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Barrios v. Zing LLC Appellant's Reply 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' REPLY BRIEF

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

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I. INTRODUCTION

This is a statutory interpretation case where the Industrial Commission ("Commission") held that an employer is responsible for the costs of a guardian and conservator for an injured employee because the phrase "other attendance" as used in Idaho Code § 72-432(1) included such services. The Commission found that the services provided by a guardian and conservator could not be considered "medical" or "surgical" or "treatment". Nevertheless, the Commission held that "other attendance" encompasses the non-medical services performed by a guardian and conservator and that employers must pay for such services. For the reasons set forth herein and in the Appellants' Brief filed by Appellants Zing, LLC and the State Insurance Fund (collectively "Employer"), the Commission's decision should be reversed.

II. ARGUMENT

The heart of the Commission's error lies in its misinterpretation of the term "other" as part of the statutory phrase "other attendance". In context, "other attendance" means attendance that is medical or surgical in nature. The Commission's determination that Claimant Josue Barrios's ("Barrios") guardian and conservator provided "other attendance" that is a compensable worker's compensation benefit is not based on a proper interpretation of Idaho Code § 72-432(1). That statute does not authorize the Commission to award benefits for non-medically related services or care.

While the Commission and this Court must be mindful of the maxim that the Worker's Compensation Act should be interpreted liberally to provide compensation for injured workers, the need to liberally construe worker's compensation law in favor of claimants to effect the

object of the law does not permit this Court or the Commission to act outside the authority granted by the Legislature. *Compare Burch v. Potlatch Forests, Inc.*, 82 Idaho 323, 327, 353 P.2d 1076, 1078 (1960) ("It is too well settled under the decisions of this Court to require the citation of authorities that the provisions of the Workmen's Compensation Law of this state are to be liberally construed in favor of employees.") *with Corgatelli v. Steel W., Inc.*, 157 Idaho 287, 292, 335 P.3d 1150, 1155 (2014) (As a purely statutory scheme, the Court cannot judicially construct a credit for employers into worker's compensation law."); *see also Simpson v. Louisiana-Pac. Corp.*, 134 Idaho 209, 212, 998 P.2d 1122, 1125 (2000) ("The Industrial Commission as '[a]n administrative agency is a creature of statute, limited to the power and authority granted to it by the Legislature and may not exercise its sub-legislative powers to modify, alter, or enlarge the legislative act which it administers.'") (citation omitted). Barrios requests the Court to ignore the unambiguous language of the Worker's Compensation Act, to ignore the clear instruction to interpret language contextually, and focus only on the oft cited maxim that the Worker's Compensation Act should be interpreted liberally. But, even a liberal interpretation does not permit the Court or Commission to find Legislative intent where none exists. The Commission has no authority or power to order an employer to pay for costs incurred by an injured employee for services provided by a guardian and conservator.

In the proceeding below, the Commission expanded the coverage of § 72-432(1)[1], which this Court held "states in broad terms the medical care that an employer is required to provide to

[1] Barrios appears to argue a statutory basis for the Commission's decision beyond subsection 72-432(1). *See generally* Respondent's Brief, pp. 18-22 (discussing entirety of § 72-

an injured employee" (*Reese v. V-1 Oil Co.*, 141 Idaho 630, 633, 115 P.3d 721, 724 (2005)) to cover non-medical related services provided by a guardian and conservator appointed by a magistrate in a separate proceeding under the Idaho Probate Code. *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 Commission does not have jurisdiction over the payment for services rendered by a guardian or conservator, as the Legislature has vested exclusive jurisdiction over the appointment and payment of a guardian or conservator with the courts.

Because the Commission lacked the statutory authority to award such benefits, the Commission's underlying decision should be reversed.

A. The Commission Erred in Holding Other Attendance Includes Attendance that is Not Medical In Nature

1. The Term Other When Used in a Statute Means "Of Like Kind and Character"

The Commission erred in holding that, "[a]gainst Defendants' assertion that the type of attendance referenced in Idaho Code § 72-432 must be medical in nature, one need only refer to the language of the statute to reject this argument. The attendance that employer is required to

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432). However, Barrios does also state that, "the portion of this statute with which the parties have a dispute comes in subsection 1...." *Id.* at 16.

provide is medical, surgical and 'other', i.e., ***other than medical***." AR, p. 31. (emphasis added). The Commission ignored this Court's directive that "[o]ther in a statute means of like kind and character." *Twin Falls Cty. v. Hulbert*, 66 Idaho 128, 140, 156 P.2d 319, 324 (1945), rev'd on other grounds by *Hulbert v. Twin Falls Cty.*, 327 U.S. 103 (1946). The Commission did not apply this definition to "other" in § 72-432 and erroneously held the "other attendance" an employer is required to pay for under § 72-432(1) includes the services provided by a guardian and conservator, despite the Commission's factual finding that the services were not medical or surgical. AR, p. 31 ("the expenses at issue cannot fairly be characterized as medical, surgical or other treatment. . . .").

This Court has repeatedly followed the doctrine of *ejusdem generis* when interpreting statutes. *See Hulbert*, 66 Idaho at 140, 156 P. 2d at 324 ("Though specific words and phrases are to be harmonized to develop a well-rounded and effective statutory structure, *ejusdem generis* is not to be disregarded."); *see also Turner v. City of Lapwai*, 157 Idaho 659, 664, 339 P.3d 544, 549 (2014) (following *ejusdem generis* doctrine to interpret statutory language); *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 244, 141 P.3d 1108, 1113 (2006) (same); *State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 109, 106 P.3d 428, 435 (2005) (same); *State v. Kavajecz*, 139 Idaho 482, 486, 80 P.3d 1083, 1087 (2003) (defining *ejusdem generis* as "a rule of statutory construction that finds where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of like or similar class or character to those specifically enumerated.") (internal quotations omitted).

In *Hulbert*, this Court was faced with interpreting what "any other government" meant in the context of the Emergency Price Control Act, which defined the term "person" as including the United States and "any other government". 66 Idaho at 139, 156 P.2d at 323.[2] This Court determined, using *ejusdem generis*, that "other government" referred to other governments that were of like kind and character to the United States, a sovereign nation, and that the law did not apply to states and local governments. *Id.* Ultimately, the United States Supreme Court reversed the decision, holding that the Emergency Price Control Act's definition of "person" did include state governments and their political subdivisions. *Hulbert v. Twin Falls Cty., Idaho*, 327 U.S. 103, 105 (1946). However, the United States Supreme Court did not question how the Idaho Supreme Court assessed the definition of "other government" through the doctrine of *ejusdem generis*. Rather, its decision rested on the Court's determination that, "Congress meant to include states and their political subdivisions when it expressly made the Act applicable to the United States 'or any other government, or any of its political subdivisions, or any agency of any of the foregoing ....' Congress clearly intended to control all commodity prices and all rents with

[2] Section 302(h) of the Emergency Price Control Act defined a "person" as including "an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing." *Case v. Bowles*, 327 U.S. 92, 98–99, 66 S. Ct. 438 (1946) (citing the language of the Emergency Price Control Act).

certain specific exceptions which it declared." *Case v. Bowles*, 327 U.S. 92, 99, 66 S. Ct. 438, 442 (1946).[3]

Even though the decision of this Court in *Hulbert* was reversed, the United States Supreme Court's decision is not inconsistent with the doctrine of *ejusdem generis*. Rather, the United States Supreme Court essentially determined that states, for the purposes of the Emergency Price Control Act, were of like kind and character as the United States – as both are sovereign governments (with the United States being a national sovereignty).

This Court's holding in *Hulbert* that "other" in a statute means "of like kind and character" is consistent with how other state appellate courts and federal courts have interpreted the meaning of "other" in a statute. *See, e.g., Trinity Park, L.P. v. City of Sunnyvale*, 193 Cal. App. 4th 1014, 1036, 124 Cal. Rptr. 3d 26, 41–42 (2011) *disapproved of by Sterling Park, L.P. v. City of Palo Alto* on other grounds, 57 Cal. 4th 1193, 310 P.3d 925 (2013) ("Thus, pursuant to *ejusdem generis* '[t]he words 'other' or 'any other' following an enumeration of particular classes should be read therefore as other such like and to include only others of like kind or character.'"); *City of Grandview v. Madison*, 693 S.W.2d 118, 119 (Mo. Ct. App. 1985) ("In accordance with that rule of construction [*ejusdem generis*], '[t]he words 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of the like kind or character.'") (citations omitted); *Scally v. Pac. Gas &*

[3] *Case v. Bowles* was decided the same day as *Hulbert* by the United States Supreme Court. The *Hulbert* decision contained no analysis and reversed the decision of the Idaho Supreme Court based on the *Case* decision. *Hulbert*, 327 U.S. at 105.

Elec. Co., 23 Cal. App. 3d 806, 819, 100 Cal. Rptr. 501, 509 (Cal. Ct. App. 1972) ("The words 'other' or 'any other' following an enumeration of particular classes should be read therefore as other such like and to include only others of like kind or character."); *Keenan v. Bowers*, 91 F. Supp. 771, 773 (E.D.S.C. 1950) ("Generally, the words 'other' and 'any other' following an enumeration of particular classes of things in a statute, must be read as meaning 'other such like' and include only words of like kind or character."); *Bigger v. Unemployment Comp. Comm'n*, 43 Del. 274, 285, 46 A.2d 137, 142 (Del. Super. Ct. 1946), *aff'd*, 43 Del. 553, 53 A.2d 761 (1947) ("it is very generally held that the words 'other' or 'any other' following an enumeration of particular classes are to be read as meaning 'other such like' and include only words of like kind or character.); *Standard Oil Co. v. Swanson*, 121 Ga. 412, 49 S.E. 262, 263 (1904) ("Where a statute or other document enumerates several classes of persons or things, and immediately following, and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated.").

When the Commission attempted to determine what the Legislature intended "other attendance" to encompass, the Commission ignored this Court's instructions that when a general word or phrase (such as "other attendance") follows an enumeration of specific things (such as "medical" attendance or "surgical" attendance), the general words must be construed to mean things of a like or similar class or character to those that were specifically enumerated. The Commission did the opposite and held the term "other" signaled the Legislature intended "other

attendance" to mean attendance that is ***not*** similar to medical or surgical attendance and not of a like kind and character to these specifically enumerated types of attendance. *See* AR, p. 31. The Commission found that the guardian and conservator did not provide medical or surgical attendance but also determined the services fell within the ambit of "other attendance". The Commission's decision cannot stand in light of this Court's clear instruction that "other" in a statute means of like kind and character. The Commission's award of benefits to Barrios for the costs of the services provided by a guardian and conservator should be reversed since the Commission based the holding on a faulty understanding of what "other" means when used in a statute.

B. The Commission's Error in Interpreting "Other" as it Appears in Idaho Code § 72-432(1) Led to an Overbroad Interpretation of Other Attendance.

The application of *ejusdem generis* in *Sattler v. Northwest Tissue Center*, 42 P. 3d 440 (Wash. 2002) demonstrates how the Commission should have interpreted "other attendance" in Idaho Code § 72-432(1). The issue in *Sattler* was whether or not Northwest Tissue Center was entitled to immunity from suit under Washington's Uniform Anatomical Gift Act for negligently collecting organs from a deceased person against the wishes of the surviving husband of the deceased. *Id.* at 442. Sattler had authorized the collection of certain organs, from his deceased wife, but not her eyes. *Id.* Due to a misunderstanding, Northwest collected the corneas but not the globes of the eyes. *Id.*

Washington's Uniform Anatomical Gift Act provided immunity to certain persons (specified in the statute) if the qualified individuals and entities demonstrated they acted without

malice and without an intent to defraud when collecting the organs. *Id.* The statute provided immunity to "[a] hospital, physician, surgeon, coroner, medical examiner, local public health officer, enucleator, technician, or other person...." *Id.* at 442-43. Northwest was a procurement organization, which was not specifically enumerated in the list in the statute. *Id.* The Washington Court of Appeals used the *ejusdem generis* doctrine to interpret the meaning of "other persons" to include an organ donation procurement organization since such organizations provide services similar to the specifically enumerated individuals and entities. *Id.* at 443. The following excerpt demonstrates how the Commission should have applied the doctrine:

> Sattler first argues that because the statutory list of entities does not specifically include procurement organizations, Northwest is not entitled to assert the good faith defense. His interpretation of the statute on this point is incorrect. The statutory grant of immunity allows the defense to a "hospital, physician, surgeon, coroner, medical examiner, local public health officer, enucleator, technician, or other person" who acts in accordance with the Act. Under the rule of *ejusdem generis*, **the general term "other person" cannot be read to include all other persons, but it does include an "other person" who is similar to the entities specified**. *See Dean v. McFarland*, 81 Wash. 2d 215, 221, 500 P.2d 1244 (1972). Northwest, a corporation, is a "person" under the Act, RCW 68.50.530(8), and is engaged in the same type of activity with respect to tissue and organ donation as the persons and entities specified in the statute.

Id. at 443 (emphasis added). The Washington Court of Appeals held "other person" does not mean any other person, but only a person that is similar to a hospital, physician, etc. *Id.*

The Commission erred when it held that "other attendance" meant all other attendance and simply looked to the dictionary definition of "to attend". Idaho Code § 72-432(1) specifically refers to medical attendance or surgical attendance. The Commission's definition of

attendance is far too broad and covers any kind of service provided to an injured employee. The Commission should have limited the scope of other attendance in the statute to attendance that is similar to medical or surgical attendance. *See* Idaho Code § 72-432(1) ("the employer shall provide for an injured employee such reasonable medical, surgical, or other treatment or attendance...."). Other attendance means attendance that is similar to medical attendance or surgical attendance and does not include all attendance. Employer requests this Court reverse the Commission's holding that "other attendance" in § 72-432(1) includes the services provided by Barrios's guardian and conservator and hold that the attendance must be of a like kind and character to medical or surgical attendance to be compensable under § 72-432(1).

C. The Legislature is Presumed to Have Had *Ejusdem Generis* in Mind When it Adopted Idaho Code § 72-432

The Idaho Legislature passed § 72-432 in 1971.[4] The legislature in passing a statute is presumed to have in mind the law that exists at the time the legislature enacts the statute. *Idaho Mut. Ben. Ass'n v. Robison*, 65 Idaho 793, 799, 154 P.2d 156, 159 (1944) (citations omitted). In passing Idaho Code § 72-432, the Legislature knew that this Court interprets "other" in a statute to be "of like kind and character". *See Hulbert,* 66 Idaho at 139, 156 P.2d at 323. So, when the Legislature inserted the requirement that employers provide to injured employees "medical, surgical, or other treatment or attendance", the Legislature intended that "other attendance" be interpreted to be of like kind and character to medical attendance or surgical attendance. In other

[4] The Worker's Compensation Act existed prior to 1971. But, in 1971, the Legislature re-codified the entire Act into Title 72 of the Idaho Code.

words, the Legislature intended that "other attendance" be interpreted to mean attendance that is medical or surgical in nature. The Commission's contrary decision should be reversed.

D. Other Attendance is not Rendered Superfluous by *Ejusdem Generis*

Limiting other attendance to attendance that is similar to medical attendance or surgical attendance does not render the phrase "other attendance" superfluous. Other attendance is attendance that is medical or surgical in nature, but not necessarily provided by a medical doctor or a surgeon. *See* Appellants' Brief, pp. 18-21 (discussing how other courts have interpreted the term other attendance to cover medical care or services and focusing on nature of the services as opposed to the license held (or not held) by the provider).

The Commission found that the services provided by a guardian or conservator are not medical, surgical, or treatment related. *See* AR, p. 31. That finding cannot be disturbed since it was supported by substantial and competent evidence.[5] *See, e.g., Neel v. West. Const., Inc.*, 147 Idaho 146, 147, 206 P. 3d 85, 86 (2009). While "other attendance" has a broader meaning than medical attendance (attendance provided by a licensed medical professional) or surgical attendance (attendance provided by a licensed surgeon), the "other attendance" must still be of a like kind and character to medical attendance or surgical attendance. As argued in Employer's prior briefing, the focus should be on the class and character of the attendance provided, not the licensing status of the provider. *See* Appellants' Brief, pp. 15-21. The Commission found the services provided by Barrios's guardian and conservator were not in the same class and character

[5] The conservator and guardian both testified at the hearing that they did not provide Barrios any medical services or treatment. *See* Appellants' Brief, p. 4.

as medical or surgical attendance or treatment and therefore should have determined Idaho Code § 72-432(1) did not authorize the Commission to order Employer to pay for such services.

E. Using *Ejusdem Generis* Does not Ignore the Policy Behind the Statute

Employer recognizes that this Court has steadfastly held that the Worker's Compensation Act should be liberally construed in favor of employees. *See Burch* at 327, 353 P.2d at 1078. But, a liberal interpretation of the term "other attendance" does not mean that the phrase can be taken out of context. *See Tirocchi v. U. S. Rubber Co.*, 224 A.2d 387, 442 (R.I. 1966) ("Contrary to petitioner's urging, a liberal 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.").

In *Burch*, this Court was tasked with interpreting the meaning of "treatment" in Idaho Code § 72-307, the pre-cursor to Idaho Code § 72-432. 82 Idaho at 327, 353 P.2d at 1078. The Court interpreted the term liberally and broadly, but still in the context of the statute, to mean treatment that was medical in nature. *Id.* The Court cited approvingly to 70 C.J.S. PHYSICIANS AND SURGEONS § 2. *Id.* Notably, this Court recognized that the term treatment must be interpreted in context and, rather than refer to a dictionary definition of treatment, referred to a legal treatise that contained a definition of treatment in the context of the practice of medicine. *Id.* This Court should, consistent with the holding in *Burch*, interpret the meaning of other attendance in the context of the provision of medical care. Interpreting the term attendance in context does not ignore the requirement that the Worker's Compensation Act be liberally interpreted in favor of employees. A liberal interpretation can only go so far and cannot rewrite

a statute or ignore the context of a word or phrase within the statute. *See, e.g., Tirocchi,* 224 A.2d at 442.

F. This Court Held § 72-432(1) Provides a Statutory Basis for Required Medical Care

Although this Court did not invoke *ejusdem generis* when tasked with interpreting the meaning of "treatment" in §72-432(1), the Court's decision is consistent with an application of that statutory interpretation tool. This Court previously held that "the first sentence of [§ 72-432(1)] states in broad terms the ***medical care*** that an employer is required to provide to an injured employee." *Reese*, 141 Idaho at 633, 115 P.3d at 725 (emphasis added). This Court also affirmed its prior holding that "the word 'treatment' is a broad term and is employed to indicate all steps taken to "effect a cure of an injury or disease." *Id.* at 634, 115 P.3d at 725 (citation omitted). This Court's holding on the meaning of treatment takes into account the context of the term within a statute that states in broad terms the medical care to be provided by employers to injured employees. In that context, the Court held treatment is a broad term, but still is limited in that the treatment is medical in nature (or steps taken in order to effect a cure of an injury or disease).

Similarly, in context and following the instruction of this Court that *ejusdem generis* should not be ignored, other attendance means attendance that is of a like kind and character as medical attendance or surgical attendance. Therefore, the Commission erred when it determined the services of a guardian or conservator (which the Commission found were not medical or surgical in nature) were compensable worker's compensation benefits under § 72-432(1). The Commission's decision should be reversed.

III. CONCLUSION

Employer requests the Court reverse the Commission's award of worker's compensation benefits to Barrios for the costs of services provided by his guardian and conservator.

DATED this 10th day of March, 2017.

ELAM & BURKE, P.A.

By: _____
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By: _____
Matthew C. Parks, of the firm

Attorneys for Defendants/Employer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of March, 2017, I caused two true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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