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

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

QUINTON BUNN,, Claimant, vs. HERITAGE SAFE COMPANY, Employer, and LIBERTY NORTHWEST INS. CORP., Surety, Defendants.	**SUPREME COURT DOCKET NO. 36024-2009** **Industrial Commission No. 2005-509704**

APPELLANT'S REPLY BRIEF

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

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RESTATEMENT OF THE CASE

This case is about two issues of law, it is about two issues of law, it is about two issues of law. Defendants would like to recharacterize it as issues of fact because the Commission's Decision on the law runs contrary those of state supreme courts throughout the country. Respondents have cited no law or cases to support the Commission's decisions on the law. Respondents have not attempted to distinguish the authorities cited by Claimant in his opening appellate brief.

The law is that: A Surety that erroneously notifies a claimant that he has no coverage is estopped to raise the one-year statute of limitation defense. The law also is that: Once an employer provides worker's compensation benefits in the form of medical treatment, a claimant has five years from the termination of benefits to file his claim. Despite Respondents' strenuous efforts to recharacterize this as a challenge of the Referee's factual decisions, this case is about two issues of law.

A. The surety's letter to Quinton Bunn declaring that he did not have worker's compensation coverage is misleading as a matter of law.

In Quinton's opening brief, Claimant cites four similar cases where a surety had erroneously notified a claimant that he or she had no coverage. Although it is only four, it is also a unanimous representation of every jurisdiction that has addressed the issue. In each case, it made no difference what reason the surety used for denying coverage. Thus, when the surety denied coverage because the claimant was president of the employer, **Robertson v. Brissey's Garage, Inc.,** 270 S.C. 58, 240 S.E.2d 810 (1978), or because the claimant is an independent contractor, **McKaskle v. Industrial Com'n of Arizona** 135 Ariz. 168, 659 P.2d 1313 (Ariz.App.,1982), or because the claimant is a part time worker, **Bauer v. State ex rel. Wyoming Worker's Compensation Div.** 695 P.2d 1048 (Wyo.,1985), or when the surety claims, similar to what Liberty Northwest did with Quinton, that the injury is a result of a non-industrial disease and not an industrial injury. **Levo v. General-Shea-Morrison**, 128 Mont. 570, 280 P.2d 1086 (1955) – whenever the surety erroneously tells the Claimant he or she has no coverage, that error is, as a matter of law, an estoppel to raise the defense of the one year bar to file a claim.

Respondent mischaracterizes the legal finding of the Referee as a factual finding. The

finding at issue is:

> 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.

FOF/COL: P15

Respondents fail to read that statement in context. When read in context, it is clear the statement is a legal finding, not a factual finding. In the first place, it is not the employer's actions that Quinton challenges as misleading, but rather the denial letter received from the Surety. The factual findings do not address whether Quinton was mislead by the denial letter of the Surety. Secondly, Referee Donohue proceeds to explain his reasons for his conclusion of law as follows: "First, Claimant received a denial letter, his subsequent request for review does not legally require further response from defendants." **FOF/COL:P16** Referee Donohue's conclusions is directly opposite to the decisions in **Robertson**, *supra*; **McKaskle**, *supra;* **Bauer**, *supra;* **Levo**, *supra.* All four of these opinions say that if a surety misinforms a claimant as to coverage, the surety ***is responsible*** for the misinforming a claimant; the surety ***does bear the risk*** of the misinformation; a surety ***must further respond*** when it becomes enlightened that its denial may have been based on misinformation or the surety is estopped to raise the one year statute of limitations. The nature of Defendants' duty, or lack thereof, is a legal issue, not a factual.

Referee Donohue gives two more reasons. The next reason given is that "Nothing about employer's alleged action in assisting Claimant to seek the first physician has created the liability for Defendants." **FOF/COL:P17** This is merely basing the Referee's first conclusion of law on his second one that treatment is not payment. It will be addressed in the next section. But, as will be shown, that is a legal conclusion.

Referee Donohue's final given reason is, "Employers' actions which occurred before surety's denial letter do not negate the clear expression that the denial of liability expressed therein." **FOF/COL:P18**

Once again, no one is saying it was an action on behalf of the employer that mislead Quinton Bunn. It is the denial letter itself and the "clear expression of the denial of liability expressed

therein." All these expressions by Referee Donohue to explain his conclusion that, "Nothing in employer's action reasonably serve to mislead Claimant about eligibility for workers compensation benefits," shows that he was making a legal conclusion, not a factual finding.

The surety's letter is misleading on its face. It is erroneous, and it is misleading. That is beyond dispute. The question is whether it is legally misleading for purposes of Idaho Code § 72-706(1). And that decision is a legal one. The Referee does not say Quinton Bunn was not misled because he – factually – didn't believe the letter. The Referee does not say that Quinton was not misled because he – factually – had superior knowledge of the law. The Referee does not say Quinton was not misled because – as a factual matter – the letter was correct when it told Quinton he was not entitled to coverage. It says he was not misled because the denial letter was legally sufficient on its face and the surety had no further responsibility, even after the surety knew better. That is not a factual conclusion, it is a legal conclusion. But it is not the law.

The Idaho Worker's Compensation Law should follow the law as established in other jurisdictions, that when the surety erroneously informs a Claimant that he has no coverage, the surety cannot then raise the one year Statute of Limitations defense if the Claimant fails to file a timely claim.

B. When an employer provides medical treatment for an injured Claimant, such treatment is "compensation" for purposes of the five year Statute of Limitations.

The Claimant's next appeal is with Referee Donohue's conclusion, again, clearly a legal conclusion -- that: "Claimant's ultimate argument — that treatment somehow constitutes compensation" — is unpersuasive. The limitation is based upon *payment*." **FOF/COL:P20** That conclusion by the Referee is clearly, and unmistakably, a legal conclusion.

Why did the Referee make that statement? Why did he even write paragraph 20? Paragraph 20 inherently implies the finding that Quinton got treatment, and that Heritage Safe arranged it. Otherwise, why else would the Referee be talking about "treatment" and "payment" if the doctor's appoint had nothing to do with Quinton's employment? Why did he fill his opinion with dicta? If, the Referee found -- as Respondents would have you believe -- that the employer did not arrange for the treatment , that the appointment for Quinton purely as an act of kindness, just as a favor, a mere courtesy, to help with Quinton's personal problem — If, the Referee found, as Respondents

would have you believe, that just because the employer made the appointment does not mean it was for treatment; then the whole paragraph 20 of the Referee's findings and conclusions is sheer *obiter dicta* with no relevance to this case. If Quinton did not get treatment, and if not at the behest of his employer, then the Referee's discussion of whether "treatment" is "payment" for purposes of Idaho Code § 72-706 is a waste of pen and paper.

All of the Referee's justifications for his determination in paragraph 20 show that he is assuming the appointment was made by the employer in the employer's behalf. The Referee states, "An employer has the right to choose a treating physician, whenever the Idaho Worker's Compensation Law may apply." **FOF/COL:P17** Then he adds "The designation of an initial physician does not create any liability on the defendants' part." **FOF/COL:P17** Finally he concludes, "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." **FOF/COL:P21**

All these statements presuppose that the employer made an appointment for the claimant. The Referee uses these statements to justify the conclusion that Quinton's argument that treatment equates with payment is unpersuasive. That conclusion, that treatment is not payment, is a legal conclusion, not a factual.

The abundant case law cited by Claimant, none of which has been discussed, distinguished, or compared to contradictory case law by Respondents, all reach the conclusion that treatment is payment. If the employer provides an injured employee with medical treatment, the five year Statute of Limitation of I.C. 72-706(2) is triggered — whether the check from the surety ever arrived at the doctor's office or not.

Respondents have not cited a single case to the contrary. Rather, they have defended this erroneous legal conclusion on what they wish had been the Referee's Findings of Fact. They wish the Referee had found that the appointment with Lakeview Clinic had been made purely for Quinton's personal behalf. They wish that Lakeview Clinic understood that neither Heritage nor its workers compensation surety was responsible for the costs. **Respondent's Brief p. 7** They brazenly state that Lakeview Clinic knew the costs of the visit would be borne by Mr. Bunn. Respondents go so far as to state, that such are the facts. They wish that the identity of Heritage Safe

as the responsible party was based solely upon representations by Mr. Bunn, and not any representations by Heritage or its surety. Respondents' Brief:P8 Such statements are a far stretch of the facts.

Referee Donohue's decision makes no such findings. Referee Donohue's opinion glosses over who made the appointment, and why, but dives straight into the legal conclusions that presupposes the appointment was obtained by Heritage.

Carol Beckstead was not Quinton's mother. Quinton did not ask her for medical attention because he needed her help to make a personal doctor appointment. Quinton was twenty-five years old. He could make his own phone call. It was Carol Beckstead herself who testified, "I tell - at the time I tell the doctor's office, you know, that it will be billed to Liberty Northwest at the time." Tr.P36:9-11 The exhibits from the medical office clearly show the intake was as a workers compensation case. It was Heritage Safe's own personnel who filled out Exhibit 1 and Exhibit 3, confirming that Heritage Safe provided the treatment to Quinton for an industrial related incident. The testimony of Lisa Harvey clearly states, "If someone were to call from Heritage Safe - and I am not even saying specifically Carol - and asked if we could see and employee, then it would be my understanding that Heritage Safe would cover the employee's visit if it were workman's comp." Harvey Depo 44:15 -20 It was also Lisa Harvey's testimony that said, "Since we received back from this workman's comp, or a letter like this, then they were obviously were aware of it." Harvey Dep 35:2-4

Quinton didn't ask Carol Beckstead to make the appointment. He talked to Shannon Johnson. Tr. 22:7-12 Shannon Johnson notified Carol Beckstead, who handled Heritage Safe's worker's compensation matters. Tr. 22:21-22 Carol Beckstead asked Quinton; "Do you really think you need to have this checked?" Tr. 22:24-1 What did she care if all she was doing was a personal favor? Why would she ask unless she had concern about the payment implications? She is not Quinton's mother. What does she care whether of not Quinton wanted to see a doctor for his own personal needs?

When Claimant filed his Motion to Reconsider with the Commission, he supported it laden with case law from many surrounding jurisdictions, all of which conclude that the requirement of "payment" for the sake of statutes like 72-706(2) does not require a cashed check. "Payment" is, in

a legal sense, when the arrangements for medical treatment are made. With the motion to reconsider before them; with an long list of case law before them, the Referee and the Commission had an easy out. All they had to do was find that Quinton's appointment with the Lakeview Clinic was purely a personal favor by Carol for Quinton's personal problem. The Commission had an open invitation to add a finding that the call from Carol Beckstead, "who always tells the receptionist at Lakeview whether it is worker's compensation related or not," was purely a favor, and that Lakeview had a clear understanding that Quinton was footing the bill. With that open invitation plainly before it, the Commission declined to make such a finding that it knew was untrue, and instead the Commission chose to adopt Donohue's legal finding that: "Claimant's alternative argument - that treatment somehow constitutes compensation - is unpersuasive.

SUMMARY

The Commission's factual determinations are not the dispute here. It is the Commission's two legal conclusions: that an erroneous letter from the surety denying coverage is, as a matter of law, not misleading; and the Commission's legal conclusions that, "treatment" is not "payment" for purposes of I.C. 72-706(2), that are at issue. Respondents' recitation of selected facts does not change that the Referee's opinion is wrong in both of these two critical legal conclusions.

This Court should adopt the majority view, that when a surety erroneously informs a Claimant he or she has no coverage; and when an employer provides treatment to an employee, both or either event affect the stringent strictures of Idaho Code § 72-706. An injured claimant has the statutorily granted right to file his legitimate claim after one year if he is either misled or afforded benefits. After all, this Court at least still pays lip service to the notion that worker's compensation law exists for the protection of Idaho's employees.

Accordingly, the Commission's opinion ought to be reversed.

Respectfully submitted this 18th day of June, 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 19th day of June, 2009, served upon the following in the manner indicated below:

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