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Gomez v. Dura Mark, Inc. Appellant's Reply Brief Dckt. 38809

IN THE SUPREME COURT OF THE STATE OF IDAHO

MARIA GOMEZ,

Plaintiff- Appellant,

v.

DURA MARK, INC., Employer, and STATE INSURANCE FUND, Surety,

Defendants/Respondents.

Case No.: IC No.: 09-018790
Docket No.: 38809

APPELLATE'S REPLY BRIEF

Appeal from the Industrial Commission
of the State of Idaho, R. D. Maynard, Chairman, Presiding

Michael R. McBride
McBride & Roberts, Attorneys
1495 East 17th Street
Idaho Falls, Idaho 83404

Attorneys for Appellate

Paul J. Augustine
Augustine Law Offices, PLLC
P.O. Box 1521
Boise, Idaho 83701

Attorneys for Respondents

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I. State Insurance Fund Admits that Express Notice On The Issue Of Causation Was Not Given.

State Insurance Fund admits that causation was not an expressed issue at hearing. (Respondent Brief, p. 12). Its attempt to boot strap it as an issue by arguing that the issue was "reasonable and necessary medical care . . . and the extent thereof" simply does not wash. It wrote: "The only review the Commission is entitled to make is whether treatment was reasonable." It then cited to *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 770 P.2d 395 (1989) and argued against reasonableness. (Respondent I.C. Hearing Brief, p. 6).

The Commission totally ignored this stipulation of counsel and opted instead to address causation. A stipulation is a "voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues." Blacks Law Dictionary 5th Ed., sv "Stipulation." State Insurance Fund cites no authority that a stipulation of the parties can be ignored by the Industrial Commission. The Industrial Commission cannot ignore a Stipulation or insert an issue not expressly agreed to be tried by the parties. *Hernandez v. Philips*, 141 Idaho 779, 781, 118 P.3d 111 (2005).

State Insurance Fund also cites to the recent case *Fife v. Home Depot, Inc.*, 2011 Opinion No. 92 (September 2, 2011), for the proposition that it aligns with *Henderson v. McCain Foods*, 142, Idaho 559, 130 P.2d 1097 (2006), in that causation must be proved before medical reasonableness can be established. It is true *Henderson* and *Fife* are alike, but not for the proposition for which it states, but rather for the proposition that an issue of causation must first be "noticed up" by the Industrial Commission and then argued by **the parties**. Like *Henderson*, Claimant *Fife* made a request for a hearing on the issue of causation **and** reasonable medical care. The evidence included testimony of "the physician who performed the independent medical exam" who concluded that

claimant's need for surgery was not related to the industrial accident and "claimant's surgeon" who opined that the industrial accident was related to his need for surgery because it exacerbated his condition (*Fife*, p. 2). After addressing causation, the Commission concluded that "Claimant had failed to prove that the medical condition for which he had surgery was **causally related** to the industrial accident or that the accident aggravated his pre-existing degenerative condition." (*Id., Emphasis added*).

In contrast, to *Fife*, Gomez did not submit proof relating to causation because it was not raised by or agreed to as an issue by the Industrial Commission or the parties.

II. State Insurance Fund's Argument Rewrites Idaho Code § 72-432.

Idaho Code § 72-432 is clear and unambiguous: "the employer **shall** provide for the injured employee such **reasonable** medical, surgical or other attendants or treatment, nurse and hospital service, medicine crutches and apparatus as may be **reasonably** required by the employee's physician or needed immediately after an injury . . . and for a **reasonable time** thereafter." There is no causation language attached to Idaho Code § 72-432. Without going through proper legislature repeal or amendment, State Insurance Fund would have the statute read "that the employer shall never be required to provide for an injured employee such reasonable medical, surgical or other attendants or treatment . . . **until and unless** Claimant proves a causal relationship for each and every treatment." With this tortured interpretation an unbearable burden is placed on Claimant. For example, a Claimant who is prescribed daily physical therapy would be required to submit proof of cause after each and every treatment in order to justify more treatment. Would State Insurance

Fund really expect "causation" paperwork to be submitted daily to substantiate treatment? This is impractical. This is not the intent of Idaho Code § 72-432.

III. Claimant Did Not Argue Causation in its Brief.

Contrary to State Insurance Fund's argument, Gomez never addressed causation in her Brief. There was no need. State Insurance Fund paid for additional treatment to Gomez's treating physician, Dr. Jake Poulter on July 22, 2010, long **after** the February 2010 opinion of Dr. David Simon. (Gomez Ex. 7). This alone is evidence that causation was not an issue in mind. It is true, Gomez's medical records were admitted into evidence, but not referenced for the issue of proving cause, but of reasonableness in accord with *Sprague*.

Had Gomez known that causation was an issue to be determined by the Commission it would have presented her case much differently. Rather than permitting medical records to speak for themselves, which is sufficient to prove reasonableness of treatment, Gomez would have taken the deposition of Dr. Poulter or Dr. Huneycutt or a radiologist to explain "cause". "Cause" in this case would focus on the MRI, the "objective" evidence. Without narrative, it reveals a "tear in the annulus fibrosis" and "disc protrusion." (Defendants Exhibit C, p. 5). Any credible physician must admit that an MRI is an instant snap shot in time. The fact that one physician, whether it be a radiologist or otherwise, does not see a disc impingement on the MRI does not mean Claimant has no impingement or symptoms. The dynamic nature of the body, whether it is positional or gravitational, may immediately create a condition in which the disc is impinged and then relieved. Moreover, physicians may disagree on what each may "see" on an MRI. Thus, the "objective" evidence of the MRI, though important, is not conclusive and clinical correlation is always indicated

in such settings. Because there was no intervening or independent accident or occurrence which took place between treatment dates, causing new symptoms, it stands to reason, Gomez's work accident continued to cause symptoms. Even though he acknowledged this, State Insurance Fund's expert Dr. Simon, declared that her symptoms were not related to the work injury. Yet in the same breath, he did not assign a "cause" leaving it "unable to be determined." (Defendants' Exhibit A, p. 5). This type of testimony calls for intense cross examination which must be bolstered by Gomez's expert opinions to establish cause. This opportunity was not afford to Gomez.

IV. Public Policy Considerations.

Legislative intent as to the value of Idaho's workers is expressly set forth in Idaho Code § 72-201:

> The common law system governing the remedy of workmen against employers for injuries received and occupational diseases contracted in industrial and public work is inconsistent with modern industrial conditions. **The welfare of the state depends upon its industries and even more upon the welfare of its wageworkers**. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, **and sure and certain relief for injured workmen and their families and dependents** is hereby provided . . . (emphasis added).

The exclusiveness of an employee's remedy in comp law is fixed, subject only to third party claims as referenced in Idaho Code § 72-223. To assure that the legislature means business, it added a stiff penalty for employers who fail to insure liability. (See Idaho Code § 72-210).

The liberality of the statutes in favor of the injured workman has been reiterated by this court, but none more succinctly stated as in *Steinebach*:

> Among the primary duty of an employer to an injured workmen is to furnish him reasonable medical, surgical or other treatment necessary to rehabilitate him and as far as possible, restore his health, usefulness and earning capacity . . . one of the principal requirements of the workman compensation law is that insofar as possible, the injured workman shall be restored to health by reasonable and proper treatment . . . and workers compensation law shall be liberally construed in favor of the injured workman. *Steinebach v. Hoff Lumbar, Co.*, 98 Idaho 428, 431, 432, 566 P.2d 377 (1977).

Defendants argument, if accepted at face value, cuts the heart out of work comp law, which is timely and reasonable treatment be provided to injured workers. Currently, **the practice** of treatment follows the scheme as outlined by Idaho Code § 72-432 and is premised upon reasonableness. Appropriately this may be called the "causation presumption." For example, though an emergency room report does not specify or note a causal link between an injured employee suffering from a penetrating wound, a broken bone, or an acute or debilitating back or neck injury caused by a blow or fall, causation is presumed. The Surety then pays the bills on the basis of reasonableness. Thereafter, it continues to pay for subsequent treatment such as follow up care, medication, x-rays, physical therapy, etc., under that same presumption. This is the practical, understandable and real world approach to payment made for medical care as outlined in Idaho Code § 72-432.

Only in the event that a Surety chooses to challenge reasonableness of care by establishing an expert opinion contrary to it or to challenge causation in order to terminate benefits must one or both of these issues be addressed. This way issues of causation and/or reasonableness remain distinct and separate or **by agreement** may be addressed together.

If Defendants' argument is accepted, then the Surety may refuse to pay medical treatment because a Claimant had not established, in **every** treatment scenario a statement eluding to or

providing a causal link between the treatment and the injury. Worse yet, a Surety could issue denials "en masse" and make them retroactive and/or call for reimbursement of payments made to medical providers because "cause" has not been established. What would stop this travesty?

The current trend in the industry is that a Surety will use an IME physician who practices in the same geographic area to render opinions on treatment, cause, stability, impairment, etc. For example, in Southeast Idaho, Dr. Simon and Dr. Knoebel get the call; in Ada County it appears to be Dr. Richard Wilson. When an **IME** exam is contrary to the treating physician's opinion (almost always), and a denial of treatment is issued, a Claimant must then seek private insurer payment (if such is available) or rush to qualify for state or federal assistance in order to pay for treatment. In a denied case, a Claimant still remains injured and unemployed and without immediate recourse, and usually a hearing takes months from the denial date. This is bad enough. But if a Claimant does not get a fair hearing, it is tragic. So much for sure and certain relief!

Claimant and defense bar, the Industrial Commission, and this Court must wrestle with this very real issue with real consequences and decide which path to take: deny Claimant hearing access or permit it on stated issues. Fortunately, the path is clear. The Legislature paved the way in Idaho Code § 72-708. The hearing process and procedure should be "summary and simple." "Rules of equity" **require** that Claimant be provided notice and the opportunity to present evidence on causation.

V. Conclusion.

Gomez requests that this Court follow constitutional and statutory law and to expressly declare that the issue of causation must be specifically and expressly "noticed up" in accord with Idaho Code § 72-713.

Gomez requests that this Court uphold Idaho Code § 72-432 which requires or infers that once the employer has commenced payment for Claimant's medical care, a "presumptive chain of causation" is established and this chain cannot be broken absent a physician opinion to the contrary.

Gomez requests this Court clarify its ruling in *Henderson* and *Fife*, holding that the issue of causation **or** reasonableness - - or both is permitted and that causation is not required to be addressed in every instance before the issue of reasonableness is addressed.

Accordingly, Claimant requests the Commission to reverse and remand so that additional evidence can be presented on the issue of causation.

RESPECTFULLY SUBMITTED this 12 day of October, 2011.

McBRIDE & ROBERTS, ATTORNEYS

Michael R. McBride
Attorney for Claimant

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on this 12 day of October, 2011, I caused a true and correct copy of the foregoing document to be served upon the person(s) listed below either by mailing, overnight delivery, hand delivery or facsimile:

Paul J. Augustine
AUGUSTINE LAW OFFICES, PLLC
P.O. Box 1521
Boise, Idaho 83701

- ☑ Mail
- ☐ Overnight Delivery
- ☐ Hand Delivery
- ☐ Facsimile

McBRIDE & ROBERTS, ATTORNEYS

By: _____
Michael R. McBride