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# Barrios v. Zing LLC Respondent's Brief Dckt. 44554

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSUE BARRIOS,

Claimant/Respondent,

vs.

ZING LLC,

Employer,

IDAHO STATE INSURANCE FUND,

Surety,

Defendants/Appellants.

Supreme Court No. 44554

I.C. No. 2014-002296

**RESPONDENT'S BREIF**

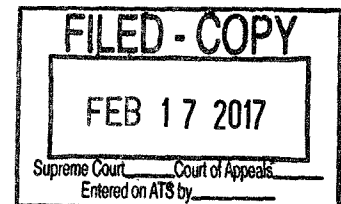
Appeal from the Idaho Industrial Commission,  
Chairman R.D. Maynard, Presiding

Richard S. Owen, # 2687  
206 Twelfth Avenue Road  
P.O. Box 278  
Nampa, Idaho 83653

*Attorney for Claimant/ Respondent  
Josue Barrios*

James A. Ford, # 3410  
Matthew C. Parks, # 7419  
Elam & Burke, P.A.  
251 E. Front Street, Suite 300  
P.O. Box 1539  
Boise, Idaho 83701

*Attorneys for Defendants/Appellants  
Zing LLC, Employer and Idaho State  
Insurance Fund, Surety*



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## **I. STATEMENT OF THE CASE**

### **A. Nature of the Case**

Respondent disagrees with the statement of the Nature of the Case contains in Defendant's Appellant Brief only in so far as the scope of the Industrial Commission's decision below. The Industrial Commission awarded Claimant workers' compensation benefits for the fees of the Guardian and the Conservator previously appointed by the District Court to attend to the Claimant.

Contrary to statement of the Appellant, the Industrial Commission did not award fees for the Guardian ad Litem and held that those were not compensable under Idaho Code § 72-432 (1).

Respondent contends that the ruling of the Industrial Commission below should be affirmed.

### **B. Course of Proceedings**

Respondents do not disagree with the recitation of the course of proceedings below.

### **C. Statement of Facts**

#### **1. Respondent's Total and Permanent Disability is Profound**

While Appellant's Brief centers upon what the Appellant has done to take care of the Respondent since his devastating head injury, many of the details of the disability suffered by the Respondent have been overlooked. As developed in the Hearing testimony below, the Respondent's disabilities are profound and prevent him from making any real decision about his medical needs or his well being in general.

As Appellant's Brief briefly alludes to, this case starts out with an injury to the Respondent, Josue Barrios, on January of 2014, when he fell 12 feet off a ladder striking his head on the concrete. Respondent was immediately taken by ambulance to St. Alphonsus Medical Center where he was evaluated and hospitalized with life threatening injuries. Respondent's initial admitting diagnosis

was as follows:

1. Severe brain injury with bilateral frontal epidural hematomas and probable intracerebral contusions.
2. Skull fractures.
3. Facial fractures.
4. Probable left carotid artery injury with occlusion and reconstruction.
5. Posttraumatic respiratory failure.

*See AR, Defendants' Exhibit 2.* The medical records demonstrate that after Respondent was evaluated diagnostically he was found to have several severe skull fractures with fragments of bone extending into the brain along with severe injury to the bones of the face. Neurosurgery was called and several operations took place. *See AR, Defendants' Exhibit 2.*

After healing and stabilizing from his surgical procedures, Respondent was transferred to the Southwest Idaho Advance Care Hospital and their initial intake provides a useful summary of medical procedures which Respondent had endured. *See AR, Defendants' Exhibit 2.* While Respondent was in the Southwest Idaho Advance Care Hospital, Dr. Michael McMartin was brought into the case and became Respondent's treating physician. Dr. McMartin was active in the brain injury treatment program at St. Alphonsus Hospital and saw Respondent throughout this program on an extensive basis. It was Dr. McMartin that eventually communicated with the Respondent's Guardian and Guardian ad Litem in connection with the application for temporary guardianship.

In May of 2014, Respondent was transferred from Southwest Idaho Advance Care Hospital to Ashley Manor, a long term care facility. The nursing staff and supervisors at Ashley Manor became concerned about Respondent's inability to care for himself and started the process for the appointment of a Guardian and Conservator to care for Respondent and manage his affairs, both medically and financially. *See Tr., 14-15.*



Initial contact was made with Mr. Robert Aldridge, a Boise attorney with extensive experience in conservator and guardianship matters. Mr. Aldridge testified at the Hearing in this matter, and described the process by which he initiated the appointment of the guardian and conservator on a temporary basis and the foundation necessary for those appointments. *See Tr.*, page 17. Mr. Aldridge testified that he made many contacts in this process including contacting family members, physicians, and working with conservators and guardians in the Boise area with whom he had long experience. Mr. Aldridge testified that following the appointment of the permanent conservator and guardian, he also became involved in helping Respondent move from one care facility to another. Mr. Aldridge explained that because Ashley Manor only had one person in the whole facility who spoke Spanish, Respondent became very isolated and frustrated and felt that he was unable to communicate with most of the people in that facility. Mr. Aldridge testified that he helped identify an alternative facility, and worked with the Guardian and the Conservator to obtain approval for Respondent to be moved to a certified family home in Caldwell where the owners both spoke Spanish. Mr. Aldridge testified that Respondent was doing much better and was much happier in this placement and testified that his services were appropriate about bringing about this transfer. *See Tr.*, 24-26.

Respondent's caregiver and attendant, Isabel Hernandez, testified extensively about the manner in which she provided care to the Respondent, and the care that is necessary because of his traumatic brain injury. First of all, Ms. Hernandez testified that as a Spanish speaking person, she is able to communicate effectively with Respondent and testified that Respondent would be lost without someone with whom he could speak Spanish. *See Tr.*, page 116.

In a summary fashion, Ms. Hernandez testified that Respondent is like a child in many ways.

Starting in the early morning, Ms. Hernandez testified that she goes into his room, she wakes him up, gets him up out of bed, reminds him to go to the bathroom to washup, reminds him to brush his teeth and fixes him breakfast. Ms. Hernandez testified that she has to cue Respondent and remind him daily of his daily hygienic routine, and that Respondent needs helps with the most basic hygienic requirements. *See Tr.*, page 116-117.

Ms. Hernandez testified that Respondent can dress himself but often picks the wrong clothes, and that she has to pick out his clothes and put them on the bed for him. *See Tr.*, page 117-118. Ms. Hernandez testified that after the normal morning routine, the Respondent watches a lot of TV and that he needs constant help with the TV remote, even though it is a small basic unit. *See Tr.*, page 118-119.

Ms. Hernandez testified that Respondent needs cuing and reminding to eat at lunch time. Respondent eats whatever is put in front of him. Ms. Hernandez testified that thankfully, Respondent is not a picky eater. *See Tr.*, page 119-120. With regard to ongoing physical activities, Ms. Hernandez testified that the Respondent likes to walk and leave home to walk on his own but that she will not let him go without somebody in his presence. This frustrates the Respondent and makes him angry. Ms. Hernandez testified that sometimes Respondent talks to people he does not know, mistaking them for relatives, and gets lost easily. *See Tr.*, page 120-121.

Ms. Hernandez testified extensively about Respondent's ability to manage his own money, and indicates that she has to monitor how much cash Respondent has in his wallet at all times to prevent abuse. *See Tr.*, page 121-122. Ms. Hernandez also testified that she goes with the Respondent to each and every one of his doctors appointments to make sure that Respondent discloses his health problems and symptoms. Ms. Hernandez testified that if left to his own

Respondent will tell all of the Doctors that he is just fine with no symptoms and that he does not appreciate the nature or the extent of his injury. *See Tr.*, page 124-125.

Significantly, Respondent complains on a daily basis about his right eye and the vision trouble which he has, and thinks that a operation will still be possible to replace his right sided vision. Ms. Hernandez testified that Respondent continues to harbor this belief even though Physicians have repeatedly told him that his right eye will never be replaced and that he will never have any vision in his right eye. *See Tr.*, page 125-126.

Ms. Hernandez also testified about Respondent's behavior immediately before the Hearing, and indicated that he had become very disruptive and aggressive towards visitors to her home and gave examples of interaction which Respondent had with Health and Welfare people who had come to her home to check on a routine basis. *See Tr.*, page 128-129.

On cross-examination, Ms. Hernandez testified that she routinely provided linens to Respondent as part of her service and routinely launders and takes care of those linens. *See Tr.*, page 132. Ms. Hernandez also testified that she assist the Respondent in obtaining personal care items such as soaps, shampoos, deodorant, shaving cream, and razors. She works with the Conservator in obtaining funding for those personal items. *See Tr.*, page 132-133. Ms. Hernandez testified that she does cue Respondent so that he is able to take care of his personal needs and that if she did not cue him, she did not think that the Respondent would shave, wear deodorant, or brush his teeth at all. *See Tr.*, page 133.

Ms. Hernandez also testified that she prepares all of the Respondent's meals and makes sure that he takes his medications as scheduled. Ms. Hernandez testified that she keeps the medication in a locked safe, and routinely gives those medications to Respondent to make sure that he is

actually taking the medication as required. *See Tr.*, page 133-135. Ms. Hernandez also testified that she launders all of Respondent's clothes and helps him pick out appropriate clothes depending on the weather. Ms. Hernandez testified emphatically that she would certainly allow Respondent behind the wheel of any car, and that she drives him everywhere. *See Tr.*, page 135-136.

## **2. Medical Care**

Immediately after Respondent's devastating head injury, the State Insurance Fund employed a Nurse to monitor and coordinate medical care to the Respondent, evidently recognizing that Respondent was not going to be able to make any medically related decisions on his own and needed someone to coordinate his medical care. This Nurse Case Manager coordinated Respondent's medical care and participated in Respondent's transfer from Ashley Manor, where he was originally placed after his acute medical care, to the care of Isabel Hernandez, the woman who operates the certified family home in Caldwell where the Respondent resides at the current time. *See Tr.*, page 148-151.

Respondent's treating physician or Dr. Michael McMartin, participated in this transfer and wrote a letter dated September 10, 2014 in part, as follows:

"He (Respondent) also requires a guardian and conservator. The appointment of a guardian and of a conservator for Mr. Barrios is medically necessary due to the traumatic brain injury, which robs him of his ability to make cogent decisions about his medical treatment and about his financial affairs, and which requires the appointment of a guardian and of a conservator to make those decisions and to manage his financial affairs." *See AR Defendants' Exhibit 8 page 74.*

One of the final medical examinations which Respondent underwent before reaching a point of medical stability, came from a psychologist. In preparation for this examination, the Defendant

adjuster, Donna Young, wrote a long letter to Dr. Gage asking his opinions about the extent of Respondent's disability. Specifically mirroring the language of Idaho Code § 72-432 (3), the doctor was asked whether or not the Respondent had been rendered so helpless as to require the constant service of an attendant due to his industrial accident. The doctor replied in the affirmative, thereby requiring the State Insurance Fund to supply Respondent with the services of an attendant (Isabel Hernandez) under the terms of Idaho Code § 72-432 (3).

This report, coupled with a letter from the State Insurance Fund Adjustor, Donna Young, demonstrates a summary of the Respondent's injuries and demonstrates that he is unable to care for himself, make any decisions about his medical care, living situation, finances, and needs the constant attendance of a personal care provider. *See* AR Claimant's Exhibit K.

### **3. The Guardian**

The roles of the Guardian and the Conservator whose fees are at issue in this appeal, were explained at Hearing in detail. The Guardian, Drew Mayes, testified at Hearing and described his duties in some detail. Mr. Mayes summarized his role as one of a parent to a minor child. He testified that his job was to make sure that decisions are made for the Respondent which he can not make on his own. *See* Tr., page 54-55. Mr. Mayes testified that attends all of the Respondents medical appointments along with the personal care provider and is there as an advocate for Respondent, to make sure that the Doctor get a full history of how Respondent has been doing and his ongoing symptoms and complaints. *See* Tr., page 55-56.

Mr. Mayes also testified that he makes visits to the personal care provider's home to make sure that the home is safe, clean, that Respondent is wearing appropriate clothes, and Respondent is not having any ongoing difficulties which require additional assistance. Mr. Mayes testified that

he makes these visits approximately once a month. *See Tr.*, page 55-56. Mr. Mayes testifies that Isabel Hernandez, Respondent's personal care provider is very good at what she does and that his involvement has not been too extensive because of her comprehensive and thoughtful care. *See Tr.*, page 57-58.

Mr. Mayes also testified that he makes an annual report to the District Court of Ada County as required by statute. Mr. Mayes testified that this report hits the highlights of what he does on a day to day basis with Respondent. *See Tr.*, page 58-59, *see AR*, Claimant's Exhibit J.

Mr. Mayes also testified to the visits he made with Respondent to various stores to enable Respondent to buy clothes, personal items, postage, and even some shampoo. *See Tr.*, page 59-60. Mr. Mayes also testified that as part of his job, he is required to prepare prospective care plans. *See AR* Claimant's Exhibit I. Mr. Mayes testified that Respondent has very poor insight and is someone who could be taken advantage of easily. Mr. Mayes testified that he has seen this happen with Respondent as it relates to efforts by one of his brothers to take over care and settle his workers' compensation case. Mr. Mayes, the Guardian, testified that he interceded with Respondent to make sure that none of this happened. *See Tr.*, page 65-66.

Mr. Mayes also testified that he meets the Respondent at appointments with other non-work related medical providers such as a Nurse Practitioner in Caldwell and a Dentist, and coordinates with these providers and the Conservator to make sure that Respondent's non-work related medical care is provided adequately and timely. *See Tr.*, page 67-68. Mr. Mayes even testified that he had become aware that the Respondent likes late night sweets as a snack and testified that as the Guardian, he worried that this would cause Respondent's blood sugar to become too high leading to further medical problems Mr. Mayes testified that he had worked with the primary care provider

Ms. Hernandez about this in order to prevent any long term difficulties. *See Tr.*, page 69-70.

On cross-examination, Mr. Mayes testified that the statutory frame work under which he is employed enables him to consent on Respondent's behalf for medical care that would may be necessary for Respondent, and is empowered to act on Respondent's behalf to ensure that he obtains appropriate medical care. *See Tr.*, page 71. Mr. Mayes also testified that he has the power to direct the Respondent's hobbies and leisure times activities in an effort to protect Respondent. Mr. Mayes testified that he would not allow Respondent in a boxing ring to trade blows with anyone even though the Respondent may wish to do so, nor would he allow the Respondent to go ten speed bike racing, or down hill ski racing. Mr. Mayes testified that he has input on the kinds of activities Respondent engages in. Mr. Mayes testified that by working with his primary care provider, Isabel Hernandez, he has the power to say no to activities which he deems are too dangerous for the Respondent. *See Tr.*, page 82-83.

#### **4. The Conservator**

The Conservator, Paul Seidman, testified the he works for Tresco of Idaho, a company which he described as a professional fiduciary corporation which manages estates and court appointed Conservatorships. *See Tr.*, page 84-85. As Conservator, Mr. Seidman testified that he is in the position of responsibility for overseeing the financial affairs of the Respondent, paying his bills, compromising expenses, and accounting to the Court on an annual basis for all these activities. *See Tr.*, page 85.

Mr. Seidman testified that he's responsibility is to manage Respondent's funds in his own best interests and that he has received the Respondent's workers' compensation benefits and paid out those monies accordingly. *See AR Claimant's Exhibit G.*

Mr. Seidman testified that all of the Respondent's assets in this matter have come from the State Insurance Fund on account of his workers' compensation claim except for a small income tax refund from the Tax Commission. *See Tr.*, page 88.

Mr. Seidman testified that he spent this money on medical expenses which were not covered by workers' compensation, for personal allowances to the Respondent, and for payments to professional providers such as the Conservator, Guardian, and Attorneys' fees. *See Tr.*, page 89. Mr. Seidman testified extensively about the manner in which he has protected the Respondent from wasting his own money, and testified that Respondent is not capable of making sound judgements as to the use of his own money. Accordingly, Mr. Seidman has put the Respondent on a debit card system where he is allowed so much money per month and this the manner in which he monitors the expenditures of the Respondent. *See Tr.*, 90-91.

Mr. Seidman testified that he works carefully with the personal care provider, Isabel Hernandez, and that if the Respondent had some idea of spending a lot of money on something that he really didn't need, he would work with Ms. Hernandez in trying to discourage that as best as he could. *See Tr.*, page 90-91. Mr. Seidman also testified that had checked with state and other federal agencies to see if Respondent had access to any other state or federal programs, and found that he was not qualified for Social Security benefits or for Medicare benefits of any kind. Nor was the Respondent qualified for any State of Idaho Medicaid benefits. *See Tr.*, page 92.

Accordingly, Mr. Seidman testified that he was quite concerned that if Respondent ever suffers from some other medical problem which is not covered by workers' compensation insurance, there will not be sufficient funding available to meet these needs. *See Tr.*, page 93. Mr. Seidman also testified that he has not been able to pay all of the bills submitted to him because of insufficient



funding. He has had to compromise some bills in order to make some payments although he was not able to pay the entire balance. *See Tr.*, page 94-95, *see also* page 103-105.

Mr. Seidman testified that in August or Early September 2014, he became aware that the State Insurance Fund was finally going to begin paying benefits to Respondent herein, and testified that he received the first check payable to the Respondent in September 2014, despite the fact that Respondent's injury occurred on January 17, 2014. *See AR Defendants' Exhibit 2.* Mr. Seidman also testified that he had been informed in the Fall of 2014, that the State Insurance Fund had denied paying any of the fees for the Guardian or Conservator and based upon this denial, he undertook to ration out and compromise some of the fees which had been presented to him as a Conservator of Respondent's estate. *See Tr.*, page 108-109. Finally, Mr. Seidman testified that despite a thorough search, he had not been able to find any other assets that the Respondent owned at the time of his accident that would enable him to further pay medical bills. He looked for anything he could such as houses, cars, motorcycles, snowmobiles, etc. Mr. Seidman had testified that he had not been able to find anything like that and that the only asset which Respondent had in this matter was his ongoing workers' compensation benefits. *See Tr.*, page 108-109.

## II. ISSUE PRESENTED ON APPEAL

Did the Industrial Commission err in holding the services provided to Respondent by Guardian and Conservator were compensable workers' compensation benefits under Idaho Code § 72-432.

## III. STANDARD OF REVIEW

Appellant have indicated in their brief that the facts of this matter are not in dispute and that this Court should therefor have exercise free review over any questions of law arising from the application of those facts. Many of the facts set forth in Respondent's Brief, above, have not been cited to by Defendants nor acknowledged as being without depute. Appellant's recitation of the facts have been very short and omits many of the facts pertaining to this appeal.

### A. Substantial and Competent Evidence

Should the Appellant's dispute any of the factual matters set forth by Respondent, above, Respondent requests that this Court defer to the Findings of the Industrial Commission as long as substantial and confident evidence appears to support their factual findings. As this Court well knows, the power of this Court to reexamine factual determinations of the Industrial Commission below is limited and must focus on whether or not the factual findings below are supported by substantial and competent evidence. *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P. 3d 85 (2009); *Millard v. ABCO Construction Company, Inc.*, Idaho \_\_\_\_, \_\_\_\_ P. 3d \_\_\_\_ (2016).

### B. Free Review of Legal Conclusions

Should the Appellant not dispute any of the factual matters set forth by Respondent, above, then the Court exercises free review of any legal conclusions drawn from those facts. *See Maravilla v. J.R. Simplot Co. Company* \_\_\_\_P.3d \_\_\_\_ 2016 WL7488385, November 30, 2016.

See also *Kelly v. Blue Ribbon Linen Supply, Inc.*, 159 Idaho 324, 360 P. 3d 333 (2015).

### **C. Liberal Construction of Workers' Compensation Act**

For almost 100 years, this Court has held that the legal provisions of the Idaho Code governing workers' compensation matters are to be liberally construed in favor of an injured Claimant with a view to effect its object and promote justice to the injured worker. See Idaho Code § 72-201, *McNeil v. Pan Handle Lumber Co.* 34 Idaho 773, 203 P.1068 (1921), *Smith v. University of Idaho*, 67 Idaho 22, 170 P. 2d 404 (1946), *Frisk v. Garrett Fright Lines, Inc.*, 76 Idaho 27, 276 P. 2d 964 (1954), *Haldiman v. American True Foods*, 117 Idaho 955, 793 P. 2d 187 (1990), *Ogden v. Thompson*, 128 Idaho 87, 910 P. 2d, 759 (1990).

The intention of the Legislature in enacting the workers' compensation law was to provide sure and certain relief for injured workers and their dependents. This leaves no room for narrow and hyper-technical interpretation of the language involved. It is clear that the workers' compensation act is to be given a broad and liberal construction and doubtful cases should be resolved in favor of compensation because the humane purposes of the law leave no room for a hyper-technical construction. *Smith v. University of Idaho*, 66 Idaho 22, 170 P. 2d 404 (1946).

### **IV. LEGAL PRINCIPALS OF STATUTORY CONSTRUCTION**

The primary objective of statutory interpretation is to give effect to Legislative intent. See *Mayer v. TPC Holdings, Inc.* 160 Idaho 223, 226, 370 P. 3d 738, 741 (2016) See also *Robinson 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). In construing statute, the plain obvious and rational meaning is always to be preferred to any curious,

narrow, or hidden sense. *Nagel v. Hammond* 90 Idaho 96, 408 P. 2d 648 (1965).

#### IV. ARGUMENT

##### A. The Statute at the Heart of the Dispute in this Matter is Idaho Code § 72-432

For completeness sake, that entire statute is reproduced herein:

“72-432. MEDICAL SERVICES, APPLIANCES AND SUPPLIES — REPORTS.

(1) 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. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

(2) The employer shall also furnish necessary replacements or repairs of appliances and prostheses, unless the need therefor is due to lack of proper care by the employee. If the appliance or prosthesis is damaged or destroyed in an industrial accident, the employer, for whom the employee was working at the time of accident, will be liable for replacement or repair, but not for any subsequent replacement or repair not directly resulting from the accident.

(3) In addition to the income benefits otherwise payable, the employee who is entitled to income benefits shall be paid an additional sum in an amount as may be determined by the commission as by it deemed necessary, as a medical service, when the constant service of an attendant is necessary by reason of total blindness of the employee or the loss of both hands or both feet or the loss of use thereof, or by reason of being paralyzed and unable to walk, or by reason of other disability resulting from the injury or disease actually rendering him so helpless as to require constant attendance. The commission shall have authority to determine the necessity, character and sufficiency of any medical services furnished or to be furnished and shall have authority to order a change of physician, hospital or rehabilitation facility when in its judgment such change is desirable or necessary.

(4) (a) The employee upon reasonable grounds, may petition the commission for a change of physician to be provided by the employer; however, the employee must give written notice to the employer or surety of the employee’s request for a change of physicians to afford the employer the opportunity to fulfill its obligations under this section. If proper notice is not given, the employer shall not be obligated to pay for the services obtained. Nothing in this section shall limit the attending physician from arranging for consultation, referral or specialized care without permission of the employer. Upon receiving such written notice, the employer shall render its written decision on the claimant’s request within fourteen (14) days. If any dispute arises over the issue of a request for change of physician, the industrial

commission shall conduct an expedited hearing to determine whether or not the request for change of physician should be granted, and shall render a decision within fourteen (14) days after the filing of the response by the employer.

(b) The industrial commission shall, no later than December 31, 1997, promulgate a rule for the expeditious handling of a petition for change of physician pursuant to this section. Nothing herein shall prevent the commission from making periodic amendments, as may become necessary, to any rule for a petition for change of physician.

(5) 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.

(6) No provider shall engage in balance billing as defined in section 72-102, Idaho Code.

(7) An employee shall not be responsible for charges of physicians, hospitals or other providers of medical services to whom he has been referred for treatment of his injury or occupational disease by an employer designated physician or by the commission, except for charges for personal items or extended services which the employee has requested for his convenience and which are not required for treatment of his injury or occupational disease.

(8) The employer or surety shall not be subject to tort liability to any health care provider for complying with the provisions of this law.

(9) Nothing in this chapter shall be construed to require a workman who in good faith relies on Christian Science treatment by a duly accredited Christian Science practitioner to undergo any medical or surgical treatment, providing that neither he nor his dependents shall be entitled to income benefits of any kind beyond those reasonably expected to have been paid had he undergone medical or surgical treatment, and the employer or insurance carrier may pay for such spiritual treatment.

(10) The commission shall promulgate rules requiring physicians and other practitioners providing treatment to make regular reports to the commission containing such information as may be required by the commission. The commission shall promulgate such rules with the counsel, advice, cooperation and expertise of representatives of industry, labor, sureties and the legal and medical professions as well as institutions, hospitals and clinics having physical rehabilitation facilities.

(11) All medical information relevant to or bearing upon a particular injury or occupational disease shall be provided to the employer, surety, manager of the industrial special indemnity fund, or their attorneys or authorized representatives, the claimant, the claimant's attorneys or authorized representatives, or the commission without liability on the part of the physician, hospital or other provider of medical services and information developed in connection with treatment or examination for an injury or disease for which compensation is sought shall not be privileged communication. When a physician or hospital willfully fails to make a report required under this section, after written notice by the commission that such report is due, the commission may order forfeiture of all or part of payments due for services rendered in connection with the particular case. An attorney representing the employer, surety,

claimant or industrial special indemnity fund shall have the right to confer with any health care provider without the presence of the opposing attorney, representative or party, except for a health care provider who is retained only as an expert witness.

(12) Physicians or others providing services under this section shall assist in the rehabilitation program provided in section 72-501A, Idaho Code. They shall cooperate with specialists from the commission's rehabilitation staff and with employer rehabilitation personnel in furthering the physical or vocational rehabilitation of the employee. The extension of total temporary disability benefits during retraining as authorized by section 72-450, Idaho Code, shall be the responsibility of the commission, however, the physician shall inform the commission as soon as it is medically apparent that the employee may be unable to return to the job in which he sustained injury or occupational disease following treatment and maximum recovery.

(13) An injured employee shall be reimbursed for his expenses of necessary travel in obtaining medical care under this section. Reimbursement for transportation expenses, if the employee utilizes a private vehicle, shall be at the mileage rate allowed by the state board of examiners for state employees; provided however, that the employee shall not be reimbursed for the first fifteen (15) miles of any round trip, nor for traveling any round trip of fifteen (15) miles or less. Such distance shall be calculated by the shortest practical route of travel.

(14) An employee who leaves the locality where employed at the time of the industrial accident, or manifestation of an occupational disease, or the locality in which the employee is currently receiving medical treatment for the injury, shall give timely notice to the employer and surety of the employee's leaving the locality. The employer or surety may require the claimant to report to the treating physician for examination prior to leaving the locality, if practical. If an examination by the treating physician is not practical prior to leaving the locality, the employer or surety may assist in arranging an examination by an appropriate physician in the new locality. After receiving notice of relocation, the employer or surety shall have the same responsibility to furnish care as set forth in subsection (1) of this section."

The portion of this statute with which the parties have a dispute comes in subsection 1 as follows:

"...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..."

Initially, therefore, it appears that the medical care or attendance at issue must be reasonably

required by the employee's physician.

**B. Services Provided by Respondent's Guardian and Conservator are Medically Necessary.**

As noted above, the Respondent's requirement for a Conservator and a Guardian have been deemed medically necessary by the Respondent's treating physician, Dr. Michael McMartin. In September, 2014, Dr. McMartin penned which, in part, reads as follows;

"He also requires a Guardian and Conservator. The appointment of a Guardian and of a Conservator for Mr. Barrios is medically necessary due to the traumatic brain injury, which robs him of his ability to make cogent decisions about his medical treatment and about his financial affairs, and which require the appointment of a Guardian and of a Conservator to make those decisions and manage his financial affairs."

*See* AR, Defendant's Exhibit 8 page 74. As set forth in the factual record above, there are many reasons for this medical opinion all of which support the medical necessity of the Respondent having a Guardian and a Conservator to act on his behalf.

First of all, as set forth in the factual discussion, above, because of the severity of his head injury Respondent, has no awareness of how badly he is injured. When he sees a physician, he does not give accurate history, does not recount his symptoms completely and is unable to communicate effectively with regards to his current treatment. The Guardian, Drew Mayes, indicated in testimony that he has had to interject during medical appointments to make sure that the Doctors get an accurate history from the Respondent to enable him to prescribe appropriate treatments. *See* Tr., page 55-56. Even though the personal care provider, Isabel Hernandez, participates in Respondent's health care on a day to day basis, only the Guardian Drew Mayes has statutory authority to intercede for the Respondent to act in his best interests at all time pursuant to the probate code under which

he was appointed. *See* Idaho Code § 15-5-301 et. seq.

Secondly, as is clear from the factual background set forth above, Respondent requires the assistance of a Guardian and Conservator to monitor his day to day living situation to ensure that his best interest are, at all times, paramount. Again, while the personal care provider, Isabel Hernandez, responsible for the day to day living situation of the Respondent, only the Guardian Drew Mayes and Conservator Paul Seidman, have the statutory authority to intercede and act on the Respondent's behalf if something he notices in this living situation is inappropriate or poses danger to the Respondent. Notably, if Respondent desires to engage in questionable recreation activities which exposes him to dangerous situations, only the Guardian Drew Mayes has the statutory authority to interceded in order to prevent those activities.

Thirdly, the Guardian and Conservator are medically necessary for the Respondent to protect his interest into the future as well, should Respondents head injury deteriorate and his current living situation become unacceptable, the Conservator and the Guardian will be key in making decisions and protecting the Respondent so that he has an appropriate living situation which is within his medical needs and allows for the safety of both the Respondent and his caregivers.

Again, although Isabel Hernandez may be instrumental in making this decision, only the Conservator and the Guardian are statutorily empowered to act on the Respondent's behalf in protecting him in the long run.

#### **C. The Scope of Idaho Code § 72-432**

Despite the Arguments of Appellants, this is a very broad statute which covers every aspect of what it takes to effect a cure and rehabilitation to an injured worker in the State of Idaho. It is not limited to medical care alone.



First of all, as illustrated by this case, Idaho Code § 72-432 (3) by specific language, covers the services of Isabel Hernandez herein who supplies much more than medical care to the Respondent. Ms. Hernandez testified at Hearing that she is a certified family home operator and discussed many of the things that she does for the Respondent. Respondent would point out that all though Ms. Hernandez is certainly a skilled individual who plays a very important role in this matter, very little of what she does can be traditionally termed “medical care.”

Most accurately, Ms. Hernandez is more like a parent to Respondent. She reminds him to get up in the morning. She reminds him to get dressed and what clothes are appropriate. She reminds him to brush his teeth. She reminds him to bathe and preform other personal hygiene tasks. She washes his clothes. She washes his laundry. She changes his bed. She cooks his meals. She turns on his television set. She supervises all his past times and accompanies him when he is away from the home.

Ms. Hernandez fills a role in this case which certainly should not be underestimated. Respondent contends that because Ms. Hernandez’s role in this matter are specifically included in Idaho Code § 72-432 (3), it is a fallacy to say that this statue only applies to what we would traditionally think of as medical treatment. Ms. Hernandez’s care illustrates that the statute should be more broadly construed and that many kinds of “attendance” should be recognized as coming within this statue.

Another illustration of the broad scope of Idaho Code § 72-432 is also brought out by the facts of this case. The representative of the State Fund, Donna Young, testified that when this case first came into the State Fund, a Nurse Case Manager was initially assigned to the case to monitor the Respondent’s case, keep track of the Respondent’s injury, and coordinate his care for the State

Fund. Idaho Code § 72-434 and Idaho Code § 72-435 require Respondent to cooperate with such a Nurse Case Manager and refusing care or otherwise obstructing what the Nurse Case Manager is grounds for penalties under those statutory provisions. Respondent, herein had a duty to cooperate with the Nurse Case Manager assigned by the Appellant.

Respondent would point out that these Nurse Case Managers do not directly offer any medical care to an injured Claimant. They do not give shots, they do not administer medications, they do not perform x-rays, they do not offer surgeries, they do not perform physical therapies, they do not offer any medical care of any kind. However, their services, the coordination of care and the arrangement of appointment and coordination between physicians comes under ambit of Idaho Code § 72-432 and Claimant's are obliged to cooperated with these nurses.

Again, Respondent contends that the very common place activities of these Nurse Case Managers, as illustrated by the facts herein, demonstrates that Idaho Code § 72-432 has been interpreted broadly and many activities that are not traditionally defined as "medical treatment" are governed under the terms of this statue.

The language of statue itself also supports the Respondent's contention. Subsection (2) of Idaho Code § 72-432 addresses an employer's responsibility to furnish replacements and repairs of a appliance and prosthesis, including what happens if the appliance or prosthesis is damaged in subsequent employment.

Subparagraph (3), as discussed above, provides for the payment of additional sums as determined by the Commission for the constant service of an attendant when it is necessary by reason of total blindness, loss of both hands or feet, or by reason of other disability resulting from the injury or disease actually rendering an injured worker so helpless as to require constant attendance. This

provision also gives the Commission authority to determine the necessity the character and sufficiency of any medical service furnished or to be furnished and gives the Industrial Commission the authority to order change of physicians, hospital or rehabilitation facilities when in the Commission's judgment such change is desirable or necessary. Subsection (3) envisions care which is not traditionally medical. This point is amply illustrated in the instant case.

Paragraph (4) of Idaho Code § 72-432 provides for a mechanism of changing physicians if an injured worker is dissatisfied with the care which he is being offered. It provides for notice, time frames for Hearing, and requires the Industrial Commission to render its decision promptly. Again, Respondent would point out that this section of the Code only tangentially involves medical care, and is more properly classified as a procedural provision.

Section (6) of Idaho Code § 72-432 prevents medical providers from engaging in balance billing as defined in Idaho Code § 72-102. Providers are, by this section, restricted to receiving those payments which are mandated under the workers' compensation medical reimbursement regulations. Again, this provision does not directly address medical benefits but only payment for those benefits.

Subsection (7) provides that an employee shall not be responsible for charges for medical care when he has been referred by his employer expect for personal items or extended services which the employee requested for their convenience and are not required for treatment.

Subparagraph (8) of Idaho Code § 72-432 exempts employers or sureties from any tort liability to any health care provider for complying with provisions of the law.

Subsection (9) of Idaho Code § 72-432 states that no worker who in good faith relies upon Christian science treatment should be required to undergo any medical or surgical care that is against his religion.

Subparagraph (10) of Idaho Code § 72-432 requires the Industrial Commission to enact rules, that require physicians and other practitioners providing treatment to make regular reports to the Industrial Commission concerning the treatment which they are offering.

Subparagraph (11) of Idaho Code § 72-432 states that information relevant to or bearing upon any occupational injury or disease shall be provided to the employer, surety, attorney of the parties, without liability on part of the physician or other providers. This subsection goes on to provide that when a physician or hospital willfully fails to make a report the Commission may order forfeiture of the payment for these services. This subsection also allows attorneys representing the parties to a workers' compensation case to meet with Physicians to discuss the care rendered without the presence of the opposing party, thereby exempting workers compensation cases from State and Federal privacy laws.

Subsection (12) of Idaho Code § 72-432 requires physicians or others providing services to assist in the rehabilitation programs provided by the workers' compensation law and, requires physicians to inform the Commission as soon as it is apparent that the Employee may be unable to return to their job at the time of injury.

Subsection (13) of Idaho Code § 72-432 requires an injured employee to be reimbursed for his travel expenses subject to certain limitations. Subsection (14) of Idaho Code § 72-432 is procedures for an injured employee who leaves the State to obtain additional medical care in cooperation with the Surety and his treating physician.

As can be seen from this summary of the provisions of Idaho Code § 72-432, this statute is very broad and is intended to cover all phases of the process any injured worker has to endure after an on the job injury. The statute is broad, it is comprehensive, and it is, Respondent submits, intended

to cover all phases of that of which is necessary to bring an injured worker through his or her industrial accident.

**D. Idaho Code § 72-432 is intended to cover the expenses of the Guardian and the Conservator**

**1. Other Attendance - Broadly Construed**

The primary section of the Appellant's Brief in the matter have centered upon interpreting the intention of the Legislature in formulating Idaho Code § 72-432, specifically that phrase in Section (1) of the Statue which reads as follows:

“... 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 made be reasonably required by the employee's physician...”

Specifically, the Appellant has made several arguments about what the phrase “other attendance” means and what the Legislature intended it to mean.

Respondent contends that the Appellants have omitted the most often cited workers' compensation maxim set forth in case law regarding Workers' Compensation Law. Appellants have searched high and low for some indication of legislative intent but have forgotten to cite to the long line of cases which hold that the workers' compensation law is intended to be broadly construed to provide sure and certain relief to injured workers, their families and dependant.

In the early case of *McNeil v. Pan Handle Lumber Co.*, 34 Idaho 773, 203 P. 1086 (1921), the Supreme Court was concerned with the definition of accident and whether or not a worker's injury had been incurred as a result of an accident as defined in the Code at the time. Reviewing the facts, and the Statue as it existed at the time, the Court held as follows:

“Undoubtably, in most cases of accidental injury the Claimant would be able to fix not only the day, but the hour, if necessary, when the accident occurred. But any case of this kind in which the injury may not appear for sometime after it has been actually inflicted by the accident it would be manifestly unfair and a denial of justice to refuse compensation because the Claimant could not identify the very day of the accident, although he could fix the time with reasonable certainty. To so hold would be to misconstrue that the main provisions of this law, whose purpose is declared by the legislature to be to provide sure relief for injured workmen and their families and dependents. The Workermans’ Compensation Law like other laws of this State, is be liberally construed with a view to effect it’s object and to promote Justice.” (34 Idaho at 786).

A subsequent case of *Smith v. University of Idaho*, 67 Idaho 22, 170 P. 2d 404 (1946), the Supreme Court was concerned with an House Mother at the University of Idaho who was injured when returning from the grocery store, having obtained supplies for a party to be given to the Sorority. Asking the question of whether or not the injury was sustained in the course and scope of employment, the Court affirmed the Industrial Commission again citing that the scope of the workers’ compensation law was intended to be broad by the Legislature.

“...all Courts are agreed that there should be accounted to the Workmens’ Compensation Act a broad and liberal construction, that doubtful cases should be resolves in favor of compensation, and that the humane purposes which these acts seek to serve leave no room for narrow technical construction...”

“One of the purposes of the Workmen’ Compensation Acts is to broaden the right of Employees to compensation for injuries due to their employment.” (67 Idaho at 26)

The Court in *Smith*, above, continued to cite cases from other jurisdiction in support of its holding in resolving the case in favor of Ms. Smith.

Subsequent cases have all reaffirmed this principle and have all indicated that a Legislature intended the Workers’ Compensation Act to be liberally construed in favor of compensation in doubtful cases *See Aldridge v. Lamb-Western Inc.*, 122 Idaho 361, 834 P. 2d 878, (1992) *Olvera v.*

*Dell's Auto Body* 118 Idaho 163, 795 P. 2d 862 (1990) *Livingston v. Ireland Bank* 128 Idaho 66, 910 P. 2d 738 (1995).

Respondent contends that this rule of construction and principle of interpretation is directly applicable in this case and that the Court herein should construe any language that is in dispute liberally in favor of compensation in order to effectuate the broad purposes of the Workers' Compensation Act.

## **2. Other Attendance - Not Medical**

The operative language upon which the Industrial Commission relied below comes from that part of Idaho Code § 72-432 (1) quoted above and has to do with the meaning of the phrase "other attendance." Defendants have broadly argued that because this phrase comes in Idaho Code § 72-432 it can only apply to medical care. Respondent contends that this argument ignores the plain meaning of the Statute and ignores the duty of this Court to liberally construe this statute in favor of compensation herein.

In its decision, the Industrial Commission cited to various definitions of "attendance" found in widely accepted dictionaries in an effort to give this statute its plain and ordinary meaning. The Industrial Commission rejected the Appellant's argument that the term attendance in the statute was synonymous with medical treatment and found that this interpretation would lead to the conclusion that the phrase "other attendance" was mere surplusage and that this is not the manner in which to interpret a statute. *See Werneke v. St. Mary's Joint School District*, 147 Idaho 277, 207 P. 3d 1008 (2009).

In further interpreting the language, the Industrial Commission noted that the use of the word "attendance" was modified by the word "other." The Industrial Commission found that this meant

that the attendance could be supplied was “other” than medical thereby giving the statute a broad enough meaning to encompass the relief requested. Respondent contends that this is a correct reading of the Statute and that the word “other” means attendance that is other than medical and apart from medical.

Respondent contends that this phrase within Idaho Code § 72-432 recognizes that the legislature intended the statute to be broad and to have a catch all phrase which would be interpreted to allow compensation for types of care, services, and attendance not specifically mentioned or anticipated at the time the statute was written.

Reference to dictionary definition of “other” support this interpretation. As defined by the English Oxford Dictionaries, other is defined as follows:

“used to refer to a person or thing that is different or distinct from one already mentioned or known about;”

As Defined by Merriam-Webster’s most recent dictionary, other is defined as follows;

“1a; being the one (as of two or more) remaining or not included <held on one hand and waved with the other> b: being the one or ones distinct from that or those first mentioned or implied <taller than the other boys>”

These definition references all support the idea that the modifier “other” in the text describing attendance means that the attendance described is other than medical and apart from medical. To interpret the statute in the matter suggested by Defendants would be to ignore the word “other” and as noted above, the Industrial Commission indicated that this was contrary to principles of statutory construction.

Respondent contends that the phrase “other attendance” is broad enough taken in conjunction with the principles of statutory construction and the manner in which the legislature intended this



statute to be read to cover charges of the conservator and the guardian in this case.

### **3. Other Attendance - Medical**

If the Court herein believes that the phrase “other attendance” is under the term of the statute, medically related, Respondent contends that the services offered by the Conservator and the Guardian in this matter should still be found to be compensable.

As noted in prior sections of this brief, the Guardian in this matter plays a vital role in assisting the Respondent with his medical needs. The Guardian is the person who gives the doctors the correct history of the Respondent’s symptoms. The Guardian is the person who supervises medical care offered to the Respondent and is the only person statutorily empowered to make judgments about which medical care the Respondent gets and whether or not it is in his best interest.

The Guardian is the only party in this matter who is statutorily empowered to watch out for the Respondent’s best interest and guard him from making bad decisions about recreational activities and other pursuits which may put him in danger.

The Respondent contends that this is one of the primary reasons that the Respondent’s treating physician, Dr. Michael McMartin, declared Respondent’s need for a Guardian and Conservator to be medically necessary.

In an associated argument, Respondent contends that the Conservator is also a part of the team which cares for the Respondent and makes sure that his medical needs are met. The Conservator negotiates with and pays all of the Respondent’s non-related medical costs and will be responsible to make sure that Respondent’s assets are protected so that if Respondent has non-work related medical needs he will have the assets to obtain those services as the years go by. No other actor in this case has the power to negotiate the Physicians, arrange for payment schedules and take


care of the Respondent's non-work related medical needs.

Respondent contends that the Guardian and the Conservator are key players in the team that is necessary to make sure that Respondent obtains medical care which is appropriate both from a work related stand point and a non related standpoint. If the Supreme Court herein finds that this phrase "other attendance" refers to medically related needs, Respondent's request for benefits should still be granted.

#### VII. CONCLUSION

Respondent contends that the Industrial Commission's decision herein should be Affirmed. Respondent contends that the Industrial Commission correctly interpreted the statutory phrase contained in Idaho Code § 72-432 (1) as being broad enough to encompass the relief requested. Respondent contends that the fees of the Guardian and the Conservator are within the ambit of Idaho Code § 72-432 (1) and the ruling of the Industrial Commission should be affirmed.

DATED this 17 day of February, 2017.

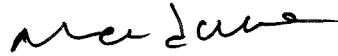
By:   
Richard S. Owen

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17 day of February, 2017, two (2) true and correct copy of the foregoing **RESPONDENT'S BRIEF** was mailed to:

James A. Ford  
Matthew C. Parks  
Elam & Burke, PA  
PO Box 1539  
Boise, Idaho 83701

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.



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Richard S. Owen