1-24-2017

Barrios v. Zing LLC Appellant's Brief Dckt. 44554

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSUE BARRIOS,

Claimant/Respondent,

vs.

ZING LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety,

Defendants/Appellants.

Supreme Court No. 44554

I.C. No. 2014-002296

APPELLANTS' BRIEF

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

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I. STATEMENT OF THE CASE

A. Nature of the Case

The sole issue in this appeal is whether the Idaho Legislature has empowered the Industrial Commission ("Commission") to award as worker's compensation benefits Claimant Josue Barrios ("Barrios") costs and fees related to the services provided by a guardian ad litem, a guardian, and a conservator. The Commission held Idaho Code § 72-432(1) authorized the award of such costs and fees. Appellants Zing, LLC and the State Insurance Fund (the "Fund") (collectively "Employer") seek a reversal of that award.

B. Course of Proceedings

Barrios filed a Worker's Compensation Complaint with the Commission on September 14, 2015. Pursuant to Idaho Code § 72-506, the Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Boise on March 31, 2016. The case came under advisement on July 11, 2016. The Commission substituted its own decision for that proposed by the Referee and entered its Findings of Fact, Conclusions of Law, and Order ("Order") on August 30, 2016. Employer timely filed a Notice of Appeal on October 6, 2016.

C. Statement of the Facts

1. Barrios Is Totally and Permanently Disabled

Barrios suffered a profound injury as a result of an industrial accident. Barrios's claim for benefits was accepted by the Fund and all medical expenses have been paid by the Fund and are paid on an ongoing basis. *See* Reporter's Transcript, March 31, 2016 ("Tr."), pp. 142-144 (testimony of Donna Young); *see also* Agency Record ("AR"), Defendants' Ex. 20 (Paid Cost

Summary indicating as of March 17, 2016, the Fund paid $530,694.20 in benefits to Barrios).[1] As of the date of the hearing before the Commission, the Fund paid Barrios $1,413.68 per month in permanent total disability payments. *Id.*

In addition to the claims examiner, the Fund assigned a nurse, Debbie Welch, to Barrios's case and monitored the medical services he was provided immediately after the accident. Tr., pp. 148-149. Following the accident, the Fund provided medical care to Barrios through St. Alphonsus and then Southwest Idaho Advanced Care, an acute care facility where Barrios was treated until he reached the level where he could participate in rehabilitation therapies. *Id.* After Barrios progressed to the point where he was able to leave Southwest Idaho Advanced Care, he returned to St. Alphonsus for approximately one month to continue his recovery; then he was transferred to Ashley Manor, an assisted living facility. *Id.* at 150-151. During this time, the Fund provided rehabilitation services through the STARS program and continued to pay all of Barrios's medical expenses. *Id.*; *see also* AR, Defendants' Ex. 20.

2. Employer Provides and Will Continue to Provide a Constant Attendant to Barrios as a Medical Service

At the time of the hearing, Barrios resided with Isobel Hernandez, who operates a certified family home. Tr., p. 113, ll. 3-19. Barrios moved from Ashley Manor to Hernandez's home because Hernandez, like Barrios, speaks Spanish. *See generally* Tr., p. 116, ll. 7-19. According to Hernandez, Barrios would be "lost" if he did not live in a Spanish speaking home.

[1] References to the Exhibits to the Agency Record will not reference page numbers as the Agency Record provided to the parties did not contain copies of the exhibits or list page numbers for the exhibits.

Tr., p. 113, ll. 3-19. Hernandez assists Barrios with the activities of daily life, such as waking up, bathing, eating, picking out his clothes, and monitoring him on a daily basis. *See generally* Tr. pp. 114-121. Employer pays the costs for the attendant care provided by Hernandez. *Id.*, p. 142, l. 17 – p. 147, l. 22 (testimony from Fund representative Donna Young that Barrios is being paid benefits on a total and permanent disability basis with additional payments of $3,200 per month (currently) by the Fund to cover the costs of Barrios's living arrangements and the services provided by Hernandez); *see also* AR, Defendants' Ex. 17 (copy of admission agreement for Barrios's admission to Hernandez's certified family home); AR, Defendants' Ex. 20 (cost summary showing payments to Hernandez).

3. The Ada County Magistrate Appointed the Guardian and the Conservator

On October 30, 2014, Ada County Magistrate Judge Bieter appointed Tresco of Idaho as the Conservator for Barrios and Castle Rock as the Guardian for Barrios, pursuant to Idaho Code § 15-5-304 and Idaho Code § 15-5-408. AR, Claimant's Exhibit C.

4. The Guardian Ad Litem, Guardian, and Conservator Do Not Provide Medical Services

Barrios's guardian ad litem, Mr. Robert Aldridge, testified that he has no license to provide any medical treatment or services and does not provide Barrios any hands-on medical care or services. Tr., pp. 33-36. The guardian ad litem also testified that he does not provide services to Barrios on a constant basis, does not live with him, does not see Barrios on a daily basis, and had not seen him in several months as of the date of the hearing in this matter. *Id.*, p. 36.

Barrios's guardian (Drew Mayes of Castle Rock Services, Barrios's court appointed guardian) testified that the court appointed guardian does not provide any medical services or treatment. Tr., pp. 72-74. Mayes testified that he does not see Barrios on a daily basis and only sees him once or twice a month. *Id.*, pp. 73-74. Castle Rock Services does not help Barrios with his daily activities, such as taking care of himself and cleaning his room and bathroom. *Id.*, p. 77. The guardian does not provide any medical services to Barrios. *Id.*, pp. 80-81.

Barrios's conservator (Paul Seideman, Barrios's assigned representative at Tresco of Idaho, the appointed conservator) testified that Tresco of Idaho does not provide any medical services or treatment to Barrios or assist him with any daily activities. Tr., pp. 97- 99.

II. ISSUE PRESENTED ON APPEAL

Whether the Industrial Commission erred in holding the services provided to Barrios by a guardian ad litem, conservator, and guardian were compensable worker's compensation benefits under Idaho Code § 72-432(1).

III. STANDARD OF REVIEW

The facts pertinent to this appeal from the Industrial Commission are not in dispute, only the legal conclusions drawn from those facts; therefore, the Court exercises free review. *See, e.g., Maravilla v. J.R. Simplot Co.*, __ P. 3d __, 2016 WL 7488385, at *2 (Idaho Dec. 30, 2016) (citing *Kelly v. Blue Ribbon Linen Supply, Inc.*, 159 Idaho 324, 326, 360 P.3d 333, 335 (2015)). An interpretation of a statute is a question of law over which the Court exercises free review. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997).

IV. ARGUMENT

A. Pertinent Legal Principles of Statutory Construction

Where the statutory language is unambiguous, "this Court does not construe it, but simply follows the law as written." *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006). The objective of statutory interpretation is to give effect to legislative intent. *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 226, 370 P.3d 738, 741 (2016) (concerning statutory interpretation of Idaho Code § 72-431); *see also Robison v. Bateman–Hall*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because "the best guide to legislative intent is the words of the statute itself," the interpretation of a statute must begin with the literal words of the statute. *In re Permit No. 36–7200*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992).

Importantly, parties' differing interpretations do not operate as a *de facto* finding of ambiguity. *See State v. Yzaguirre,* 144 Idaho 471, 476, 163 P.3d 1183, 1188 (2007). In *Canty v. Idaho State Tax Commission*, the Idaho Supreme Court established that a statute is ambiguous when:

> [T]he meaning is so doubtful or obscure that "reasonable minds might be uncertain or disagree as to its meaning." *Hickman v. Lunden*, 78 Idaho 191, 195, 300 P.2d 818, 819 (1956). "However, ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous.... [A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

Canty, 138 Idaho 178, 182, 59 P.3d 983, 987 (2002) (quoting *State v. Browning*, 123 Idaho 748,

750, 852 P.2d 500, 502 (Ct. App. 1993)). In construing statutes, the plain, obvious and rational meaning is always to be preferred to any curious, narrow, hidden sense. *Nagel v. Hammond*, 90 Idaho 96, 408 P.2d 468 (1965); *John Hancock Mutual Life Ins. Co. v. Haworth*, 68 Idaho 185, 191 P.2d 359 (1948).

"[I]t is a well–recognized rule of statutory construction that general terms and expressions of a statute are to be given a general construction ***unless some other provision of the statute or the context itself shows that the Legislature intended them to be used and applied in a limited or restricted sense.***" *Robinson v. Huffaker*, 23 Idaho 173, 189, 129 P. 334, 339-340 (1912) (emphasis added); *see also Baca v. State*, 119 Idaho 782, 810 P.2d 720 (1991) ("...[i]n ascertaining this intent, not only must the literal wording of the statute be examined, but also account must be taken of other matters, such as the context....") (citation and internal quotation omitted). "In determining legislative intent, [Idaho courts] apply the doctrine of *ejusdem generis*, which states that where specific words of description are followed by general terms, the latter will be regarded as referring to persons or things of a like class of those particularly described." *Washington Water Power Co. v. Kootenai Envtl. All.*, 99 Idaho 875, 881, 591 P.2d 122, 128 (1979).

When interpreting a statute, courts are advised to avoid interpretations that could lead to absurd results. *See, e.g., Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005).

Nevertheless, the worker's compensation law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. *Haldiman v. American*

Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes that this law seeks to serve leave no room for a narrow technical construction. *Id.* "The lodestar of liberal construction of the Workmen's Compensation Law [requires] if possible, the rehabilitation of injured employees and correct treatment of them." *Irvine v. Perry*, 78 Idaho 132, 139, 299 P.2d 97, 101 (1956). However, the Commission may not read into a statute a provision that is not found in the statute. *See Tway v. Williams*, 81 Idaho 1, 8, 336 P.2d 115, 119 (1959) (courts and administrative agencies interpreting statutes "are not permitted to read into a statute a provision not found therein.").

B. Idaho Code § 72-432(1) Does Not Authorize the Commission to Order Employer to Pay Any Costs or Fees Related to the Guardian Ad Litem, the Guardian, or the Conservator

1. Idaho Code § 72-432(1) Applies Only to Reimbursable Medical Services

The first step in statutory interpretation is determining whether or not the statutory language is ambiguous. If the language is not ambiguous, the Court should apply the terms of the statute as written. The language at issue in Idaho Code § 72-432(1) is unambiguous. It lists compensable ***medical*** services and devices and other healthcare related services. It makes no reference to services provided by a guardian ad litem, guardian, or conservator.

The first sentence of Idaho Code § 72-432(1) is the language at issue in this case.

> Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, 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.

Idaho Code § 72-432(1).[2] According to this Court, "[t]he first sentence of the subsection states in broad terms the ***medical care*** that an employer is required to provide to an injured employee." *Reese v. V-1 Oil Co.*, 141 Idaho 630, 633, 112 P.3d 721, 725 (2005) (emphasis added). The Commission erred in holding that § 72-432(1) requires an employer to compensate an injured worker for non-medical or non-healthcare related services. The guardian ad litem, guardian, and conservator each testified they do not provide medical care.

2. The Commission Erred in Interpreting "Other Attendance" To Include Non-Medical or Non-Healthcare Related Services

The Commission erroneously concluded the term "other attendance" found in § 72-432(1) authorized the Commission to order an employer to reimburse an injured employee for costs and fees incurred by the employee for a person to "make day to day decisions" for the injured worker or to "manage his financial affairs". AR, pp. 31-32. The Commission examined the definition of "attendance" and noted the dictionary defined attendance as the act of attending. *Id.* The Commission reasoned that the "attendance that employer is required to provide is medical, surgical and 'other', i.e. other than medical." *Id.* at p. 31. The Commission determined the modification of attendance with "other" was meant by the Legislature to authorize the Commission to award non-medical benefits for attending services. The Commission noted that "[i]t does not seem unreasonable to require Employer to provide [a guardian, guardian ad litem,

[2] The provisions of Idaho Code § 72-706 are not relevant to this appeal.

or conservator] to ameliorate" Barrios's loss. *Id.* But, whether or not it would be reasonable or unreasonable to make an employer pay for these non-medical services is irrelevant to whether the Legislature authorized the Commission to award such benefits. The Commission failed to properly analyze the statutory language in context to determine the legislative intent and erroneously focused on what it considered to be a reasonable outcome.

The Commission cited to selected dictionary definitions of attendance, ignored several definitions of "attending" in its selected sources[3], and ignored the context of the first sentence of § 72-432(1). Rather than examine the term "other attendance" in context (in a statute concerning the provision of medical services and reimbursement for such services and embedded in a list of specific types of medical services), the Commission ignored the context of the statutory scheme of Idaho Code § 72-432 and the definition of medical services in Idaho Code § 72-101(21). Because "other attendance" is placed in the midst of a list of clearly medical and healthcare related services, the Legislature obviously intended the term "attendance" to mean a provision of healthcare services attending to his or her patient or client. *See Robinson*, 23 Idaho at 189, 129 P. at 339-340 (holding context of term in statute can demonstrate Legislature intended term be understood in a limited or restricted sense).

The term "attending" or "to attend" has been traditionally used, when the subject matter concerns an injured person, to mean the provision of healthcare related services. *See, e.g., Hayes*

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[3] The Commission ignored the definition of "to attend" as care provided by a physician. *See* https://www.merriam-webster.com/dictionary/attend (last visited January 13, 2017) (defining to attend as "to visit professionally especially as a physician <a doctor attending his patients>".

v. Kessler, No. 43327, 2016 WL 6559372, at *3 (Idaho Ct. App. Nov. 4, 2016) (commenting that plaintiff failed to establish the, "requisite element that Kessler [a medical provider] acted with deliberate indifference in failing to ***attend*** to Hayes' medical condition") (emphasis added); *Paul v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 134 Idaho 838, 841, 11 P.3d 34, 37 (2000) ("Dr. Paul was on vacation during the time in question, and other neurosurgeons were on call to ***attend*** to patient D.G.") (emphasis added); *Blackburn v. Olson*, 69 Idaho 428, 433, 207 P.2d 1160, 1163 (1949) ("It appeared that the foreman of the employer requested a physician to ***attend*** claimant stating that she was covered by insurance....") (emphasis added). The prior enactment of Idaho Code § 72-432, the now repealed Idaho Code § 72-307, had the heading "Medical Attendance". *See Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 430, 566 P.2d 377, 379 (1977) ("Medical attendance. The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment ... as may be required or be requested by the employee immediately after an injury, and for a reasonable time thereafter.") (citing Idaho Code § 72-307 prior to 1972 amendment).

"[W]hen the legislature borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *State v. Oar*, 129 Idaho 337, 340, 924 P.2d 599, 602 (1996) (citations and punctuation omitted). The Legislature is presumed to know the traditional use of the word

"attendance" in the medical context and the limited or restricted use of the term in that context. In that context, "to attend" means to provide medical or healthcare related services.

Further evidence of the limited meaning of other attendance is found in the definition of medical services in § 72-101(21). That statute defined medical services to include, "medical, surgical, dental or other attendance or treatment...." *See* Idaho Code § 72-101(21) (emphasis added). This definition does not include any reference to services provided by a guardian ad litem, guardian, or conservator. "Legislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute." *State v. Yzaguirre*, 144 Idaho at 477, 163 P.3d at 1189. "Other attendance" is a medical service per § 72-102(21). The Commission erred in ignoring that statutory definition and holding the term "other attendance" encompassed non-medical and non-healthcare related services. The guardian ad litem, guardian, and conservator by their own admission did not provide medical services to Barrios. Therefore, the services are not encompassed by the term "other attendance". Any guardian ad litem, guardian, or conservator services provided to Barrios are not compensable under Idaho Code § 72-432(1).

In the context of § 72-432(1) and in line with the statutory definition of medical services (which includes the reference to "other attendance"), the only reasonable conclusion is that "other attendance" is a medical or healthcare related service (such as services provided by an attending physician, nurse, physical therapist, etc.). *See, e.g., Great Northern Cas. Co. v. McCollough*, 174 N.E. 103, 105 (Ind. Ct. App. 1930) ("The primary meaning of 'medical attendance' is the rendering of professional medical services. BOUV. LAW DICT., title Medicine.

And it has been held that the words 'medical attendance' are not necessarily restricted in their meaning to the professional attendance of a physician, but may include nursing and watching."). The term "attendance" in Idaho Code § 72-432(1) cannot logically be construed to include the non-medical services provided by the guardian ad litem, the guardian, or the conservator.

3. The Nature of the Services Provided Determines Whether the Services are Compensable Under § 72-732(1)

By using the phrase "other attendance" in Idaho Code § 72-432(1), the Legislature established that the employer's required provision of medical and healthcare related services could be provided by a medical professional ("medical attendance") or by a non-professional ("other attendance") – so long as the services were medical or healthcare related. A court decision from over 100 years ago explains well the nature of the services that are considered "attendance".

> While the words *medical attendance* are often used to denote the rendering of professional medical services, we do not think that their use in that respect is such as necessarily to exclude all other meanings. The efforts of the physician, however skilful (sic) or assiduous he may be, must usually be supplemented by an attendance which he cannot give. It matters not that the persons who give such attendance are usually donominated (sic) nurses. Their office is to assist the physician to obtain certain medical results.
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> We have no reason to suppose that the legislature used the words *medical attendance* with the design that any narrow or technical meaning should be put upon them. The statute contemplates that there are persons who need county assistance, but who should not be sent to the county poor–house. It provides that the township trustees shall determine who such persons are, and supply the necessary relief. We think that they should be allowed in all proper cases to furnish attendants, other than professional attendants, to

> administer the medicine professionally prescribed, and do whatever else constitutes a part of the medical treatment.

Scott v. Winneshiek Cty., 3 N.W. 626, 627 (Iowa 1879). Modern courts have acknowledged the same distinction in the context of the provision of services to an injured employee. In *Oil Well Cementers, Inc. v. Thompson*, 82 P.3d 125, 128 (Okla. 2003), the court held the term "other attendance" in Oklahoma's worker's compensation statute concerning medical services to be provided by an employer to an injured employee (which contained the same language as Idaho's statute)[4], covers services that, if provided by a professional, would be considered medical treatment. The nature of the services provided (the "attendance") was the important fact to examine, not whether the provider had a professional license (hence the obligation to reimburse "other attendance", which would be attendance (medical or healthcare services) provided by a non-licensed non-professional healthcare provider). *Id.*

In the instant case, the nature of the services provided by the guardian ad litem, the guardian, and the conservator are not healthcare related services and are not "other attendance" as the Idaho Legislature intended that term be understood.

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[4] *See Oil Well Cementers, Inc.*, 82 P.3d at 128 ("At the time of Claimant's injury (and now), § 14(A) of title 85 held (and holds) an employer liable for its worker's reasonable '***medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus*** as may be necessary after the injury.'") (emphasis added). Okla. Stat. Ann tit. 85(a), § 14 was repealed in 2011 and replaced with Okla. Stat. Ann. tit. 85A, § 50 (West).

4. The Commission Erroneously Found the Term "Other" in Idaho Code § 72-432(1) Completely Removes the Term "Attendance" From Its Statutory Context

In interpreting a statute, the Court is required to give effect to every word, clause and sentence of a statute, where possible. *See Norton v. Dep't of Emp't*, 94 Idaho 924, 928, 500 P.2d 825, 829 (1972) ("[A] statute should be construed so that effect is given to all its provisions, so that no part thereof will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another."); *see also Messenger v. Burns*, 86 Idaho 26, 30, 382 P.2d 913, 915 (1963); *State v. Alkire*, 79 Idaho 334, 338, 317 P.2d 341, 344 (1957). The Commission failed to employ this directive and concluded use of the term "other" was intended by the Legislature to signal that "other attendance" must mean that the attendance is non-medical. *See* Order, p. 9 ("The attendance that employer is required to provide is medical, surgical and 'other', i.e., other than medical.").

The Commission ignored the contextual placement of the term "other attendance", with respect to both the list of services in the first sentence of subsection 72-432(1) and the context of 72-432 as a whole within the Worker's Compensation Act.

> When interpreting a statute, the statute is to be construed as a whole without separating one provision from another. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. Although this rule is generally applied in terms of interpreting an ambiguous statute, the logic behind it applies with equal force to situations where a statute is not ambiguous. Indeed, the plain, obvious, and rational meaning of a statutory provision cannot be properly determined from its literal words by focusing on a tiny fraction of language while ignoring the remainder of the statute. *See id.*

State v. Alley, 155 Idaho 972, 980, 318 P.3d 962, 970 (Ct. App. 2014) *abrogated by State v. McKean*, 159 Idaho 75, 356 P.3d 368 (2015).

The first sentence of § 72-432(1) contains a list of specifically enumerated healthcare related services that an employer must provide (medical attendance or treatment, surgical attendance or treatment, nurse and hospital services, medicines, crutches and apparatus) and general healthcare related services (other attendance or treatment). Under the doctrine of *ejudsem generis*, the general phrase "other attendance" or "other treatment" must be construed as meaning services that are like or of a similar class to the specifically enumerated services. In other words, the term "other attendance" must be read in context and therefore refers to attendance that is medical or health care related in nature. Examples of "other attendance" that fall within § 72-432(1) would be treatment or attendance by a licensed psychologist or counselor (such professionals are not medical doctors), chiropractors, home health aides, or similar health service providers. The term "other" does not alter the ***nature*** of the services that must be reimbursed under Idaho Code § 72-432(1), but rather concerns the ***provider*** of such services. The Commission erred in ignoring the context of "other attendance" within § 72-432(1).

The Idaho Supreme Court has not examined the term "other attendance" but has examined the meaning of "other treatment" and held that "treatment" is a broad term and "employed to indicate all steps taken in order to effect a cure of an injury or disease." *Burch v. Potlach Forests, Inc.*, 82 Idaho 323, 328, 353 P. 2d 1076, 1078 (1960).[5] This holding is

[5] In *Burch*, this Court examined the meaning of "other attendance or treatment" in Idaho Code § 72-307, the prior version of § 72-432(1). While the words of the statutes are not an exact

consistent with Employer's interpretation of "other attendance." Attendance is a broad term as used in Idaho Code § 72-432(1), but like treatment must be read in context to mean the provision of medical care or healthcare related services.

In everyday usage, treatment can mean more than just medical or surgical treatment or health care related treatment. *See* https://www.merriam-webster.com/dictionary/treatment and https://www.merriam-webster.com/dictionary/treating (last visited January 12, 2017) (defining treatment as the act of treating someone and "treating" as to deal with in speech or writing, to present or represent artistically, to bear oneself towards, to provide free food, drink, or entertainment, to care for medically, or to act upon with some agent). While there are many different definitions of "treatment" in the dictionary, in the context of 72-432(1), only "to care for medically" makes sense. This Court interpreted treatment to be steps taken to effect a cure of an injury or disease (i.e., medical treatment). *Burch*, 82 Idaho at 328, 353 P. 2d at 1078. It would be illogical to find that "other treatment" relates to how an employer speaks or writes about or artistically renders an employee.

Mindful of the need to give meaning to each word in a statute, the "other" treatment (i.e., other than medical or surgical), in context, could refer to dental treatment or other health care related treatment – but not treating someone to a free meal or entertainment. That would make no sense.

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match, the statutes both require an employer to provide "other attendance or treatment" and also reference medical, surgical, hospital, and nursing services.

The Commission's interpretation of other attendance to include any services related to watching over, guarding, or tending to an injured worker, even if the services are not medically related will cause absurd results. Under the Commission's interpretation, the employer of an injured worker could potentially have to pay for a maid, a companion, a bodyguard, and basically any person or service that looks after or watches over an injured worker, whether or not the services are healthcare related (but subject to the condition that a physician find the service is reasonably required).

An employee's ultimately unpersuasive arguments in a case from Florida exemplifies the error in the Commission's interpretation. The Florida District Court of Appeals found that a hairstylist who was advised by her doctor to avoid contact with chemicals and thus was required to pay a "shampoo girl" to wash her customers' hair could not be reimbursed by the employer for that cost. *Ulmer v. Jon David Coiffures*, 458 So. 2d 1218, 1218-19 (Fla. Dist. Ct. App. 1984). The employee argued the shampoo girl should be deemed a medical service under the Florida statute that required an employer to pay the costs for, "remedial treatment, care, and attendance under the direction of a qualified physician...." *Id.* The Court found the employee's argument, "exceeds the bounds of liberal interpretation." *Id.* However, under the Commission's decision in this case, the shampoo girl could qualify as "other attendance" and her wages would be a compensable benefit in Idaho.

"Other attendance" must be examined in context and held to mean healthcare related attendance (such as services provided by an attending physician, attending nurse, or constant "attendant" as that term is used in § 72-432(3)). The Commission should not have removed the

"other attendance" language from the context of the statute. The Commission's decision must be reversed.

5. Cases From Other Jurisdictions Interpreting Similar Statutory Language Hold "Other Attendance" Must be Examined in Context

The interpretation of "other attendance" as used in § 72-432(1) is an issue of first impression that has not been considered by the Commission or the Idaho Supreme Court. In considering issues of first impression, the Court may consider the decisions of other jurisdictions as persuasive authority. *See, e.g., Wagner v. Wagner*, __ Idaho __, __ P.3d. __ (2016) (noting that in cases of first impression, the Supreme Court finds it useful to consider persuasive authority from other jurisdictions). The appellate courts of Rhode Island and Oklahoma have provided instructive decisions on the meaning of "other attendance" in similar worker's compensation statutes dealing with compensable benefits.

The Supreme Court of Rhode Island considered whether the "other attendance" language could be interpreted to include household and maid services and held that such services would not fall under the category of "other attendance" as set forth in the statute. That court commented as follows:

> An analysis of this obligation as expressed in said § 28-33-5[6] discloses that the means designed to accomplish such relief are medical in nature. Contrary to petitioner's urging, a liberal

[6] "The employer shall, subject to the choice of the employee as provided in § 28-33-8, promptly provide for an injured employee any reasonable medical, surgical, dental, optical, or ***other attendance or treatment***, nurse and hospital service, medicines, crutches, and apparatus for such period as is necessary, in order to cure, rehabilitate or relieve the employee from the effects of his injury" R.I. Code § 28-33-5 (emphasis added).

> construction of the statute does not warrant lifting 'or other attendance or treatment' out of context and attributing to it a meaning totally foreign to that which it has when the section is read as a whole. It is entitled, 'Medical services provided by employer,' and the quoted phrase on which petitioner relies is preceded by 'such reasonable medical, surgical, dental, optical' and followed by 'nurse and hospital service, medicines, crutches and apparatus ....' In such context it would be irrational to give the phrase relied on a meaning completely at variance with the fair intendment of the section when read in its entirety, as it must be.

Tirocchi v. U. S. Rubber Co., 224 A.2d 387, 442 (R.I. 1966). The court went on to hold that "other attendance" in the context of the worker's compensation statute meant a service that was "medical in character" and that reimbursable expenses under the statute had to be "incurred in carrying out a course of medical treatment directly or implicitly related to the employee's health and prescribed by the employee's physician." *Id.*

The Court of Civil Appeals of Oklahoma held differently from the Supreme Court of Rhode Island in *Wilson Paving Inc. v. Abernathy*, 76 P. 3d 103 (Okla. 2003). In *Wilson Paving*, the court held that the services provided by a family member were compensable as "other attendance" since the services were akin to the care that would be provided to the injured worker by an in-home nurse. *Id.* at 105. The employer argued the services were not compensable since they were not provided by a licensed health care provider. *Id.* The court disagreed and focused on the nature of the services rather than the licensing status of the provider. *Id.* The court's analysis as to the scope and meaning of "other attendance" is persuasive:

> We decline to interpret the statute so narrowly that it would limit "other attendance" to licensed health care providers. If a non-nurse, especially a parent or other family member, is capable and willing to provide home nursing care then that should be

> acceptable and, in our view, is contemplated by the statute. "[O]ther attendance" is not defined in or limited by the statute. This implies an understanding that the spectrum of care needed by injured employees is probably as varied as the injuries employees receive. ***As long as the care being provided is equivalent to some type of medical or health care it should make no difference that a parent is the care provider.***

Id. (emphasis added). The terms "other attendance" in Idaho Code § 72-432(1) should be similarly understood to encompass medical or healthcare related services (i.e., the nature of the services) without differentiating on the identity of the provider. In this case, the guardian, guardian ad litem, and conservator all testified they do not provide medical or healthcare related services.

In one of the few appellate cases that has considered whether the term "other attendance" covers the expenses of a guardian that provides financial and personal services unrelated to the provision of health care, an Oklahoma court held the costs and fees of a guardian were not reimbursable as "other attendance" services. *Mohn v. Kentucky Fried Chicken*, 994 P.2d 99 (1999). The court was asked to hold that "other attendance" encompassed the services provided by a guardian and denied the request in a well-reasoned discussion:

> ...Respondent cites 85 O.S. § 14(A)(1), which directs the employer to provide "other attendance" as may be necessary after an injury. Section 14 addresses the issue of medical attention. She contends that because it provides statutory authority for hiring a professional health care provider, it should be extended to include the fees and expenses of a guardian who performs financial and personal services. Employer correctly contends there is no evidence as to the type of services King has provided. The specific subsection of § 14 provides:

> 1. The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus as may be necessary after the injury....
>
> ¶ 5 Section 14 clearly provides only for ***medical*** care and treatment. This court will not assume that the Legislature has done a vain and useless act. Rather it must interpret legislation so as to give effect to every word and sentence. *Hill v. Board of Educ.*, 1997 OK 111, 944 P.2d 930, 933, *citing Globe Life and Accident Ins. Co. v. Okla. Tax Commission*, 1996 OK 39, 913 P.2d 1322, 1328 and *Farris v. Cannon*, 1982 OK 88, 649 P.2d 529, 531. To hold § 14 provides authority for payment of guardian fees and expenses as claimant proposes would thwart the legislative intent which, by the clear language of the statute, deals with medical care and treatment only.

Id. at 101. The Commission's interpretation of Idaho Code § 72-432(1) thwarts the legislative intent and ignores the context of the statute, which deals with the provision of medical care and treatment. The Commission's decision should be overturned since the Commission failed to assess the meaning of other attendance in context.

6. Idaho Code § 72-432 as a Whole Covers Medical Services and Any Interpretation of Idaho Code § 72-432(1) Must Take That Context Into Consideration

Idaho Code § 72-432, as a whole, deals with medical services, how such services are provided, and administrative requirements concerning the provision of such medical services.

First, the title of the section is "Medical Services, Appliances, and Supplies – Reports". Under the Commission's interpretation, the title of the statute is ignored. Idaho Code § 72-432 covers an employer's obligation to provide medical services for injured employees. If this Court determines the term "other attendance" in Idaho Code § 72-432(1) is ambiguous, the heading of

Idaho Code § 72-432 demonstrates that the statute in question deals solely with medical services. "[W]here the meaning of a statute is unclear, resort may be had to the statutory heading as an aid in ascertaining legislative intent...." *Walker v. Nationwide Fin. Corp. of Idaho*, 102 Idaho 266, 268, 629 P.2d 662, 664 (1981) (citing *State v. Murphy*, 94 Idaho 849, 499 P.2d 548 (1972)); *State v. Mead*, 61 Idaho 449, 102 P.2d 915 (1940). The heading of Idaho Code § 72-432 is "Medical Services, Appliances and Supplies – Reports". The statute concerns "medical services", which is a statutorily defined term that does not include any language that could be reasonably construed to include the costs of a guardianship or conservatorship or the appointment and services provided by a guardian ad litem.

Second, subsection 72-432(5) provides that, "Any employee who seeks **medical care** in a manner not provided for in this section, or as ordered by the industrial commission pursuant to this section, shall not be entitled to reimbursement for costs of such care." (emphasis added). Under the Commission's holding, even though an injured employee would not be free to seek reimbursement for medical care received in a manner not prescribed under § 72-432, the employee could be reimbursed for "other attendance" received in a manner not prescribed under § 72-432. That is an inconsistent result which should be avoided.

Third, subsection 72-432(9) provides that the injured employee is entitled to reimbursement for travel expenses in obtaining **medical care** under § 72-432. Under the Commission's holding, even though a claimant may have expenses in travelling to see his or her guardian or conservator, that travel would not be reimbursed, even though the services would be

reimbursable. Again, the Commission's interpretation leads to an illogical result that must be avoided.

Fourth, the statute requires that a claimant's treating physician must order that the "other attendance" is reasonably required. *See* Idaho Code § 72-432(1). The fact the Legislature requires that a treating physician determine that the services are reasonably required means that the services must be medical or healthcare related. Otherwise, the requirement that a physician order the services makes no sense.

7. The Commission's Decision Creates a Conflict Between Idaho Code § 72-432 and Idaho Code § 72-803

The Commission's interpretation of other attendance in § 72-432(1) to include non-medical services conflicts with other statutory provisions within the Worker's Compensation Act. Since "other attendance" is included within the definition of medical services in Idaho Code § 72-102(21), the Commission is empowered to approve the costs and fees charged by the providers of other attendance services (again, since other attendance services are statutorily defined as medical services). *See* Idaho Code § 72-803 (empowering Commission to approve claims for "medical services" provided to an injured worker). It would not be logical to conclude the Legislature intended that Idaho Code § 72-432(1) authorized awarding costs and fees for medical and non-medical services under Idaho Code § 72-432(1), but only granted the Commission's oversight over the amounts charged for medical services under Idaho Code § 72-803. Once again, the only logical conclusion is that Idaho Code § 72-432(1) concerns the

provision of medical or healthcare related services. The Commission's holding to the contrary should be reversed.

8. Idaho Code § 72-432(3) Defines "Attendant" Care as a Medical Service

Idaho Code § 72-432(3) authorizes the Commission to require an employer to pay, in addition to income benefits, the costs of the constant service of an attendant, "as a medical service...when the constant service of an attendant is necessary ... by reason of other disability resulting from the injury or disease actually rendering him so helpless as to require constant attendance." The statute requires that a claimant seeking payment for a constant attendant be so helpless as to require "constant ***attendance***", which as discussed above means attendance that is medical in nature. In § 72-432(3), the attendance provided by an attendant is characterized as a medical service. The definition of attendance under subsection 72-432(3) cannot be different than "attendance" under subsection 72-432(1). The Commission's interpretation of "other attendance" creates an internal conflict between subsections (1) and (3) of § 72-432 and thus should be reversed. The same terms or words used in a statute should be given the same meaning throughout the statute.

9. Appointment and Compensation of a Guardian (Including a Guardian Ad Litem) and a Conservator Are Governed by the Idaho Probate Code

The Magistrate Court for the 4th Judicial District for the State of Idaho, the court that appointed the guardian and the conservator, has exclusive jurisdiction over the guardianship and the conservatorship. *See* Idaho Code § 15-13-205 ("Except as otherwise provided in section 15–

13–204, Idaho Code, a court that has appointed a guardian or issued a protective order consistent with this chapter has ***exclusive and continuing jurisdiction*** over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.") (emphasis added); *see also* Idaho Code § 15-5-402 (court that appointed conservator has exclusive jurisdiction over management of the need for a conservator and protection of the estate).

The Magistrate Court has the exclusive jurisdiction to order a party to those proceedings to pay the costs of the appointment and services of the guardian.

> If not otherwise compensated for services rendered or expenses incurred, any visitor, guardian ad litem, physician, guardian, or temporary guardian appointed in a protective proceeding is entitled to reasonable compensation **from the estate for services rendered and expenses incurred in such status**, including for services rendered and expenses incurred prior to the actual appointment of said guardian or temporary guardian which were reasonably related to the proceedings. If any person brings or defends any guardianship proceeding in good faith, whether successful or not, he or she is entitled to receive **from the estate** his or her necessary expenses and disbursements including reasonable attorney's fees incurred in such proceeding. If the estate is inadequate to bear any of the reasonable compensation, fees, and/or costs referenced in this section, the court may apportion the reasonable compensation, fees, and/or costs to any party, or among the parties, as the court deems reasonable.

Idaho Code § 15-5-314.[7] The Magistrate Court, and not the Commission, has the exclusive jurisdiction to determine whether or not to order a party to the appointment proceedings to pay

[7] Idaho Code § 15-5-414 contains similar language regarding the compensation payable to conservators.

the reasonable compensation, fees and/or costs for the guardian ad litem, the guardian, or the conservator.

Absent express statutory authorization, the Commission has no jurisdiction over the guardianship or conservatorship, including issuing an order requiring Employer to pay the costs or fees associated with the appointment or services provided by the guardians or the conservator. There is no such statutory authorization granted to the Commission. In fact, the authorization lies with the probate courts. The Commission's legal conclusions in this matter have created a conflict between Idaho Code § 72-803 and § 15-5-314. The Commission cannot have oversight over the costs charged by the guardian, guardian ad litem, and conservator under § 72-803, since § 15-5-314 grants exclusive jurisdiction to the Magistrate Court to determine the reasonableness of such costs and charges. That conflict is easily avoided by holding reimbursable benefits under Idaho Code § 72-432(1) do not include costs and fees for a guardian ad litem, guardian, or conservator.

10. Only the Legislature Can Expand the Scope of Compensable Benefits Under the Worker's Compensation Act

"As a creature of legislative invention, the [Industrial] Commission may only act pursuant to an enumerated power, whether it be directly statutory or based upon rules and regulations properly issued by the Commission under I.C. § 72–508." *Curr v. Curr*, 124 Idaho 686, 691, 864 P.2d 132, 137 (1993). Idaho's Worker's Compensation Act does not provide the Commission with the power to award costs and fees for the services provided by a guardian ad litem, guardian, or conservator. The Commission erroneously held that Idaho Code § 72-432(1)

authorized the Commission to award costs and fees incurred by an injured worker for a guardian ad litem, guardian, and conservator as compensable benefits.

Whether or not the Worker's Compensation Act should, from a public policy standpoint, require an employer and its surety to pay the costs for a guardian or conservator may not be considered when interpreting the statute. "If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial." *In re Estate of Miller*, 143 Idaho 565, 567, 149 P.3d 840, 842 (2006). In the absence of a delegation of authority from the Idaho Legislature, the Commission cannot order Employer to reimburse Barrios for the guardian ad litem, guardianship, and conservatorship costs and fees (including any costs incurred in appointing them). *See, e.g., Curr*, 124 Idaho at 691, 864 P.2d at 137 (Commission, "may only act pursuant to an enumerated power"); *Cheung v. Pena*, 143 Idaho 30, 35, 137 P.3d 417, 422 (2006) (holding Commission acted outside its powers when it ordered attorney to forfeit fees for services separate from the claims before the Commission despite noting the services were connected with the accident that caused employee's injuries).

Unlike Idaho, other states have adopted statutes that do address the reimbursement for guardian and conservator fees.[8] Minnesota adopted a statute that provides for the appointment of a guardian and conservator to represent the interests of an injured employee. *See Botler v. Wagner Greenhouses*, 754 N.W.2d 665, 670 (Minn. S. Ct. 2008) (discussing Minnesota's

[8] The Legislature has authorized the Commission to order an employer to pay the worker's compensation benefits owed to an insane person to that person's guardian. *See* Idaho Code § 72-226. The Legislature could have required the employer to pay the costs of the guardian, but did not.

statutory scheme concerning the appointment and compensation for guardians and conservators of injured employees). Minnesota's worker's compensation statute explicitly covers the appointment of a guardian or conservator by the worker's compensation court to look out for the best interests of the injured employee. *Id.* Minnesota's probate code contains a statutory mechanism to require the insurer or self-insured employer to pay the costs of the guardian, conservator and attorney fees incurred in their appointment. *See* Minn. Stat. § 524.5–501(c):

> Subject to the approval of the court, the insurer or self-insured employer shall pay the costs and guardian, conservator, and attorney fees of the employee or dependent associated with the appointment of a guardian or conservator and as required under section 176.092.

In *Botler*, the court was presented with several interrelated issues. However, both parties agreed that the worker's compensation court had the power to determine whether or not an insurer was responsible for the payments to reimburse the costs for the appointment of a guardian or conservator. *Botler,* 754 N.W.2d at 670. The parties disagreed over whether or not the worker's compensation court could determine the reasonableness of the costs and fees and whether the worker's compensation court could require the insurer to pay the ongoing costs and fees of the guardian and conservator. *Id.* at 670-71. The first issue was easily ruled on by the court since neither party contested the reasonableness of the costs and fees requested. *Id.* As to the second issue, the court held the worker's compensation court could ***not*** require the insurer or self-insured employer to pay for any costs or fees beyond those incurred in the appointment of the guardian and conservator because the statute did not authorize the worker's compensation

court to hold an insurer responsible for the ongoing costs of a guardian or conservator. *Id.* at 671. The court noted that:

> ...the Act does not provide for the payment of the costs associated with the ongoing services of a guardian or conservator, including an annual accounting. "When a question of statutory construction involves a failure of expression rather than an ambiguity of expression, courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature." *Genin v.1996 Mercury Marquis,* 622 N.W.2d 114, 117 (Minn. 2001) (internal quotation marks omitted).

Id.

The Idaho Legislature has not authorized the Commission to order employers or their sureties to reimburse injured employees for the costs of appointment of or services provided by guardians or conservators, either in the Worker's Compensation Law or the Probate Code. In the absence of any statutory authorization, the Commission may not, per the canons of statutory construction, supply the omitted authority for the Idaho Legislature. The power to correct what the Commission deems an oversight in the statutory scheme is a legislative power, not judicial. *See In Re Estate of Miller,* 143 Idaho at 567, 149 P.3d at 842. If the Idaho Legislature wanted to make fees and costs incurred by employees concerning the appointment of and services provided by guardians (including guardians ad litem) and conservators compensable, the Idaho Legislature could have adopted a statutory scheme similar to Minnesota or another state that has adopted such a scheme. The Idaho Legislature did not and the Commission may not, in the absence of any statutory authority, act in a legislative capacity and exercise a power not granted to it.

V. CONCLUSION

Employer ask this Court to hold the Commission lacks the statutory authority to award costs and fees of a guardian, guardian ad litem, or conservator be paid by an employer or surety to an injured employee and to reverse the underlying decision that Idaho Code § 72-432(1) authorizes the Commission to award Barrios costs and fees incurred by Barrios for services provided by a guardian ad litem, guardian, or conservator.

DATED this 24 day of January, 2017.

ELAM & BURKE, P.A.

By: _____
James A. Ford, of the firm

By: _____
Matthew C. Parks, of the firm

Attorneys for Defendants/Employer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of January, 2017, I caused two true and correct copies of the foregoing **APPELLANTS' BRIEF** to be served by the method indicated below, and addressed to the following:

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(✓) U.S. Mail, Postage Prepaid
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_____
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