quinton's defenses to the one year limitation. Quinton raise two defenses: that he had been misled to his detriment by the surety; and that his employer provided for his medical treatment, thus providing compensation in accordance with Idaho Code § 72-706(2). Quinton was therefore entitled to a five year Statute of Limitations.

On October 10, 2008, the Industrial Commission issued its Order denying Quinton's coverage on the basis of Idaho Code § 72-706. Quinton Bunn filed a timely Motion for Reconsideration which was denied on December 17, 2008. Whereupon, Claimant Quinton Bunn filed his timely appeal.

STATEMENT OF THE FACTS

Quinton Bunn began working for Heritage Safe Company in March of 2005. **Tr. 16-17:11-10.** In April of 2005, Quinton's job duties changed to the installation of lock mechanisms into gun safes. This was done using a Phillips screwdriver to tighten the screws that hold the safe locks. **Tr. 19:14-20.** Tightening the screws required intense twisting pressure with the wrist.

On April 28, 2005, Quinton felt a weakness in his wrist like a pulled muscle. **Tr. 19:20.** He went home from work with a sore and swelling wrist. His hand went blue and numb. **Tr. 23:3-**

5. Over the weekend he packed it in ice. **Tr. 21:9-20.** Monday, when he returned to work, he reported his situation to his supervisor, Shannon Johnson, **Tr. 22:1-23** who in turn reported it Carol Beckstead, manager of workers compensation issues for Heritage Safe. **Beckstead Depo. 6:1-2.**

Quinton asked to see a doctor. Carol asked him if he really needed to see a doctor over that. **Tr. 22-31:21-1.** He said that the pain was so intense that he could not work. **Tr. 23:3-5.** At first, Carol informed him that a doctor was unavailable. **Tr. 22:6-14.** Later she called the Lakeview Clinic in Soda Springs and made an appointment. **Tr.23:7-9**. Quinton went to Soda Springs where he was examined by Bret Smith, a physician's assistant.

Heritage Safe, through Carol Beckstead, made the appointment with its preferred medical provider, Lakeview Medical Clinic. **Beckstead Depo. 11-12:14-14** Carol Beckstead testified, " "If I have employee that I send over there, I tell them specifically on the phone whether Heritage is paying for it or not." **Tr. 38:1-4.** "I tell whoever makes the appointment, this is to be billed to Liberty Northwest." **Tr. 38:6-8.** At intake, Heritage Safe Company was listed as the "Financial Responsible Party." **Exhibit 45.** The primary financial classification on the billing screen indicated the matter as "Workmen's Comp", and the primary payer is indicated as "Work Comp." **Harvey Depo. 22-24:24-23.**

X-rays were taken. Bret Smith's examination led him to the diagnosis that Quinton was suffering from carpal tunnel syndrome. **Exhibit 8.** Bret Smith provided Quinton was a volar splint, instructed him to ice the wrist three to five times a day, and furnished Quinton with Mobic, an anti-inflammatory medication. **Exhibit 9.** He then released Quinton to return to work on condition that he no longer use manual screwdrivers. **Exhibit 4.**

The following day, Carol Beckstead, Quinton, and others completed the "Incident/Accident Investigation Form" The form, signed by Carol Beckstead check the "Y" box indicating "Medical Attention Needed?" **Exhibit 3.** Carol also completed the Idaho Worker's Compensation first report of injury or illness Carol Beckstead checked the number "2" instead of "0", under "Initial Treatment" on the form, confirming that Quinton received treatment for his injury at the behest of Heritage Safe **Exhibit 1.**

The ink had barely dried on the Accident Investigation Report before Lynn Green of Liberty Northwest, copied a letter to Lakeview Clinic, addressed to Quinton, notifying the clinic that Liberty

Northwest did not consider Quinton's condition compensable. **Exhibit 3; Exhibit 12.** The reason given by Liberty Northwest was that Quinton's injuries were a non-acute occupational disease. Apparently Ms. Green's letter refers to the fact that, in the State of Idaho, alone, carpal tunnel syndrome is still treated as an occupational disease rather than an occupational injury.

None of this helped Quinton's sore wrist. On May 5th, Quinton returned to Lakeview Clinic because his wrist was swelling and hurting more. **Exhibit 10.** By this time he indicated his pain was quite significant. On this visit, Dr. Franson also examined the wrist. **Exhibit 10.** Dr. Franson was surprised that Quinton's wrist was not improving but did not change Bret Smith's diagnosis. Either Dr. Franson or Bret Smith provided further treatment by injecting lidocaine and solu-medrol into the wrist. **Exhibit 10.**

Quinton had already taken two days off due to the wrist pain. The pain remained so excruciating he could not work. By mid May, Heritage Safe let him go. **Beckstead Depo. Exhibit F.**

The pain still persisted. Neither the brace, the lidocaine, nor the instructions to ice the wrist given him by Bret Smith or Dr. Franson provided Quinton with any sustained improvement.

Desperate to find relief, Quinton sought a second opinion. He visited his own Doctor, Noall Wolff, in Montpelier. Dr. Wolff ruled out carpal tunnel syndrome and referred Quinton to Dr. Kenneth Newhouse. **Tr. 27:6-12.** At Idaho Orthopaedic and Sports Clinic in Pocatello, Idaho, Dr. Kenneth Newhouse examined Quinton's wrist. He sought a second examination by Dr. Vermon Esplin. **Exhibit 14 and 15.** The examination showed symptoms of fraying of the triangular fibrocartilage complex of the wrist. **Exhibit 15.** However, this diagnosis, too, did not seem to explain all of Quinton's symptoms. **Exhibit 15.** Dr. Esplin concluded the next step would have to be exploratory surgery of the wrist. **Exhibit 18 and 19.** On July 19th, 2005, Dr. Esplin performed the surgery, during which he discovered the scapholunate ligament tear and attempted to repair it by pinning the scapholunate ligament back to the wrist. **Exhibit 18 and 19.** Although not significant at this juncture of the proceedings, it should be noted that it took a second surgery in June of 2006, before Quinton's injury would show improvement. **Exhibit 40-44.**

On May 30, 2005, Quinton notified Ms. Green of Liberty Northwest, that his doctor disagreed with the diagnosis of carpel tunnel syndrome. **Exhibit 13.** He received no response. Not

knowing what Ms. Green meant by the expression "non-acute occupational disease", **Tr. 28:12-20** Quinton assumed that he would certainly hear back from Liberty Northwest if the ruling out of carpal tunnel syndrome by Dr. Wolff's made any difference to Liberty's reason for denying coverage. **Tr. 28:12-24.** As a consequence, Quinton proceeded to seek the medical treatment he needed, but did not seek legal help until shortly before a year after the injury. He contacted an attorney who, after the year had expired, told Quinton he represented Heritage Safe. **Tr. 32:1-8.**

ISSUES PRESENTED ON APPEAL

This appeal has two issues. Both of which have been defined by a sufficient abundance of case law from other jurisdictions. The referee has adopted the minority position on both issues. Appellant contends that Idaho ought to adopt the majority position.

The first issue: If a surety gives bad advice, denying the existence of coverage as a result of an honest mistake, and fails to correct the denial when apprised of the correct information, does the claimant have a legally justifiable reason to file the claim beyond the one year as proscribed by Idaho Code § 72-706(1).

The second issue: If an employer makes arrangements for a claimant to receive medical treatment for an occupational injury, does that treatment constitute "payment of benefits" for the purposes of Idaho Code § 72-706(2), thereby affording the Claimant five years to file his claim from the date of last benefits.

ARGUMENT

1. The Surety "mislead" Quinton, Within the Meaning of Idaho Code § 72-706(1).

Idaho Code §72-706(1) provides:

> 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.

The issue here is whether "mislead to his prejudice " includes unintentional misleading as well as intentional. The majority rule is well explained in **Bauer v. State ex rel. Wyoming Worker's Compensation Div.** 695 P.2d 1048 (Wyo.,1985). The Supreme Court of Wyoming said:

[F]raud should not be the 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.

695 P.2d 1048 at 1051-1052.

Referee Donahue takes the opposite position. In paragraphs 15 and 16 he declares:

> 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 both the hearing and in the briefing, was asked to consider whether "mislead" for the purposes of Idaho Code § 72-706(1) 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. The letter from Liberty Northwest telling Quinton that his circumstance was not covered by the Idaho Worker's Compensation Law, (**Exhibit 12**) 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, 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 of coverage fall on the surety and the employer, not on the claimant.

For example, in **Robertson v. Brissey's Garage, Inc.,** 270 S.C. 58, 240 S.E.2d 810 (1978). The Supreme Court of South Carolina reached such a conclusion based on misinformation from the surety. The carrier advised the widow claimant that it had determined her husband was the

president and part owner of the business and not an employee, and his injury was therefore not compensable. The carrier further advised the widow that she had one year to file a claim, but she failed to make a claim until almost three years after the injury. The court held that the employer and carrier were, by virtue of the statement of non-compensability, estopped to raise the one-year statute of limitations. The court restated the principle of equitable estoppel and applied it thus:

> The conduct of defendant and its insurance carrier may be such as to estop them from presenting the statutory limitation as a defense in bar of the claim for compensation, if the effect of such conduct was to mislead or deceive claimant, whether intentionally or not, and induce him to withhold or postpone filing his claim petition until more than a year had elapsed from the occurrence of the accident.

240 S.E.2d at 811. (citations omitted). The South Caroline Supreme Court specifically addressed whether bad faith need be an element of "misleading" by the Worker's compensation carrier. The court said:

> Although the carrier acted in good faith, the fact is inescapable that it occupied a position far superior to that of the claimant. The claimant was ignorant of the Workmen's Compensation Act and of business practices generally. This factor may be taken into account in determining whether the claimant was misled. . . . We also feel that it may properly be considered in determining whether the claimant's reliance was justified. Although claimant was advised that she could file a claim, it was reasonable under the circumstances for her to feel that such would be a futile gesture in view of the positive assertion by the carrier of the reasons why the death was not compensable. . . . It is clear to us that the words of the adjuster were being accepted by the claimant without question, which is not strange when considered in the light of the disparity between the knowledge and experience of the parties. We feel that the failure of the claimant to file a claim was a reasonable reaction to the initiative taken by the carrier.

240 S.E.2d at 812

In **Levo v. General-Shea-Morrison**, 128 Mont. 570, 280 P.2d 1086 (1955), the facts are very much similar to Quinton's case. The claimant was informed by the employer that his heart attack was the result of non-industrial disease and not any industrial injury, and that there was no use in filing a claim, "nothing that could be done". The court held:

> [T]he advice here given by the assistant project manager and personnel director and the advice given by a lawyer who the claimant thought to be a company lawyer did not permit the claimant in good conscience to file a claim. Ignorance based on completely erroneous advice from persons who are directly connected with the affairs

> of the employer can even be more profound and dangerous in its consequence than ignorance based on no advice at all. Such advice effectively prevents a conscientious employee from filing a claim for an award or at least until different advice of equal or higher standing is received. According to the record the conclusion is inescapable that claimant was actually dissuaded from filing a claim by the agents of defendant.
>
> We find that the doctrine of equitable estoppel should be applied under the facts in this cause.

280 P.2d at 1089-90.

The Court of Appeals for the State of Arizona looked at the same issue and reached the same result as the majority of other states. In **McKaskle v. Industrial Com'n of Arizona** 135 Ariz. 168, 659 P.2d 1313 (Ariz.App.,1982),the claimant was injured in the course of employment, but failed to file a claim for worker's compensation because his supervisors told him he was an independent contractor and not an employee entitled to benefits. The court concluded:

> We hold that the employer and carrier may be estopped to raise the statute of limitations, either by assurances that the claimant will be "taken care of" or, as here, by management personnel declaring that the claimant has no claim since he was an independent contractor and not an employee. 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.

659 P.2d at 1317-1318. In the same year, the Arizona Court of Appeals also considered a case where neither the employer nor surety supplied the bad advice, but rather the agency that sold the surety's policy provided the claimant with the wrong form to file. The dilatory filing was excused. The court said:

> The issue is not limited to whether any of the respondents actively mislead petitioner (intentionally or not), see Keeler v. Industrial Commission, 122 Ariz. 16, 592 P.2d, 1282 (App. 1979). Rather, the broad issue in this case requires consideration of whether petitioner's error was the result of her reasonable reliance on incorrect information. In other words, any element of "fault" is not conclusive.

Cohen v. Industrial Commission of Arizona, 133 Ariz 24, 648 P.2d 139, 140 (1982).

In **Bauer v. State ex rel. Wyoming Worker's Compensation Div.,** 695 P.2d 1048 (Wyo.,1985) the employer's mistaken statements that the employee had no worker's compensation coverage because the employee was part-time in her work as a member of an ambulance service.

In a well reasoned opinion, the court discussed the broad body of case law on the subject. The court discussed the Commission's argument that the "bad advice" relied on by the claimant was the result of an honest mistake, and therefore should not be the basis for an estoppel. The court concluded to the contrary:

> 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.

695 P.2d at 1053

Referee Donahue determined that Liberty Northwest did nothing misleading, even though Liberty's denial letter to Quinton is, on its face, clearly misleading. Telling Quinton he had no coverage, because he had a non-accute occupational disease, is every bit as misleading as telling a widow claimant that her husband had no coverage because he was an owner, (**Robertson, supra**); or that a heart attack is a non-industrial disease, (**Levo, supra**); or that the employee's private contractor status, (**McKaskle, supra)** or part-time status (**Bauer, supra)** precluded them from coverage. The referee also offered no explanation as to why Idaho should wander an aberrational path alone, instead of following the majority rule of its neighboring states; or why Idaho employees should receive less protection under Idaho's worker's compensation laws than the employees of other states.

Having advised Quinton that he had no coverage, Liberty Northwest had a duty to Quinton to correct their denial letter when notified that Liberty's denial of coverage was based on a bad diagnosis. In some states the "misleading" information constitutes an estoppel against the surety's defense of Statute of Limitations. In Idaho, the consequences of misleading is also statutory. The claimant is statutorily excused from the one year restriction of Idaho Code § 72-706(1) .

2. <u>The Five Year Limitation of Idaho Code §72-706(2), is Triggered When an Employer Provides Medical Treatment for an Injured Claimant.</u>

Idaho Code § 72-706(2) provides:

> 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.

The question presented is whether the providing of medical benefits is the equivalent of "payments of compensation" for purposes of initiating the five year limitation. One would think this Court had already laid that issue to rest. Apparently not. In ***Bainbridge v. Boise Cascade Plywood Mill,*** 111 Idaho 79, 721 P.2d 179, (1986) the Idaho Supreme Court stated :

> "Compensation" is a word of art under thee Workmen's Compensation act and refers to income and medical benefits "made under the provisions of this law, " I.C. §72-102(5), (12), and (15).

211 Idaho at 83.

In ***Ryen v. City of Coeur d'Alene,*** 115 Idaho 791, 770 P.2d 800 (1989) the Supreme Court elaborated on its ***Bainbridge*** holding. This Supreme Court stated:

> 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 a "a word of art under the Workman's Compensation Act and [it] refers to income and medical benefits."

115 Idaho at 802

Although the rulings of this Court seem clear enough, in the Commission's Order of October 10, 2008, Referee Donohue says: "Claimant's alternate argument - that treatment somehow constitutes 'compensation' is unpersuasive." **Recommendation, ¶ 20**. Specifically, he 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 Referee Donahue's opinion, the exception in Idaho Code § 72-706(2) turns entirely upon the word "payment". Such a rendering is rather anomalous considering that the statute is to be liberally construed in order to benefit claimants. Referee Donahue's interpretation is a very strict interpretation, not a liberal interpretation in favor of claimants, as required by the Worker's Compensation Law. What is all the more anomalous is that the Referee strictly interprets "payment" when even Idaho Statute does otherwise. Idaho Code § 72-102 (20) defines "medical and related benefits" as:

> "Medical and related benefits" means payments ***provided for or made*** for medical, hospital, burial and other services as provided in this law other than income benefits. (Emphasis added).

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. In other words, if Quinton had gone back to Heritage and stole some property, he could now get worker's compensation benefits, but since he did not, he is on his own. Such is not, nor ought not to be, the Idaho law.

No one ever "pays" medical benefits. Medical benefits are provided, furnished or authorized. By strict interpretation, the phrase "when payments of compensation have been made" would not include medical benefits at all. But the Idaho Supreme Court already determined otherwise. In **Bainbridge v. Boise Cascade Plywood Mill Co.**, supra, this court said the phrase "payments of compensation" when liberally construed, includes "made under the provisions of this law." This Court, for good reason, used the word "made" not "paid." By the same policy, "payment" of medical benefits would also include furnishing of medical benefits, providing of medical benefits, or authorization of medical benefits. Such is clearly the policy in other states

In fact, overwhelmingly, the majority of jurisdictions ***are*** persuaded that treatment is compensation. The referee's conclusion that: "Claimant's alternate argument - that treatment somehow constitutes 'compensation' is unpersuasive" only appears to be unpersuasive to this referee. The Supreme Court of Florida reached the opposite conclusion. In **McNeilly v. Farm Stores, Inc.**, 553 So.2d 1279 (1989), The Florida High 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.

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), the Court framed the question as follows:

> To obviate this purported defense, [non-"payment" of benefits] 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. (Emphasis added) To answer that argument the Colorado High 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 at 592, 212 N.YS. 2d 466 (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."

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

In Arkansas, the Court of Appeals, in **Plante v. Tyson Foods, Inc.**, 319 Ark. 126, 890 S.W.3d 253 (1994) expressed the following:

> The one-year limitations period begins to run from the last payment of compensation, which this court has held means from the date of the last furnishing of medical services.
>
> * * *
>
> This court has also stated that employers and carriers must either have actual knowledge or constructive knowledge that medical services are being provided before they are deemed to have furnished medical services.
>
> * * *
>
> The respondent cannot succeed on the limitations defense, therefore, simply because the authorized physician never submitted a separate bill for the 1989 and 1990 follow-up visits, which were presumably included in the payment for surgery, **because it is the furnishing of the services that tolls the statute, not the payment therefor.**

319 Ark at 130 (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 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. The employee paid for it and then made it up to himself by stealing from his employer. 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 point where Quinton takes issue with Referee Donohue's opinion is the referee's 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.

The reason Quinton takes issue on this point is that, other jurisdictions have looked at this very issue. And, once again, as far as we can find, every other jurisdiction in the country agrees with Quinton's position and not Referee Donohue's. The state's Supreme Courts appear to be virtually unanimous in reaching the opposite conclusion as the Referee; i.e. they universally agree that it is the furnishing of the care to the employee, – not the cutting of the check to the doctor – that constitutes "payment."

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.** Referee Donohue's opinion is the exact opposite as the 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 industrial injuries 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**, 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"***

415 S.W3d at 342. (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.

642 P.2d at 577. (Emphasis added).

All of this brings us back to our original question: Can an employer or the surety 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, as rendered in virtually any other jurisdiction, is clearly: No, they cannot. The determining factor is whether the claimant is afforded medical treatment by the employer or surety, not whether the employer or surety put a check in the mail.

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." **Tr. 36:9-11**. 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 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 "non-accute occupational disease."**Exhibit 12.**

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. The law and the decisions clearly distinguish between instances where the employer sends the employee to a doctor for diagnosis of the cause of an injury or illness, and instances where

the employer furnishes the employee with medical treatment for work related injuries. 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 inflamation 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 this Court's 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 that 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. Quinton has a valid, meritorious clam that was not filed because of reliance upon Liberty Northwest's representation that he was not covered by worker's compensation. A Surety's misleading statements, although unintentional, are sufficient to constitute an estoppel and prevent an employer from invoking the statute of limitations as a defense.

For these reasons, Quinton Bunn would ask this court to reverse the Industrial Commission's Opinion of October 2nd, 2008 Opinion and acknowledge the legitimacy of Quinton's claim.

Respectfully submitted this 1st day of May, 2009, 2009.

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 1st day of May, 2009, 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