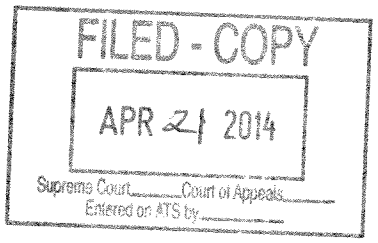
4-21-2014

Deon v. H&J Appellant's Reply Brief Dckt. 41593

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRUDY DEON, Claimant-Appellant, vs. H&J Inc., d/b/a, BEST WESTERN, COEUR D' ALENE INN & CONFERENCE CENTER, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants-Respondents, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant-Respondent.	)	Docket No. 41593 I.C. No. 2007-005950 and 2008-032836 APPELLANT'S REPLY BRIEF



APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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III. INTRODUCTION

Five issues were raised by the defendants in their briefing in support of affirming the Commission's Order on Reconsideration dated November 4, 2013. First, the employer/surety raised quasi-estoppel as a new basis to affirm the Commission. This Court has repeatedly upheld the principle that review on appeal is limited to those issues raised at the Commission. For that reason, the defense of quasi-estoppel should be deemed waived.

Second, the employer/surety concluded that *Vawter* was distinguishable from this case so that collateral estoppel remained a viable defense. This argument is based on the belief that because more than one complaint was filed, there is more than one cause of action at issue. This argument ignores the simple fact that the industrial accident on 10/4/08 provided the group of operative facts which gave rise to the basis for suing all the defendants in this case. As such, there is but a single cause of action rendering collateral estoppel inapplicable. *See Vawter v. United Parcel Service, Inc.* 155 Idaho 903, 318 P.3d 893, 902 (2014).

Third, the employer/surety concluded that it was permissible for the Commission to raise affirmative defenses *sua sponte* following trial. This argument ignores the Court's recent statement in *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 272 P.3d 569, 573 (2012) which stated that administrative tribunals are required to provide parties both a "fair notice" and a "full opportunity" to meet issues before raising them. In this case, by approving the lump sum settlement and then using that settlement as the basis to avoid deciding this case on the merits, the Commission failed to provide the claimant with fair notice or a full opportunity to meet the collateral estoppel defense and violated the claimant's right to due process.

Fourth, all defendants to this appeal have argued that I.C. §72-719(3) is incapable of being utilized to modify a settlement agreement on the basis of manifest injustice when read in

conjunction I.C. §72-719(4). This is because I.C. §72-719(4) speaks of a prohibition on a commutation of payments under I.C. §72-404. However, I.C. §72-404 is ambiguous as to whether it applies to ISIF settlements as it only discusses discharging the liability of the employer via lump sum and does not reference the ISIF. Because Title 72 specifically differentiates the employer/surety from the ISIF, adopting the defendants view would require the Court to construe this ambiguous statute in favor of denying disability benefits to the claimant, which this Court has previously declined to do. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989); *Ogden v. Thompson,* 128 Idaho 87, 910 P.2d 759 (1996).

Finally, the ISIF argues that the ISIF settlement is not void pursuant to I.C. §72-318(2),which prohibits an agreement by an employee which waives her rights to compensation under Title 72. ISIF argues that this case is distinguishable from the *Wernecke* case where a claimant entered into a void settlement with the ISIF by failing to satisfy the elements of ISIF liability. Similar to the claimant in *Wernecke*, the claimant in this case was also determined to not have met the elements of ISIF liability after a hearing on the merits. In such a scenario, just as the ISIF settlement in *Wernecke* was declared void, so to should the ISIF settlement in this case be declared void. Inexplicably and in contravention of its findings on the merits that the ISIF had no liability, the Commission then utilized the ISIF settlement agreement as a basis to withhold disability benefits from the claimant. As this Court stated in *Wernecke*, if a contract is illegal and void, the court will leave the parties as it finds them and refuse to enforce the contract. The contract cannot be treated as valid by invoking waiver or estoppel. *Whitney v. Cont'l Life & Accident Co.*, 89 Idaho 96, 105, 403 P.2d 573, 579 (1965).

IV. ARGUMENT

1. THE DEFENSE OF QUASI ESTOPPEL HAS BEEN WAIVED

Employer/Surety raised the affirmative defense of quasi-estoppel for the first time on appeal. This Court has repeatedly upheld the well established principle that review on appeal is limited to those issues raised in the lower tribunal. With few exceptions[1], this Court will not address issues raised for the first time on appeal. *Nycum v. Triangle Dairy Company Co.*, 109 Idaho 858, 862, 712 P.2d 559, 563 (1986) citing *Baldner v. Bennett's, Inc.,* 103 Idaho 458, 460, 649 P.2d 1214, 1216 (1982); *Webster v. Potlatch Forests,* 68 Idaho 1, 16, 187 P.2d 527, 536 (1947). *See also Masters v. State,* 105 Idaho 197, 668 P.2d 73 (1983) (parties are held to the theories on which a cause was tried in the lower court and may not raise additional or new theories on appeal); *International Business Machines Corp. v. Lawhorn,* 106 Idaho 194, 677 P.2d 507 (Ct.App.1984) (even if issue was arguably raised in the lower tribunal under liberal interpretation of pleadings, if not supported by any factual showing or by submission of legal authority, it was not presented for lower court's decision and would not be considered on appeal.) Because Employer/Surety limited their argument at the Commission exclusively to the affirmative defense of collateral estoppel, any quasi-estoppel defense has been waived. *See* Ex. Add. Doc 2 and 4.

2. THE 10/4/08 ACCIDENT IS THE SOLE CAUSE OF ACTION IN THIS CASE

Employer/Surety has concluded that there are two causes of action in this case because there was a separate complaint filed against the ISIF in relation to 10/4/08 accident. This

[1] The noted exceptions include issues regarding jurisdiction, failure to state a claim upon which relief can be granted, and constitutional questions.

argument ignores the Court's rationale in *Vawter* that where a cause of action was defined as a "group of operative facts giving rise to one or more bases for suing; a factual situation that entitled one person to obtain a remedy in court from another person..." *Vawter v. United Parcel Service, Inc.* 155 Idaho 903, 318 P.3d 893, 903 (2014).

Collateral estoppel is inapplicable in cases like this one where the litigation, albeit including several different hearings, is nevertheless all part of the same case. *See Sanije Berisha*, Claimant, IC 2002-003038, 2012 WL 2118142 (Idaho Ind. Com. May 30, 2012). Employer/surety's argument on this issue is even contrary to the Commission's view of a cause of action which assigns a single case number to each industrial accident[2], regardless of the whether the ISIF could be held liable in addition to the employer/surety.

3. THE COMMISSION VIOLATED CLAIMANT'S RIGHT TO DUE PROCESS

Employer/Surety argues that it is permissible for the Commission to raise affirmative defenses *sua sponte* following trial. This is expressly contrary to the Commission's own statement that, "The Commission cannot decide issues that are not before it." *Sherri Troutwine, Claimant*, IC 2006,012796, 2009 WL 5850565 (Idaho Ind. Com. November 27, 2009). Moreover, this Court has held that administrative tribunals are unable to raise issues without first serving an affected party with "fair notice" and a "full opportunity" to meet such issues. *Hernandez v. Phillips, 141 Idaho 779, 781, 118 P.3d 111, 113 (2005).*

In this case, by raising the affirmative defense of collateral estoppel **after** a decision on the merits had been issued on May 3, 2013, concluding apportionment issues were moot; the Commission violated the Claimant's right to due process. In this situation, the claimant lacked fair notice or full opportunity to meet this defense after settlement with the ISIF. R. p. 110. This

[2] The relevant Industrial Commission case number with respect to the 10/4/08 accident is 2008-032836.

is because claimant relied on the fact that affirmative defenses must be timely set forth in the notice of hearing pursuant to I.C. §72-713. Additionally, the pleading form that all defendants are required to use when answering a complaint in an industrial claim specifically requires that the employer/surety, "State with specificity what matters are in dispute and your reason for denying liability, **together with any affirmative defenses**" to avoid surprise at trial. R. p. 11.

4. THE COMMISSION ERRED BY REFUSING TO MODIFY THE SETTLEMENT AGREEMENT

Both defendants have argued that I.C. §72-719(3) is incapable of modifying a settlement agreement based on *Harmon v. Lute's Const. Co.*, 112 Idaho 291(1986) absent proof of fraud. This conclusion makes little sense and would render I.C. §72-719(3) duplicative of I.C. §72-719(1). In *Banzhaf v. Carnation Co.*, 104 Idaho 700, 702, 662 P.2d 1144, 1145 (1983), the Court addressed a similar argument when the Commission refused to modify a settlement agreement based on a belief that a settlement agreement could only be reopened only, "Upon a showing of fraud or a change in condition." *Id.* The Court stated that the Commission was, "erroneously under the impression that the doctrine of res judicata precludes any consideration of the applicability of I.C. §72-719(3) in the absence of either fraud or a change of condition. . . Here the statute clearly over-rides that concept of finality, permitting the Commission to reopen its earlier decision if it finds it necessary to do so to correct a manifest injustice. *Id.*

Moreover, a reading of I.C. §72-719(4) states that, "This section shall not apply to a commutation of payments under section 72-404." However, a plain reading of I.C. §72-404 reveals no discussion of the ISIF and instead speaks only of the, "liability of the employer." As the employer is specifically defined in I.C. §72-102(12)(a) as any person who has expressly or impliedly hired or contracted the services of another, the ISIF is excluded from a plain reading of

I.C. §72-404. The recent revision to I.C. §72-223(7) which expressly granted all the rights of the employer to the ISIF as well further clarifies that the legislature considers the ISIF a distinct entity from the employer. As such, because the ISIF settlement did not speak to the liability of the employer/surety, §72-719(4) does not provide a bar to modification of the ISIF settlement. The provisions of the Workers Compensation law are to be liberally construed in favor of the employee. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow technical construction. *Ogden v. Thompson,* 128 Idaho 87, 910 P.2d 759 (1996).

5. THE SETTLEMENT IS VOID AS A MATTER OF LAW

Finally, ISIF argues that the ISIF settlement is not void because claimant did not waive her rights to benefits under Title 72. However the plain text of I.C. §72-318 states that, "No agreement by an employee to waive his rights to compensation under this act shall be valid." ISIF argues that this case is distinguishable from the *Wernecke* case where a claimant entered into a void settlement with the ISIF by failing to satisfy the elements of ISIF liability. Similar to the claimant in *Wernecke*, the claimant in this case was also determined to not have met the elements of ISIF liability after a hearing on the merits.

In such a scenario, just as ISIF settlement in *Wernecke* was declared void for failing to meet elements of ISIF liability, so to should the ISIF settlement in this case be declared void. This is in keeping with similar cases which found that agreements in violation of public policy are void. *Mortimer v. Riviera Apartments*, 122 Idaho 839, 840 P.2d 383 (1992). As this Court stated in *Wernecke*, if a contract is illegal and void, the court will leave the parties as it finds them and refuse

to enforce the contract. The contract cannot be treated as valid by invoking waiver or estoppel. *Whitney v. Cont'l Life & Accident Co.*, 89 Idaho 96, 105, 403 P.2d 573, 579 (1965).

6. ATTORNEY FEES SHOULD BE AWARDED ON APPEAL

Attorney fees are awarded on appeal in an industrial case if the court determines that the employer or his surety contested a claim for compensation made by an injured employee without reasonable grounds pursuant to I.C. §72-804. In this particular case, the employer/surety has raised the same arguments previously ruled upon in *Vawter v. United Parcel Service, Inc.* 155 Idaho 903, 318 P.3d 893, 903 (2014). In reviewing *Vawter*, the undersigned is unable to appreciate any discernible difference in the arguments put forward by the employer/surety in that case and the arguments put forward by the employer/surety in this case. As such, the arguments now being advanced by the surety have previously been determined to be without merit.

V. CONCLUSION

It is the policy of worker's compensation statutes to encourage "sure and certain relief for injured workers." I.C. §72-201. It should be remembered that until *Jackman v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 689, 951 P.2d 1207 (1997), utilizing a settlement agreement as a basis for collateral estoppel was not permitted at the Commission. *See Gay Wheeler*, Claimant, IC No. 93-844411, 1996 WL 938429 (Idaho Ind. Com. Oct 7, 1996).

Regardless, because there is but a single cause of action in this case stemming from the 10/4/08 accident, collateral estoppel cannot be applied in this case anymore than it could be in the *Sanije Berisha*, Claimant, IC 2002-003038, 2012 WL 2118142 (Idaho Ind. Com. May 30, 2012) case referenced in *Vawter*. Even if it could be said that the 10/4/08 accident gave rise to

more than one cause of action, the settlement agreement at issue in this case was not the product of actual litigation and was certainly not a final judgment on the merits for the reasons discussed extensively in claimant's opening brief. Finally, even assuming that the above theories are all incorrect, the ISIF settlement has now been determined to be void by virtue of the May 3, 2013, decision post-trial where it was determined that the ISIF had no liability. R. pp. 81-111. As discussed above, where a settlement is violative of public policy for failure to satisfy the elements of ISIF liability, it may be collaterally attacked at any time.

In conclusion, the claimant would ask this court to specifically overrule *Jackman* and clarify that *Tagg v. State of Idaho, ISIF,* 123 Idaho 95, 844 P.2d 1345 (1993) and *Vawter v. United Parcel Service, Inc.* 155 Idaho 903, 318 P.3d 893, 903 (2014) properly set forth the law in Idaho. Based on the argument presented herein, the Commission's prior determination that collateral estoppel is applicable to this case should be reversed and the case remanded back to the Commission so that the May 3, 2013, order assessing total and permanent disability benefits against the surety is reinstated.

RESPECTFULLY SUBMITTTED this 18th day of April, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of April, 2014 two true and correct copies of the foregoing document were served upon each of the following individuals by the method indicated below:

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