8-25-2011

Gomez v. Dura Mark Inc. Appellant's 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 BRIEF

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

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I.
STATEMENT OF THE CASE

A. Nature of the Case.

This is a workers compensation case.

Appellate Gomez appeals from an Industrial Commission decision denying her request for rehearing on April 7, 2011. Gomez suffered a lumbar injury at work on July 24, 2009. The Employer/Surety accepted the claim and paid TTD and medical benefits. Gomez treated with physicians for pain management, but treatment was discontinued after the Surety required that she be examined by its physician who opined she did not need additional treatment related to her work injury. Nonetheless, Gomez continued treatment as instructed by her physician which substantially improved her condition.

B. Course of Proceedings Below.

Gomez filed a Workers Compensation Complaint with the Industrial Commission on June 25, 2010. The one and only hearing relating to her Complaint was held on October 6, 2010. This decision, unfavorable to Gomez, was filed by the Commission on January 31, 2011. Gomez filed a Motion for Reconsideration, which was denied on April 7, 2011. Gomez then timely filed an appeal on May 10, 2011.

C. Statement of Facts.

Claimant was born in Mexico and completed the sixth grade there. In 1983, at age 16, she moved to San Jose, California and worked as a babysitter. In 1991 she moved to Blackfoot, Idaho. She started to work for Blackfoot Brass in 2001 and was employed there when she first injured her back in 2002. She was treated with physical therapy, improved and returned to full-time work

without restrictions. In 2006, she hurt her neck and shoulder on the job. She received treatment and again returned to work without restriction.

Her current work injury occurred on July 24, 2009, when she was lifting boxes that weighed approximately 60 to 65 pounds and "lifted wrong." *Tr., p. 19, LL. 9.* The Surety accepted the claim paid medical and TTD benefits. This injury caused pain in her back from belt line into her buttocks and into her right leg. She started treatment with Chiropractor, Dr. Michael Johnson on July 24, 2009 and was then referred to Nurse Practitioner, Gus Grimmet at Blackfoot Medical Center who saw her on September 16, 2009. An MRI as taken on October 10, 2009. It showed a disc herniation at L 4-5 and an annular tear at L 5 S 1. Gus Grimmet then referred her to Neurosurgeon Dr. Scott Huneycutt, who examined her on November 11, 2009 and opined that she had an L 4-5 disc herniation. She informed him of her past (2002) back injury history. No disc injury had ever been diagnosed nor MRI ever administered until the MRI on October 10, 2009. Dr. Huneycutt ruled out surgery and referred her to Dr. Jake Poulter, a physiatrist for pain management. His treatment commenced on December 7, 2009 and continued uninterrupted until the Surety compelled her examination with Dr. David Simon on February 16, 2010. Thereafter, Dr. Simon authored a report which included an opinion that treatment Gomez received after February 16, 2010 was not related to her work injury, but came from some unknown cause which he could not identify. *R., p. 36.*

II.
PROCEEDINGS

Because Gomez's case was accepted and benefits were paid by the Surety, the parties agreed to try the case before the Industrial Commission on the **limited and singular issue** of whether Gomez's continued medical expenses were reasonable (those beyond February 16, 2010 the date Dr. Simon declared Gomez medically stable). The Industrial Commission heard the case on October 6,

2010 and issued an opinion on January 13, 2011, but it never addressed the issue of reasonable medical care, instead it inserted and addressed a new issue - - one of causation. Gomez requested reconsideration in order to submit evidence on causation which the Industrial Commission denied.

III.
ISSUES ON APPEAL

1. Whether the Industrial Commission erred in its Order Denying Claimant's Request for Reconsideration to reopen the hearing to take additional evidence on the issue of causation.

2. Whether Claimant/Appellant's constitutional rights were violated by lack of notice that causation was an issue at Claimant's hearing.

3. Whether Idaho Code § 72-432 mandates that the issue of causation be addressed before reasonable medical treatment is provided.

IV.
STANDARD OF REVIEW

The Supreme Court freely reviews the Industrial Commission's conclusions of law. *Page v. McCain Foods, Inc.*, 145 Idaho 312, 179 P.3d 265, 268 (Id 2008). As to matters of law, the Court exercises free review over the Commission's legal conclusions. *Brewer v. LaCrosse Health and Rehab*, 138 Idaho 859, 862, 71 P.3d 458, 461 (2003).

V.
ARGUMENT

1. The Industrial Commission erred in its Order denying Claimant's request for reconsideration to reopen the hearing to take additional evidence on the issue of causation as it failed to provide notice that causation was an issue.

Idaho Code § 72-713 mandates that "the Commission shall give at least 10 days written notice of the time and place of a hearing and **of the issues to be heard**" (emphasis added).

The notice of hearing was filed by the Industrial Commission on August 3, 2010 referencing that the only issues to be determined were: 1) "Whether the Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432 and the extent thereof; and 2) Whether Claimant is entitled to temporary partial and/or temporary total disability benefits and the extent thereof." This document was signed by Michael E. Powers, Referee of the Industrial Commission. (See Appendix - Notice of Hearing filed August 3, 2010). These identical issues were reiterated in the Industrial Commission Findings of Fact and Conclusions of Law and Recommendation filed January 31, 2011. *R., p. 58.*

Prior to the hearing on October 6, 2010, those issues had not changed. In fact, this was the understanding of all parties including the Industrial Commission. At the beginning of the Industrial Commission hearing held on October 6, 2010, Referee Powers said:

> "I understand that the issues that we are to be dealing with as a result of this hearing are simply medicals and perhaps TTD; is that correct, Mr. McBride?
>
> Mr. McBride: That's right.
>
> Mr. Augustine: That's right." *Tr., p. 3, LL. 9-14.*

Accordingly, Claimant's Opening Brief made reference to those issues only:

"1. Claimant's medical treatment after February 16, 2010 was reasonable; and

2. Whether Claimant is entitled to TTD benefits until she reaches medical stability."

Claimant's Opening Brief, p., 2.

Likewise, Defendants Brief referenced those same two issues and none else, that is, "whether Claimant is entitled to reasonable and necessary medical care as provided by Idaho Code § 72-432 and the extent thereof and whether Claimant is entitled to temporary partial and/or temporary total

disability benefits and the extent thereof." *Defendants Brief, p. 2.* The hearing involved live testimony from Gomez and Defendants' employee; documentary evidence from treating physicians and insurance physician Dr. David Simon and Dr. Simon's deposition. This was Gomez's **first and only** hearing before the Industrial Commission.

The Commission issued a written opinion, Findings of Fact and Conclusions of Law on January 31, 2011. Therein, it totally ignored the issues as agreed to by the parties and its Referee, and instead inserted the issue of causation. This was true even though the Industrial Commission findings clearly identify the issues as: 1) "Whether Claimant is entitled to reasonable and necessary medical care as provided by Idaho Code § 72-432 and the extent thereof; and 2) whether Claimant is entitled to total partial or total permanent disability benefits and the extent thereof." *R., p. 58.* Out of the blue, it then stated "Claimant must first show that there is a causal relationship between the accident and the injuries for which she claims benefits. Claimant bears the burden of producing medical proof to prove her claim for compensation to a reasonable degree of medical probability . . . Before *Sprague* comes into play, Claimant must first show that there is a casual relationship between the accident and the injuries for which she claims benefits . . . She must show that it is more likely than not that her treatment is casually related to the subject accident." *R., p. 63.* The Commission then proceeded to discuss causation under the paragraph heading "Causation." *R., p. 65-69.* After discussion of the evidence, it declared "all other issues, (i.e., reasonable medical care) are moot and that Gomez had not met her burden of proof." *R., p. 69-70.*

Needless to say, Gomez felt ambushed by this decision as she did not secure or submit evidence on causation, such as the deposition testimony of Dr. Poulter and Dr. Huneycutt who would testify that Claimant suffered from a herniated disc related to her work injury.

Accordingly, Claimant promptly moved the Industrial Commission to reconsider its decision and to permit new evidence on causation as that issue was not noticed. In response, the Industrial Commission admitted "Claimant is correct that the Commission based its decision on causation, and did not reach the question of whether the care required by Claimant's treating physician was reasonable." *R., p. 87.* Instead of permitting new evidence which procedural due process and equity require, the Commission attempted to justify its decision by quoting from *Henderson v. McCain Foods, Inc.*, 142, Idaho 559, 130 P.2d 1097 (2006): "... because the Claimant put causation at issue by virtue of her claim for additional medical benefits, she was not denied due process by the Referee's failure to expressly state that causation was one of the facts Claimant must prove in order to recover those medical benefits." *R., p. 89.* However, this analysis did not go far enough. The Commission failed to differentiate *Henderson* on its facts as compared to **Gomez** on its facts. Significantly, Claimant Henderson had already been through one Industrial Commission hearing on September 6, 2002. In that hearing, the issue of causation was specifically noted and specifically addressed by the parties, i.e., whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident. *Henderson at 1100.* Thereafter, *Henderson* received a favorable decision from the Industrial Commission which included an Order "finding that the claimant had suffered an industrial accident on August 25, 1999 which caused an injury to her neck and exacerbated a pre-existing irregularly symptomatic condition." *Id.*

The Commission also ordered among other things "that the Claimant was entitled to reasonable future medical care as deemed necessary by her treating physician." *Id.*

Critically important, in the case at bar, is that Claimant never had a previous Industrial Commission hearing and causation had never **been** previously addressed. The only issue to be resolved was one of reasonable medical care - - all the parties agreed to this. Thus, the Industrial Commission's Order Denying Reconsideration essentially on the basis of constructive notice falls far short. *R., p. 89.*

2. Gomez's Constitutional Rights were Violated by Lack of Notice that Causation was to be an issue.

Article I §13 in the Idaho Constitution requires "due process of law."

Idaho Code § 72-708 provides that "process and procedure under this law shall be a summary and simple as reasonably may be and as far as possible in accordance with the **rules of equity**."

Furthermore, Idaho Code § 72-713 mandates at least a ten (10) day advance written notice to the parties of the issues to be heard.

This court has declared that "Due Process concerns have led us to say that an administrative tribunal may not raise issues without first serving the affected party with fair notice in providing him with full opportunity to meet the issue . . . The legislature has codified this Rule, requiring the Commission to provide the parties with written notice of the issues that will be heard prior to the hearing. Idaho Code § 72-713. *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111 (2005).

"Idaho case law, though it has developed in other contexts, is equally insistent that an administrative tribunal may not raise issues without first serving the affected party with fair notice in providing him a full opportunity to meet the issue. *White v. Idaho Forest Industries*, 98 Idaho

784, 786, 572 P.2d 887 Idaho (1977). White presented an unemployment case to the Industrial Commission. He never received notice of the issue that the Commission might hear new evidence and might determine his eligibility on the basis of a theory which had never been raised before. In reviewing this fact, the Court held: ". . . the notice contains no mention of the precise issue to be heard before the Commission much less the Commission's intent to raise the issue of failing to accept suitable work, which, to that date, had never arisen at all." *Id.* Thus, the Court concluded, "the order of the Industrial Commission because it rests upon an issue of which the Claimant had no fair notice, violates the due process requirements of this state's constitution, Idaho Constitution, Article I, § 13 and must be reversed" *Id.*

It is presumed that the *Henderson* case was cited by the Commission as authority to somehow justify the merger of the issue of causation with the issue of reasonable medical care. However, *Henderson* does not support that contention. In fact, *Henderson* stands for the proposition that the Industrial Commission **must** give notice of causation to the parties before the **initial** hearing. It failed to do so and is in error.

3. Idaho Code § 72-432 Does not Mandate that the Issue of Causation be Addressed Before Reasonable Medical Treatment is Provided.

> Idaho Code § 72-432 reads in pertinent part, that "the employer **shall** provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus as **may be reasonably required by the employee's physician** or needed immediately after an injury or manifestation of an occupational disease and for a **reasonable time thereafter** if the employer fails to provide the same the injured employee may do so at the expense of the employer . . . (emphasis added).

No where in that statute is there any reference that before an injured worker sees a physician, whether it be for the first time or for follow up care which may be weeks or months apart, that the issue of causation be addressed. Yet this is the net effect of the Industrial Commission decision in Gomez. In other words, the Industrial Commission seeks to legislate "from the bench" so that the first issue can never be whether medical care is reasonable, but always whether the physician has established causation before any treatment. Under this analysis, the Surety could deny medical care on every single physician visit. This impossible burden would create untold havoc for injured workers and their physicians. Gomez argues that is why causation is not part of the Idaho Code § 72-432 legislative scheme. Understandably, causation is an issue **when** put at issue. It stands to reason that once the Surety has accepted the claim as compensable, and has paid for medical treatment by a given medical provider, then causation is presumed and the continuity of such treatment can not only be reasonably expected or anticipated by the Claimant, but will continue, absent some medical proof to the contrary.

In Gomez, it is undisputed that she commenced treatment with Dr. Jake Poulter on or about December 7, 2009, the Surety paid for it and pursuant to his directive it continued thereafter. The only interruption in the treatment came as a result of an insurance medical exam provided by Dr. David Simon at the request of the Surety. On or about February 16, 2010, he authored a report finding **cause** from the accident date to the date of his exam, but not thereafter. Rather than assigning "cause" to another accident, incident or pre-existing condition, he simply stated that he was "unable to determine the cause of the continued symptoms." *R., p. 36.* He claimed Gomez was completely healed from her work injury when he examined her. He offered no explanation as to why her symptoms continued. Also, he never disagreed that she needed more treatment. *Id.* Despite this

pronouncement, the Surety continued to pay Dr. Poulter for his treatment through July 22, 2010, then cut Claimant off. *Claimant's Brief Exhibit 7.* Why it continued to pay after Dr. Simon's report for a period of time is unknown. However, eventually it did discontinue payment and thus, placed Claimant in the precarious position of having no TTD benefits, no job and potentially no form of payment of medical expenses. Given this state, Claimant made a request for an emergency hearing which was granted by the Industrial Commission. Both Defendant and Gomez petitioned the Commission for a determination of whether continued medical care by the same practitioner, Dr. Jake Poulter, was reasonable and necessary pursuant to the *Sprague* test. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P2d 395 (1989) It is fair to say that both parties assumed causation had been established. Yet, as discussed previously, the Commission never touched on that issue. This is gross error.

VI.
CONCLUSION

Under the circumstances as described, Gomez requests that this Court reverse the decision of the Commission denying Claimant's reconsideration request and instruct that Gomez is entitled to present additional evidence on the issue of causation. This request is in keeping with her constitutional and statutory rights to due process and the legislative intent that "the welfare of the state depends upon its industries and even more upon the welfare of its wage workers" Idaho Code § 72-201 and "That the Court must liberally construe the provisions of the Workers Compensation Law in favor of the employee in order to serve the main purpose for which the law promulgated." *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (Id 2008).

RESPECTFULLY SUBMITTED this 25 day of August, 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 25 day of December, 2010, 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

APPENDIX - NOTICE OF HEARING
FILED AUGUST 3, 2010

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA GOMEZ, Claimant, v. BLACKFOOT BRASS, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2009-018790** **NOTICE OF HEARING** **FILED** AUG 03 2010 INDUSTRIAL COMMISSION

Pursuant to the telephone conference conducted by Referee Michael E. Powers with the parties on August 3, 2010,

NOTICE IS HEREBY GIVEN that a hearing will be held in the above-entitled matter on **October 6, 2010, at 1:30 p.m., for one-half day,** at the Industrial Commission Field Office, 1820 East 17th Street, Suite 300, in the City of Idaho Falls, County of Bonneville, State of Idaho, on the following issues:

1. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof; and,

2. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof.

If the above-entitled matter settles prior to hearing, **the Commission must be notified in writing**.

DATED this 3rd day of August, 2010.

INDUSTRIAL COMMISSION

Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2010, a true and correct copy of the **NOTICE OF HEARING** was served by United States Certified Mail upon each of the following:

MICHAEL R MCBRIDE
1495 EAST 17TH ST
IDAHO FALLS ID 83404

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

And by regular United States mail upon the following:

SANDRA J BEEBE
PO BOX 658
BLACKFOOT ID 83221

E-mailed to field office

Gina Espinoza

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