

9-23-2011

Gomez v. Dura Mark Inc. Respondent's Brief Dckt. 38809

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Gomez v. Dura Mark Inc. Respondent's Brief Dckt. 38809" (2011). *Idaho Supreme Court Records & Briefs*. 2931.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/2931

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

MARIA GOMEZ,

Claimant-Appellant,

vs.

DURA MARK, INC., Employer,

and

IDAHO STATE INSURANCE FUND, Surety,

Defendants-Respondents.

DOCKET NO. 38809

RESPONDENTS' BRIEF

RESPONDENTS' BRIEF

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

**Michael R. McBride
Residing at Idaho Falls, ID for Appellant, Maria Gomez**

**Paul J. Augustine
Residing at Boise, ID for Respondents, Dura Mark, Inc. and Idaho State Insurance Fund**

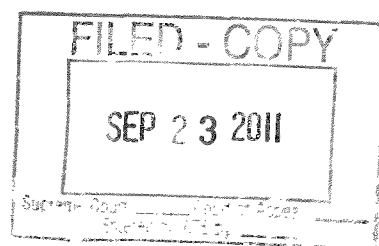


TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES..... i

STATEMENT OF THE CASE.....1

A. Nature of the Case.....1

B. Course of Proceedings.....1

C. Statement of Facts.....2

 1. *The Claimant's Background/Pre-Injury Employment*2

 2. *Claimant's Accident and Injury*2

 3. *Dr. Simon's February 16, 2010 Examination*4

 4. *Claimant's Medical Care After February 16, 2010*7

ARGUMENT.....7

A. Claimant Had Ample Notice That She Would Have to Prove That the Medical Treatment for Which She Sought Benefits at Hearing Was Causally Related to Her Industrial Accident and Injury; Therefore the Commission Properly Denied Her Motion for Reconsideration and Her Constitutional Rights Were Not Violated7

 1. *Under Idaho Code §72-432, Claimant has the Initial Burden of Establishing That her Medical Expenses Were Incurred as a Result of an Industrial Accident*.....8

 2. *Claimant Received Adequate Notice That She Would Have to Prove That Her Medical Treatment Which Was Denied by the Surety was Caused by Her Industrial Accident*12

 3. *The Claimant Was Not Denied Her Constitutional Rights to Due Process*.....15

B. The Commission's Finding That Claimant Failed to Meet Her Burden of Proving That Her Medical Treatment She Received After February 16, 2010 is Related to Her Industrial Accident an Injury is Supported by Substantial and Competent Evidence17

CONCLUSION19

TABLE OF CASES AND AUTHORITIES

CASES

<i>Boise Orthopedic Clinic v. Idaho State Ins. Fund (In re Wilson)</i> , 128 Idaho 161, 164, 911 P.2d 754, 757 (1996).....	18
<i>Fife v. Home Depot, Inc.</i> , ISCR No. 37894 (September 2, 2011).....	10,11,12,17,20
<i>Gooby v. Lake Shore Mgmt. Co.</i> , 136 Idaho 79, 86, 29 P.3d 390, 397 (2001).....	18
<i>Henderson v. McCain Foods, Inc.</i> , 142 Idaho 559, 130 P.3d 1097 (2006)....	8,9,10,14,15,16,17,20
<i>Hernandez v. Phillips</i> , 141 Idaho 779, 118 P.3d 111 (2005).....	15,16,20
<i>Jones v. Emmett Manor</i> , 134 Idaho 160, 997 P.2d 621 (2000).....	13
<i>Konvalinka v. Bonneville County</i> , 140 Idaho 477, 479, 95 P.3d 628, 630 (2004).....	9
<i>Langley v. State, Industrial Special Indemnity Fund</i> , 126 Idaho 781, 890 P.2d 732 (1995)	8
<i>McGee v. J.D. Lumber</i> 135 Idaho 328, 334, 17 P.3d 272, 278 (2000)	17
<i>Mortimer v. Riviera Apartments</i> , 122 Idaho 839, 840 P.2d 383 (1992)	17
<i>Ogden v. Thompson</i> , 128 Idaho 87 910 P.2d 759 (1996)	18
<i>Parker v. Engle</i> , 115 Idaho 860, 771 P.2d 524 (1989)	18
<i>Spencer v. Allpress Logging, Inc</i> , 134 Idaho 856, 11 P.3d 475 (2000)	18
<i>Sprague v. Caldwell Transportation, Inc.</i> , 116 Idaho 720, 722, 779 P.2d 395, 397 (1989).....	11
<i>White v. Idaho Forest Indus.</i> , 98 Idaho 784, 786, 572 P.2d 887, 889 (1997).....	15,16,17

STATUTES AND RULES

Idaho Code § 72-71315,16
Idaho Code § 72-432.....1,8,9,10,11,12,14

STATEMENT OF THE CASE

A. Nature of the Case

This is a worker's compensation case appealed from the Idaho Industrial Commission (hereinafter the "Commission"). Appellant Maria Gomez (hereinafter "Gomez" or "claimant") appeals from the Order of the Commission dated January 31, 2011 adopting the Findings of Fact and Conclusions of Law of the Referee and the Commission's Order Denying Reconsideration dated April 7, 2011 which found that claimant failed to prove that the medical treatment she received after her February 16, 2010 IME performed by Dr. Simon was related to her industrial accident and injury.

B. Course of Proceedings

On June 25, 2010 Gomez filed a Complaint alleging that she injured her low back while in the employ of Blackfoot Brass, also known as Dura Mark, Inc. (hereinafter "Employer" or "Blackfoot Brass"). R., pp. 1-2. On July 6, 2010, claimant requested an emergency hearing on the issue of whether she was entitled to payment of total temporary disability ("TTD") benefits after defendants terminated her TTD benefits based upon a February 16, 2010 determination by Dr. David Simon that she was medically stable and that no future medical treatment was needed. R., pp. 4-21. In their Answer, defendants denied that any additional benefits were owed to the claimant. R., pp. 22-24. The Commission held a hearing on October 6, 2010 on two 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 benefits, and the extent thereof. Appendix-Notice of Hearing filed August 3, 2010 (hereinafter “Notice of Hearing”); R., p. 58. On January 11, 2011 the Referee concluded that the claimant failed to prove that the medical benefits she sought were incurred for conditions related to her industrial accident and injury. R., p. 69. The Commission then issued an Order on January 31, 2011 in which they held that claimant failed to prove that the medical treatment she received after Dr. Simon’s February 16, 2010 IME was related to her industrial accident and injury. R., p. 71. The claimant then filed a Motion for Reconsideration to Reopen the Record for the Taking of Additional Evidence on the Issue of Causation (hereinafter “Motion for Reconsideration”). R., pp. 73-77. On April 7, 2011 the Commission entered an Order Denying Reconsideration. R., pp. 85-93. Claimant timely appealed.

C. Statement of the Facts

1. *The Claimant’s Background/Pre-Injury Employment*

The claimant is a forty three year old divorced resident of Idaho with two children, ages twenty and nineteen. Hearing Transcript “Tr.” p. 4, L.1-p. 5, L.1. She was hired by Blackfoot Brass in 2001 as a packing inspector responsible for cleaning parts from the sandblaster, inspecting them, boxing them, labeling the boxes and placing the boxes on pallets. Tr. p. 8, ll. 22-24; p. 46, ll. 2-25.

2. *Claimant’s Accident and Injury*

On July 24, 2009, the claimant injured her low back while lifting a sixty pound box “wrong.” Tr. p. 19, ll. 8-10. She alleged that she suffered immediate pain along her beltline and

down her right leg. Id. at p. 19, ll. 11-21. She testified that she told her supervisor, Josh Scott, immediately about the pain in her back and down her leg. Id. at p. 19, ll. 21-24. Mr. Scott testified that she told him that she injured her lower back but not her right leg. Tr. p. 54. ll. 4-11. He also filled out an accident form indicating that the claimant only injured her low back. Defendants Exhibit "Def. Ex.", C. p. 17.

After receiving notice of her accident, Mr. Scott sent Ms. Gomez to a local chiropractor, Dr. Johnson in Blackfoot. Tr. p. 20, ll. 4-9. Dr. Johnson then referred the claimant to Dr. Grimmatt. Id. at p. 20, ll. 22-25. Dr. Grimmatt recommended an MRI based upon the claimant's complaints. Claimant's Exhibit "Clmt. Ex." 4, p. 49. She underwent an MRI on October 10, 2009 and saw a neurosurgeon, Dr. Huneycutt on November 11, 2009. Clmt. Ex. 2, p. 28. Dr. Huneycutt reviewed the lumbar MRI scan and indicated that it showed a herniation at L4-5 with impingement of the exiting nerve root on the right and neural foraminal stenosis. Id. He diagnosed the claimant with a herniated disc with lumbar radiculopathy and low back pain following incident at work. Id. However, he refused to relate the claimant's disc herniation to her activities at work stating "I have made no statement in referencing to causality. I made it clear to the patient that I would defer her to a physical medicine specialist in the determination of causality or disability determinations." Id. Dr. Huneycutt then referred the claimant to Dr. Poulter for follow up care. Tr. p. 22, ll. 3-6.

On December 7, 2009 the claimant was evaluated by Dr. Poulter and an epidural steroid injection was recommended. Def. Ex., A, p. 3. She later underwent an epidural steroid injection

but told Dr. Simon in February 2010 that the epidural steroid injection “did not work.” Deposition of David C. Simon, M.D. dated November 2, 2010 (hereinafter “Simon Depo.”), p. 14, ll. 1-4. She then underwent a course of physical therapy. Clmt. Ex. 3, pp. 30-44.

3. *Dr. Simon’s February 16, 2010 Examination*

On February 16, 2010 at the request of the State Insurance Fund (hereinafter “Fund”), the claimant underwent an examination by Dr. David Simon. Dr. Simon is a physician licensed to practice medicine in the State of Idaho specializing and board certified in physical medicine and rehabilitation. Simon Depo., p. 6, L. 10-p.7, L.10. Prior to Dr. Simon’s examination, the claimant filled out a pain questionnaire in which she denied any previous problems or injuries to her low back, denied having any difficulties prior to her injury similar to those that she was experiencing at the time and denied any work injuries in the past. Id. at p. 12, ll. 1-24. However, Dr. Simon noted based upon his review of the medical records that the claimant had back pain and suffered industrial injuries in the past, contrary to her statements to him. Id. at p. 13, ll. 1-9. At the time of his examination, Dr. Simon noted that the claimant demonstrated exaggerated pain behaviors. Id. at p. 15, ll. 1-18. Dr. Simon performed a physical examination of the claimant including a negative straight leg raise which indicated that the claimant did not have a lumbar radiculopathy. Def. Ex. A, p. 4.

Dr. Simon diagnosed the claimant with back and right leg pain originating from her accident at Blackfoot Brass and a resultant strain injury all of which had resolved. Def. Ex. A, p. 5. He felt the claimant’s physical examination was inconsistent with a disc herniation

radiculopathy, that she demonstrated exaggerated pain behaviors and had inconsistent findings on the examination. Dr. Simon opined that the claimant's subjective symptoms outweighed his objective findings. Def. Ex. A, p. 5. In addition to his physical exam, Dr. Simon personally reviewed a September 16, 2009 x-ray of the claimant's lumbar spine and the October 10, 2009 MRI of the claimant's lumbar spine. Simon Depo., p. 17, ll. 3-8. Due to the claimant's reported symptoms, he was concerned that she had a pinched nerve which would be visible on the films; however, based upon his personal review of the claimant's MRI he did not see any evidence of a pinched nerve. Id. at p. 17, L. 9-p. 18, L. 3. While Dr. Simon saw evidence of a disc protrusion at the L4-5 level, it did not pinch any nerves or create stenosis, i.e., narrowing of the exiting nerve root sufficient to explain her reported symptoms. Simon Depo., p. 18, L. 24-p.19, L. 6.

Following receipt of Dr. Simon's report in March 2010, the Idaho State Insurance Fund terminated the claimant's time loss, i.e., TTD benefits. R., pp.13 and 15. Thereafter, on April 8, 2010 Dr. Poulter indicated that he disagreed with Dr. Simon's findings and opined that the claimant had a persistent disc bulge which continued to be symptomatic and required additional treatment. R., p. 7. Dr. Poulter stated that on the claimant's MRI "she had an acute L4-5 disc rupture with right neuroforaminal stenosis and contact with the exiting nerve root at this level." Id. He recommended additional treatment, including an epidural steroid injection and possible surgical intervention. Id. On April 22, 2010 Dr. Poulter restricted Ms. Gomez from returning to work until her treatment was completed and she was feeling better. R., p. 11.

Shortly thereafter, by letter dated April 27, 2010, Dr. Simon addressed Dr. Poulter's concerns. R., p. 38; Def. Ex. A, pp. 8-9. As Dr. Simon indicated, their difference of opinion was related to their different understanding of what the MRI showed. Id. at p. 8. Dr. Simon took issue with Dr. Poulter's conclusion that the MRI showed an "acute" L4-5 disc rupture. Id. He also disagreed with Dr. Poulter's conclusion that the MRI showed stenosis or a disc in contact with the exiting nerve root. Dr. Simon reiterated that he did not appreciate any stenosis on the MRI and cited the radiologist's report that at L4-5 "the neural foramen are widely patent" which supported his conclusion that there was no contact with the exiting nerve root to justify the claimant's symptoms. Id. Further, Dr. Simon opined that the claimant's reported symptoms were not localized to an L5 distribution; therefore the most likely explanation was that her reported right leg symptoms were not legitimate. Simon Depo., p. 21, ll. 5-11; Def. Ex. A, p. 9.

Based upon his examination in which the claimant's subjective symptoms outweighed his objective findings, her lack of credibility as a historian, and the lack of any anatomical explanation for the claimant's purported right leg symptoms on the MRI, Dr. Simon opined there was no causal relationship between her continuing complaints and her industrial accident and injury of July 24, 2009. Simon Depo., p. 23, ll. 10-14. Dr. Simon further opined that (1) the claimant had reached maximum medical improvement, (2) no further medical treatment was necessary and (3) she could return to work without restrictions. Id. at p. 24, ll. 3-12. Most importantly, Dr. Simon noted because there was no anatomical explanation for her right leg pain, there was no medical treatment that was reasonable and necessary to treat the pain. Id., p. 24, ll. 13-16. Dr. Simon indicated that any further epidural steroid injections or physical therapy was not medically necessary. Id. at p. 29, ll. 4-11.

4. *Claimant's Medical Care After February 16, 2010*

Following Dr. Simon's full release of the claimant to return to work in May 2010, Gomez was offered a light duty position at Blackfoot Brass. Def. Ex. C, p. 95. Mr. Scott offered the claimant an opportunity to return to work because she indicated that she needed light duty work and was interested in returning to work. However, Mr. Scott imposed three stipulations on her return: no heavy lifting, no more than three absences and only a four hour work day. Id. Mr. Scott testified that he talked to Dr. Poulter who recommended that the claimant return to light duty work with less than a full day of work at the time of his offer. Tr., p. 60, ll. 1-9.

Following the termination of her TTD or income benefits, Gomez continued to treat with Dr. Poulter numerous times through September 2010. See generally, Clmt. Ex. 1. At hearing, claimant's counsel submitted Dr. Poulter's denied medical bills for treatment rendered to Gomez as an exhibit into the record. Claimant's Supplement-Pre-Hearing Disclosure of Witnesses and Exhibits, Clmt. Ex. 7. According to Dr. Poulter's medical records, the Fund stopped paying her medical bills in August 2010. Id. As a result Gomez owed an outstanding balance as of the hearing of \$1,282.00 for which she sought payment from the Fund. Id.

ARGUMENT

A. Claimant Had Ample Notice That She Would Have to Prove That the Medical Treatment for Which She Sought Benefits at Hearing Was Causally Related to Her Industrial Accident and Injury; Therefore the Commission Properly Denied Her Motion for Reconsideration and Her Constitutional Rights Were Not Violated

The gravamen of claimant's argument on appeal is that she was not given notice by the Commission that she was required to prove a causal relationship between her medical treatment

and her industrial accident at hearing. However, an examination of the Notice of Hearing and Idaho law clearly establishes that she was given proper notice that she would be required to establish a causal relationship between her industrial accident and the medical treatment for which she sought workers' compensation benefits.

l. Under Idaho Code § 72-432, Claimant has the Initial Burden of Establishing That her Medical Expenses Were Incurred as a Result of an Industrial Accident.

In its Findings of Fact and Conclusions of Law, the Commission correctly noted that under Idaho law “**Claimant bears the burden of proving that medical expenses and treatment were incurred as a result of an industrial injury** and must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability.” R., p. 63 (citing *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995) (emphasis in original). Consistent with Idaho Supreme Court precedent in *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 130 P.3d 1097 (2006), the Commission stated that Claimant “must first show that there is a causal relationship between the accident and the injuries for which she claims benefits....She must show it is more likely than not that her need for treatment is causally related to the subject accident.” R., p. 63. As this Court stated in *Henderson*, “one of the facts essential to the recovery of medical expenses is that the expenses were incurred as a result of an industrial accident.” *Henderson*, 142 Idaho at 563, 130 P.3d at 1101. Otherwise, workers' compensation insurance becomes health insurance and would cover every ailment that a claimant suffers following an industrial accident regardless of whether the

treatment was related to their industrial accident. “Worker’s compensation is not meant or intended to be life or health insurance; it is purely accident and occupational disease insurance.” *Konvalinka v. Bonneville County*, 140 Idaho 477, 479, 95 P.3d 628, 630 (2004).

As a result, it is well-settled under Idaho law that an employee, such as Gomez, “seeking compensation for medical care must prove that there is a causal relationship between the industrial accident and a need for medical care.” *Henderson*, 142 Idaho 559, 564, 130 P.3d 1097, 1102. Defendants stopped paying Gomez’s medical bills based on Dr. Simon’s February 2010 and April 27, 2010 opinions that there was no causal relationship between her continuing pain complaints and her industrial accident. It is very clear to the parties that there was a dispute between Dr. Poutler and Dr. Simon as to the cause of claimant’s complaints and whether additional medical treatment was required or related to her industrial injuries. Therefore, the primary issue decided at the hearing before the Commission was “whether the Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432 and **the extent thereof.**” Notice of Hearing (emphasis added). Since claimant was seeking payment of Dr. Poulter’s unpaid medical bills it should have been clear to her that she had the burden of proving causation.¹

In her post-hearing brief, claimant apparently believed that she was only required to establish that Dr. Poulter’s denied medical expenses were reasonable. In her Opening Brief after hearing, claimant mistakenly cited the primary issue as “whether claimant’s medical treatment

¹ Gomez offered medical reports at hearing which related her medical treatment to her accident, but the Commission

after February 16, 2010 was reasonable.” Claimant’s Opening Brief, p. 2. However, the actual issue noticed by the Commission went far beyond the limited issue of reasonableness – it included “whether the claimant is entitled to reasonable and necessary medial care as provided by Idaho Code § 72-432 and the extent thereof.” Notice of Hearing.

Claimant’s misunderstanding of her well-settled burden under Idaho law is evidenced by her argument to this Court that under Idaho Code § 72-432, once a claim is accepted and treatment is paid by the surety, all treatment provided by the treating doctor is presumed to be causally related to the industrial accident. Appellate’s Brief, p. 9. Under claimant’s argument -- which is contrary to Supreme Court precedent in *Henderson* and *Fife v. Home Depot, Inc.*, ISCR No. 37894 (September 2, 2011) -- the only inquiry the Commission can make is into the reasonableness of the medical treatment, not its necessity or whether it is causally related to the industrial accident. Claimant’s argument transforms workers’ compensation insurance into health insurance, because medical treatment rendered by the claimant’s physician can only be challenged on the basis of whether it is reasonable, regardless of whether it is related to the industrial injury.

The fallacy of claimant’s argument was recently addressed by this Court in *Fife* which is strikingly similar to the instant case. In *Fife*, the Court reiterated that a claimant seeking the payment of medical benefits under Idaho Code § 72-432 must first establish causation before the Commission addresses the reasonableness of the medical treatment. *Fife*, ISCR No. 37894. In

chose to accept Defendants’ expert’s opinions on the issue.

Fife, the claimant injured his low back while at work. Three weeks later, he underwent a five level decompression and fusion surgery. Thereafter, the surety requested claimant's medical records and had them reviewed by a physician who performed an independent medical examination. As is the case here, in *Fife* the IME physician concluded claimant's need for surgery was not related to his industrial accident as his MRI did not show any evidence of acute injury, fracture or dislocation consistent with an industrial accident or injury.

In *Fife* following an evidentiary hearing and post hearing depositions, the Commission accepted the testimony of the IME physician and concluded that the claimant failed to prove that the medical condition for which he had surgery was causally related to his industrial accident or that his accident aggravated his pre-existing degenerative condition. On appeal *Fife* argued that the surgery was reasonable treatment for his industrial accident. As with Gomez, in support of his argument the claimant in *Fife* relied on Idaho Code § 72-432 and this Court's decision in *Sprague v. Caldwell Transportation, Inc.*, in which it held that "it is for the physician, not the Commission, to decide whether the treatment is required." *Sprague*, 116 Idaho 720, 722, 779 P.2d 395, 397 (1989).

However, this Court dismissed *Fife's* argument stating that "a determination that a particular treatment was required for a claimant's medical condition does not equate to a determination that the employer or surety is liable for the cost of that treatment." *Fife*, ISCR No. 37894. In *Fife*, as in the present case, the Commission held that the claimant failed to prove that the industrial accident caused the condition for which the claimant sought medical treatment.

The Commission did not question the reasonableness of the surgery as a treatment for his medical condition, because as with Gomez, the claimant failed to establish causation. Ultimately, the Court upheld the Commission's determination that the claimant failed to prove causation because it was supported by substantial and competent evidence. *Id.*

While not breaking new ground, the decision in *Fife* simply stands for the well established proposition that the claimant always bears the initial burden of proving that medical treatment was caused by an industrial accident. Once claimant establishes that the medical treatment is causally related to her industrial accident, she then bears the burden of proving that it is reasonable. It is precisely this initial burden the Commission held that claimant failed to carry at hearing. *R.*, p. 71.

2. *Claimant Received Adequate Notice That She Would Have to Prove That Her Medical Treatment Which Was Denied by the Surety was Caused by Her Industrial Accident.*

The Notice of Hearing unequivocally stated that the primary issue to be determined was whether "the claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432 and the extent thereof." Notice of Hearing. At the time of the hearing, the Fund denied payment of claimant's medical bills incurred after July 2010 and also terminated her TTD benefits based upon Dr. Simon's determination February 2010 that she was medically stable. At hearing claimant claimed that she was entitled to additional medical care as evidenced by the inclusion of her medical records and medical bills incurred after Dr. Simon's February 16, 2010 examination into evidence.

In her Brief, Gomez claims that she felt “ambushed by [the Commission’s] 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.” Appellate’s Brief, p. 6. First, claimant could not feel “ambushed” by the Commission as it is well settled precedent in Idaho that she is required to establish causation, especially when the Fund denied claimant’s medical bills based upon a physician’s opinion that the claimant’s medical treatment was not causally related to her industrial accident. Second, the claimant submitted evidence of causation to the Commission, including Dr. Poulter’s and Dr. Huneycutt’s records which obviated the need for live testimony. A claimant can establish medical causation to a reasonable degree of probability based solely upon her medical records which constitute “medical testimony.” *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000). The claimant presented “testimony” in the form of her medical records, including Dr. Poulter’s and Dr. Honeycutt’s medical records in which they both stated that they believed the MRI showed a disc herniation which caused impingement on the exiting nerve root. Clmt. Ex. 2, p. 29; Clmt. Ex. 1, p. 2. Ultimately, the Commission rejected the opinions of Drs. Poulter and and Honeycutt, instead adopting the opinions of Drs. Simon, Montalbano and Biddulph (the radiologist who interpreted the original MRI) that there was no radiologic evidence that her disc was impinging on her exiting nerve root, thus there was no anatomic explanation for her symptoms and no further medical treatment was necessary to treat her industrial injury. R., p. 68.

Finally, and most importantly, the claimant put causation at issue because she made a claim for the payment of additional medical benefits following Dr. Simon's February 16, 2010 examination. As the Commission noted in its Notice of Hearing, the issue was not simply whether the claimant's medical treatment was reasonable; rather it was whether the claimant was entitled to additional medical treatment ("the extent thereof") and whether the medical treatment was reasonable and necessary under Idaho Code § 72-432.

Despite making causation an issue by requesting payment of denied medical bills and TTD benefits at issue, in her Brief the claimant attempted to differentiate her case from *Henderson*. The claimant placed great importance upon the fact that this was her first hearing before the Commission hearing, while the claimant in *Henderson* had one prior hearing. This distinction makes no difference because in *Henderson*, at the first hearing the Commission determined that the claimant's injury to her neck exacerbated a pre-existing condition. *Henderson*, 130 P.3d at 1100. At the second hearing the issue was the same as it was in Gomez, namely whether the claimant's medical treatment, i.e., her neck surgery, was causally related to her industrial accident. *Id.* Ultimately the Commission held that she was not entitled to medical benefits for the surgery. *Id.*

On appeal the claimant in *Henderson* argued that she did not have notice that she would have to prove at the second hearing that her neck surgery was causally connected to her industrial accident. *Id.* The Supreme Court analyzed whether the claimant had notice that she would have to prove causation at her second hearing. *Id.* The fact that she had a prior hearing

determining the initial compensability of her injury was of no significance in the court's analysis. Rather, the court analyzed long standing precedent which "made it clear that an employee seeking compensation for medical care must prove that there is a causal relationship between the industrial accident and the need for the medical care." *Id.* at p. 1102. Since the issue to be heard at the second hearing in *Henderson* was whether the claimant was entitled to additional medical benefits, as it was in *Gomez*, the claimant was required to prove a causal connection in order to receive these additional medical benefits. *Id.* As with *Gomez*, the claimant in *Henderson* "put causation at issue by virtue of her claim for additional medical benefits." *Id.* Therefore, the court specifically held that "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." *Id.* (citing *Hernandez v. Phillips*, 141 Idaho 779, 118 P.3d 111 (2005)).

3. *The Claimant Was Not Denied Her Constitutional Rights to Due Process.*

As the *Henderson* case illustrates where, as here, the claimant places her entitlement to additional medical benefits at issue, the Commission's failure to specifically identify that causation was one of the facts which claimant must prove in order to recover those medical benefits does not deny the claimant her due process rights. *Henderson*, 130 P.3d at 1102. Under Idaho law, an administrative tribunal may not raise issues without first serving the affected party with fair notice and providing them with a full opportunity to be heard on the issue. *White v. Idaho Forest Indus.*, 98 Idaho 784, 786, 572 P.2d 887, 889 (1977). Idaho Code § 72-713 codifies this rule and requires the Commission to provide the parties with written notice of the

issues to be heard ten (10) days prior to hearing. *Idaho Code* § 72-713. In *Hernandez*, cited by the claimant, the Referee in the Notice of Hearing indicated that one of the issues to be decided at hearing included “**whether and to what extent**, Hernandez was entitled to medical benefits, including cervical spine surgery.” *Hernandez*, 141 Idaho at 781, 118 P.3d at 113 (emphasis added). The issue to be decided at hearing in *Hernandez* is virtually identical to the issue in the Notice of Hearing in the instant case. However, in *Hernandez*, the claimant argued not that he had no notice that causation was an issue, but that he did not have proper notice of the Commission’s finding that he had reached maximum medical improvement and thus was only entitled to benefits through that date. *Id.* While the Notice of Hearing did not reference to specific issue, the Idaho Supreme Court held that the issue of maximum medical improvement was necessarily an issue by virtue of claimant’s claim for additional temporary income benefits. *Id.* As in *Hernandez* and *Henderson*, in this case medical causation was necessarily an issue at hearing because of Gomez’s claim for additional medical and TTD benefits, so claimant’s due process rights were not violated.

Gomez bases her argument that her constitutional rights were violated on the *White* case, arguing that the precise issue of causation was not contained in the Commission’s Notice of Hearing. However, *White* offers no support for her position. Instead, *White* stands for the proposition that due process may be violated by the Commission deciding an issue about which a party to the action had no notice:

Idaho case law...is equally insistent that an administrative tribunal may not raise issues without first serving the affected party with

fair notice and providing him with a full opportunity to meet the issue. 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...and must be reversed.

White, 98 Idaho at 786, 572 P.2d at 889 (citations omitted). Here Ms. Gomez had notice that her entitlement to medical benefits was at issue and, was given an opportunity to present evidence on this issue, including causation, and she presented causation evidence.

The Commission gave fair notice to the claimant that her entitlement to medical benefits, including the extent thereof, was at issue. The notice which informed the parties that the purpose of the hearing was to determine amount of benefits claimant was entitled to complied with due process requirements. *Mortimer v. Riviera Apartments*, 122 Idaho 839, 847, 840 P.2d 383, 391 (1992); *McGee v. J.D. Lumber*, 135 Idaho 328, 334, 17 P.3d 272, 278 (2000) (finding notice that referenced liability was an issue did not violate due process rights even though it did not identify specifically that medical stability would be an issue). Once Gomez received this notice she should have known that, based upon prior Supreme Court precedent in *Henderson* (and reconfirmed recently in *Fife*) she carried the burden of proving that additional medical treatment was causally related to her industrial accident. Although she presented evidence on this issue, the Commission rejected it and held that she failed to meet her burden of proof. Clearly, the claimant was not denied her due process rights.

B. The Commission's Finding That Claimant Failed to Meet Her Burden of Proving That Her Medical Treatment She Received After February 16, 2010 is Related to Her Industrial Accident and Injury is Supported by Substantial and Competent Evidence

When the Supreme Court reviews a decision from the Industrial Commission, it reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Boise Orthopedic Clinic v. Idaho State Ins. Fund (In re Wilson)*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). "As the factfinder, the Commission is free to determine the weight to be given to the testimony of physicians. The Commission is not bound to accept the opinion of the treating physician over that of a physician who merely examined the claimant for the pending litigation." *Gooby v. Lake Shore Mgmt. Co.*, 136 Idaho 79, 86, 29 P.3d 390, 397 (2001). The Supreme Court will not disturb the Commission's factual findings unless they are clearly erroneous. *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 11 P.3d 475 (2000). Finally, all facts and inferences must be viewed in the light most favorable to Respondents herein as they prevailed before the Industrial Commission. *Parker v. Engle*, 115 Idaho 860, 863, 771 P.2d 524, 528 (1989).

In this case the Commission was asked to resolve a dispute between Drs. Poulter and Honeycutt, on the one hand, and Drs. Simon, Montalbano and Biddulph on the other as to whether claimant's lumbar MRI demonstrated impingement which would explain her continuing pain complaints and justify the medical expenses incurred to treat those complaints. In its

Findings of Fact and Conclusions of Law, the Referee did an excellent job outlining the conflicting opinions of the physicians. R., p. 68. The Commission then resolved this conflict in favor of the Defendants stating:

In resolving this conflict, the Referee is more persuaded by the opinions expressed by Drs. Simon, Montalbano and Biddulph, than those of Drs. Poulter and Honeycutt, regarding the etiology of the condition which required Claimant to receive on-going treatment from Dr. Poulter following Dr. Simon's February 16, 2009, IME. Dr. Poulter's treatment both before and after Dr. Simon's IME was ostensibly directed at Claimant's L4-L5 nerve root and alleged right leg radiculopathy. However, the MRI report itself is clear that there is no nerve root impingement at that level, and is so read by Drs. Simon and Montalbano, as well as the radiologist. While Dr. Poulter may well have also been treating some myofascial pain and whatever pain may have arisen from the annular fibrosis tear at L5-S1, there is nothing in the record in that regard. Further, the record does not reveal the bases for Drs. Honeycutt's or Poulter's reading of the MRI in the manner they do.

R., pp. 68-69.

Therefore, there is substantial evidence in the form of medical opinions from Drs. Simon, Montalbano and Biddulph that the claimant's continuing complaints and the medical treatment incurred to treat those complaints was not causally related to her industrial accident.

CONCLUSION

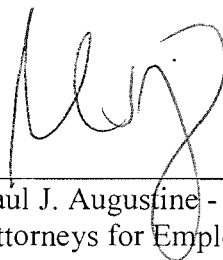
The Commission gave proper notice to the parties that a determination of the claimant's entitlement to additional medical benefits (which were denied on the basis of lack of causation) would be determined at hearing. It is well settled under Idaho law that in order to recover additional medical benefits, claimant was required to establish causation. Therefore, under

Supreme Court precedent in *Henderson, Hernandez and Fife*, claimant was not denied her due process rights by the Commission's failure to specifically identify causation as an issue to be decided at hearing. In fact, claimant provided evidence of causation at hearing by several reports from Drs. Poulter and Honeycutt which she believed established that her medical treatment was related to her industrial accident. As a result, the Commission's denial of her Motion for Reconsideration should not be overturned by this Court.

The Commission, however, after weighing the evidence, decided that the evidence provided by Defendants was more persuasive and thus determined that the claimant failed to meet her burden of establishing that her medical treatment was related to her industrial accident. The Commission's decision was supported by sufficient and competent evidence and should not be overturned on appeal.

Dated this 23rd day of September, 2011.

AUGUSTINE LAW OFFICES, PLLC



By: _____
Paul J. Augustine - Of the Firm
Attorneys for Employer/Surety - Respondent

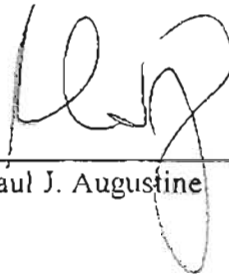
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ^{23rd} day of September, 2011, I caused a true and correct copy of the foregoing document to be served upon the following persons in the manner indicated below:

Michael R. McBride
McBride & Roberts, Attorneys
1495 East 17th Street
Idaho Falls, ID 8.3404

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy

Attorneys for Claimant- Appellant



Paul J. Augustine