8-24-2018

Moser v. Rosauers Supermarkets, Inc. Appellant's Brief Dckt. 46004

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8/24/2018 1:03 PM
Idaho Supreme Court
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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MIRANDA MOSER, Claimant/Appellant, v. ROSAUERS SUPERMARKETS, INC., Defendant/Respondent.	SUPREME COURT NO. 46004

APPELLANT'S OPENING BRIEF

Appeal from the Industrial
Commission of the State of Idaho

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I.

STATEMENT OF THE CASE

Nature of the case: This appeal is from an Order on Petition for Declaratory Ruling issued by the Idaho Industrial Commission in a workers' compensation case. R, pp. 92-104. The sole issue before the Commission was whether the Industrial Commission or an employer can compel an injured worker's attendance at an I.C. § 72-433 medical examination without first establishing that the injured worker is within the period of disability. R, p. 92.

Course of proceedings: Following a motion by Defendant and a response from Claimant, the Commission ordered Claimant's attendance at an I.C. § 72-433 medical examination. R, p. 59. Claimant filed a JRP (Judicial Rules of Practice and Procedure) 15 Petition for Declaratory Ruling, challenging the Commission's Order. R, pp. 65-87. Ruling on the JRP 15 Petition, the Commission held that an employer may require an I.C. § 72-433 medical exam without establishing that the injured worker is within the period of disability. R, pp. 102-103. Claimant appealed the Industrial Commission's Order. R, p. 109.

Statement of facts: Claimant injured her shoulder while working for Defendant on October 9, 2016. Defendant accepted the claim and paid benefits, including a shoulder surgery. R, p. 27. Unfortunately, Claimant continued to struggle with right shoulder problems.

Defendant sent Claimant to Dr. Ludwig for an I.C. § 72-433 insurance medical examination on September 7, 2017. Dr. Ludwig opined that Claimant had reached maximal medical improvement and did not require additional medical care as a result of the subject work

injury. R, pp. 36-43. Defendant issued a Notice of Claim Status on September 28, 2017, stating Claimant would not be receiving additional benefits. R, p. 46.

On December 29, 2017, Defendant informed Claimant of a second I.C. § 72-433 medical examination it had scheduled for February 5, 2018, with a new doctor, Dr. Lynch. R, p. 48. Claimant refused to attend the repeat I.C. § 72-433 medical examination because Defendant had already concluded that Claimant was not within her period of disability and terminated benefits based on Dr. Ludwig's opinions. R, p. 46.

II.

ISSUE PRESENTED ON APPEAL

Whether the Industrial Commission erred in concluding that Employer can require an I.C. § 72-433 medical examination without first establishing that Claimant is within her period of disability.

III.

ARGUMENT

The interpretation of a statute is a question of law over which the Supreme Court of the State of Idaho exercises free review. State v. Hart, 135 Idaho 827, 829, 25 P.3d 850 (2001). The Court is not bound by the Industrial Commission's conclusions of law and must set aside a Commission order where the law is misapplied. Combs v. Kelly Logging, 115 Idaho 695, 697, 769 P.2d 572, 574 (1989).

A. Idaho Code § 72-433 provides the employer or the Commission limited authority to require a medical examination during the period of disability.

I.C. § 72-433 reads as follows:

> **Submission of injured employee to medical examination or physical rehabilitation.** -- (1) After an injury or contraction of an occupational disease and during the period of disability the employee, if requested by the employer or ordered by the commission, shall submit himself for examination at reasonable times and places to a duly qualified physician or surgeon… (emphasis added).

"The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Liberal construction in favor of the worker is required to enable the act to serve the humane purposes for which it was promulgated, 'leaving no room for narrow, technical construction.'" Sprague v. Caldwell Transp., Inc., 116 Idaho 720, 721, 779 P.2d 395, 396 (1989) (emphasis in original; citations omitted) (quoting Hattenburg v. Blanks, 98 Idaho 485, 578 P.2d 829 (1977)).

Interpretation of a statute begins with an examination of the statute's literal words. State v. Burnight, 132 Idaho 654, 659, 978 P.2d 214 (1999). Every word, clause, and sentence should be given effect. Robison v. Bateman-Hall Inc., 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). The Industrial Commission "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." Simpson v. Louisiana-Pacific Corp., 134 Idaho 209, 212, 998 P.2d 1122, 1125 (2000).

Having recognized the intrusive nature of compulsory medical examinations, the Court has held that the "legislative intent of I.C. § 72-433 is to protect the employee

compelled to undergo a medical examination" by an employer-selected physician. Hewson v. Asker's Thrift Shop, 120 Idaho 164, 167, 814 P.2d 424 (1991). The Court has also instructed that it is the employer's burden to prove that an injured worker is required to attend an I.C. § 72-433 examination. Id. at 168.

I.C. § 72-433 provides limited authority to request a medical examination. Before an injured worker can be compelled to attend an insurance medical examination, 72-433 imposes all the following prerequisites:

1. An injury or the contraction of an occupational disease;
2. That the injured worker is within the period of disability;
3. An employer request or a commission order for an examination;
4. That the examination be scheduled at a reasonable time;
5. That the examination be scheduled at a reasonable place; and
6. That the examiner is a duly qualified physician or surgeon.

The statute explicitly requires that the examination take place "during the period of disability." Without finding that an injured worker is within the period of disability, the Commission lacks statutory authority to act. Wernecke v. St. Maries Joint School Dist. No. 401, 147 Idaho 277, 286, 207 P.3d 1008 (2009). When the Commission acts without a statutory basis, its action will not be upheld. Corgatelli v. Steel West, Inc., 157 Idaho 287, 335 P.3d 1150 (2014).

The Commission did not find that Claimant is within her period of disability. The Commission's order fails to satisfy the requirements of I.C. § 72-433 and cannot be upheld.

B. Idaho Code § 72-433(2) reaffirms the "period of disability" requirement.

I.C. § 72-433(2) reaffirms that the injured worker must be within the period of disability for an employer to request a medical evaluation:

> (2) The employee shall have the right to have a physician or surgeon designated and paid by himself present at an examination by a physician or surgeon so designated by the employer. Such right, however, shall not be construed to deny the employer's designated physician or surgeon the right to visit the injured employee during reasonable times and under all reasonable conditions during disability.

I.C. § 72-433(2) (emphasis added).

The employer's physician has a right to visit an injured worker during reasonable times and under all reasonable conditions during disability. I.C. § 72-433(2) reaffirms that the employer can compel a medical examination only during the period of disability.

C. The phrase "period of disability" is clear and unambiguous.

I.C. § 73-113 controls the construction of words and phrases. It requires that "The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction." I.C. § 73-113. What is more, words and phrases that "are defined… are to be construed according to such peculiar and appropriate meaning or definition." I.C. § 73-113(3). The Supreme Court of the United States wrote: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there... When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" Connecticut National Bank v. Germain, 503 U.S. 249, 112 S.Ct. 1146 (1992) (citations omitted). The Supreme Court of the State of Idaho has stated that

where statutory language is unambiguous, the "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).[1]

The phrase "period of disability" is to be given its plain, usual, and ordinary meaning. The phrase is not composed of difficult or obscure words.

Period is defined as "any point, space, or division of time." Black's Law Dictionary, 1025 (5th Ed. 1979); (6th Ed. 1990). A period is a finite division of time with a beginning and an end.

The Idaho Code defines disability:

> "Disability," for purposes of determining total or partial temporary income benefits, means a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

I.C. § 72-102(11). The term "disability" dictates the amount of income benefits to which an injured worker is entitled. As defined by statute, the period of disability is the period of income benefits.

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[1] 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. However, ambiguity is not established merely because different possible interpretations are presented to the 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.

BHA Investments, Inc. v. City of Boise, 138 Idaho 356, 358, 63 P.3d 482 (2003).

Both the Court and the Commission have used the phrase "period of disability" in accord with its plain statutory meaning. Brooks v. Duncan, 96 Idaho 579, 532 P.2d 921 (1975) ("Following the initial period of disability after the accident, Brooks resumed working…") (emphasis added); Sykes v. C.P. Clare and Co., 100 Idaho 761, 763, 605 P.2d 939, 941 (1980) ("…the burden is on the claimant to present expert medical opinion evidence of extent and duration of disability in order to recover income benefits for such disability.") (emphasis added); Browne v. Brigham Young Lodge, 2009 IIC 0499.10 (Sept. 2009) ("Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits… Dr. Blair should be asked to make a determination on Claimant's period of disability for purposes of determining what, if any, TTD or TPD benefits are due and owing to Claimant… This results in a compensation rate of $103.85 per week during her period of disability… she is at a serious disadvantage in establishing her period of disability in order to recover income benefits for that period…") (emphasis added); Granger v. Blue Cross of Idaho, 2010 IIC 0347.5 (July 2010) (Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees 'during the period of recovery.' The burden is on the claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability… Inasmuch as his period of disability exceeds two weeks, the five-day waiting period of Idaho Code § 72-402 is not applicable.") (emphasis added); Melendez v. Conagra Foods/Lamb Weston,

2015 IIC 0038 (Aug. 2015) ("… the overpayments made to Claimant were made during the period of disability and they were not due and payable when made. Therefore, those overpayments may be deducted from income benefits yet owed… § 72-316 makes it clear that it applies to 'any payments' that were made to the Claimant during the period of disability, but which were not due and payable when made. This language is not ambiguous and includes within its embrace any payments that were made to the Claimant during the period of disability which were not due and payable when made.") (emphasis in original) (emphasis added).

Thus, "period" has a plain meaning, and "disability" is statutorily defined. The phrase is plain and unambiguous. Both the Court and the Commission have the used the phrase "period of disability" synonymously with period of income benefits. Neither the word "period" nor the word "disability" is subject to statutory interpretation. An I.C. § 72-433 exam can only be requested during the period of disability or a period of income benefits.

D. If statutory construction is necessary, Title 72 repeatedly establishes that the "period of disability" is the period during which benefits are paid.

The Court has required that "[i]n interpreting a statute, it is [the Commission's] duty to ascertain and give effect to the legislative intent by reading the entire act, including amendments." St. Luke's Magic Valley Reg'l Med. Ctr., Ltd. V. Bd. of Cty. Comm'rs of Gooding Cty., 149 Idaho 584, 588, 237 P.3d 1210, 1214 (2010). R, p. 103. The Commission, however, does not provide any evidence of the legislature's intent. What is more, the Commission does not address the remainder of the Act in reaching its conclusion. In addition to

I.C. § 72-102(11), which defines disability, Title 72 repeatedly refers to the "period of disability."

I.C. § 72-316 "Period of Disability"

Section 72-316 discusses payment of income benefits:

> **Voluntary payments of income benefits.** – Any payments made by the employer or his insurer to a workman injured or afflicted with an occupational disease, during the period of disability, or to his dependents, which under the provisions of this law, were not due and payable when made, may, subject to the approval of the commission, be deducted from the amount yet owing and to be paid as income benefits; provided, that in case of disability, such deduction shall be made by shortening the period during which income benefits must be paid, and not by reducing the amount of weekly payments (emphasis added).

The employer makes payments during "the period of disability." As set forth above, the Commission applied the "period of disability" requirement from I.C. § 72-316 in Melendez. In fact, the Commission unequivocally wrote: "This language is not ambiguous…" Melendez.

If the Commission's interpretation of the phrase "period of disability" in the present case is adopted, the phrase becomes meaningless. This is contrary to rules of statutory construction. The Supreme Court of the State of Idaho has ruled that it "will not construe statute in a way which makes mere surplusage of provisions included therein." Bradbury v. Idaho Judicial Council, 149 Idaho 107, 116, 233 P.3d 38, 47 (2009) (quoting Sweitzer v. Dean, 118 Idaho 568, 571, 798 P.2d 27, 30 (1990)).

I.C. § 72-412 "Period of Disability"

I.C. § 72-412 uses the phrase "period of disability" in addressing periods of income benefits for death:

> **Periods of income benefits for death.** – The income benefits for death herein provided for shall be payable during the following periods:
> …
> (6) In case death occurs after a period of disability, either total or partial, the period of disability shall be deducted from the total periods of compensation respectively stated in this section.

I.C. § 72-412. The only possible reading of this statute is that the period of disability is a period of payment. If a period of disability is not a period of payment, it would be impossible to deduct the "period of disability" from the total periods of compensation. The Industrial Commission's interpretation of "period of disability" would render an entire subsection of § 72-412 a nullity. The Commission may not interpret a statute in a manner that would render it a nullity. Twin Lakes Canal Co. v. Choules, 151 Idaho 214, 218, 254 P.3d 1210, 1214 (2011).

I.C. § 72-418 "Period of Disability"

I.C. § 72-418 addresses the computation of disability benefits.

> **Computation of weeks and days.** – In computing periods of disability and of compensation a week shall be computed as seven (7) days and a day as one-seventh (1/7) of a week, without regard to Sundays, holidays and working days (emphasis added).

A period of disability is a finite period of time that is calculated in weeks and days. I.C. § 72-418 confirms that periods of disability are periods of payment. The same period of disability that entitles an injured worker to compensation subjects an injured worker to an I.C. § 72-433 medical examination.

I.C. § 72-419 "Period of Disability"

I.C. § 72-419 references how benefits are calculated when specific classes of injured workers anticipate a wage increase "during the period of disability":

> (8) If the employee was a minor, apprentice or trainee at the time of the accident or manifestation of the disease, and it is established that under normal conditions his wages should be expected to increase during the period of disability that fact may be considered in computing his average weekly wage.

The Commission implies that the "period of disability" is the remainder of an injured worker's life. R, p. 98. According to the Commission's interpretation, if an injured minor, apprentice, or trainee could prove that her wages would increase during her lifetime, then that would be considered in computing the injured worker's average weekly wage. An individual's average weekly wage, however, is only relevant to the calculation of the first 52 weeks of temporary total or temporary partial disability benefits pursuant to I.C. §§ 72-408, 409, 419.

The Commission's position that every single injured minor's, apprentice's, or trainee's wage-earning potential must be projected over the course of her lifetime to determine the appropriate disability benefit is contrary to the entirety of the Act. I.C § 72-419 refers to the plain and ordinary meaning of period of disability, or the minor's, apprentice's, or trainee's period of income benefits.

I.C. § 72-426 "Period of Disability"

I.C. § 72-426 references a "deemed period of disability:"

> **The whole man – A period of five hundred weeks.** – The "whole man" for purposes of computing disability evaluation of scheduled or unscheduled permanent injury (bodily loss or losses or loss of use) for conversion to scheduled income benefits, shall be a deemed period of disability of five hundred (500) weeks.

The Legislature clarified that while an injured worker is no longer in the period of recovery, the period of scheduled and unscheduled permanent disability payments will be considered a period of disability.

Once again, the Commission's construction of the phrase "period of disability" conflicts with the rest of Title 72. If the Commission's interpretation were correct that the period of disability refers to the remainder of the injured worker's life, then explicitly deeming periods of payment as periods of disability would be unnecessary.

The Legislature utilized the phrase "period of disability" repeatedly in Title 72. The phrase "period of disability" is always used in conjunction with disability payments. For purposes of Title 72, disability is a payment. If the phrase "period of disability" were found to be ambiguous, then the remainder of Title 72 clearly establishes that the period of disability is a period of payment. The Commission's and the employer's ability to compel a § 72-433 medical examination is contingent on the period of disability or period of payment.

E. "Permanent disability" has a statutory definition and is not found in I.C. § 72-433.

In concluding that "period of disability" is ambiguous, the Commission relies heavily on the argument that the definition of "permanent disability" is inconsistent with the "period of disability." The Commission wrote: "We find this argument untenable in view of the statutory definition of permanent disability, from which flows the conclusion that one's permanent disability does not evaporate after the periodic payment of a disability award is completed." R, p. 98.

The Commission's argument acknowledges that permanent disability has a statutory definition. The Commission, however, fails to acknowledge that the phrase "permanent disability" is not found in I.C. § 72-433.

The Commission "cannot insert into statutes terms or provisions which are obviously not there." Matter of Adoption of Chaney, 126 Idaho 554, 558, 887 P.2d 1061, 1065 (1995). The Commission's arguments with respect to "permanent disability" are inconsistent with the rules of statutory construction and unpersuasive.

IV.

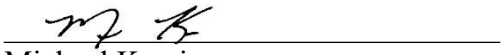
CONCLUSION

Idaho Code § 72-433 clearly and unambiguously requires that an injured worker be within the period of disability for an employer or the Industrial Commission to compel an insurance medical examination. The definition of disability and Title 72 establish that the period of disability is the period of income benefits. If an injured worker is not receiving income benefits, neither the employer nor the Commission have statutory authority to compel an insurance medical examination.

Wherefore, Claimant respectfully requests that the Commission's Order on Petition for Declaratory Ruling be reversed.

Dated this 24th day of August 2018.

GOICOECHEA LAW OFFICES, LLP



Michael Kessinger
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August 2018 I caused to be served a true and correct copy of the forgoing document via iCourt File and Serve:

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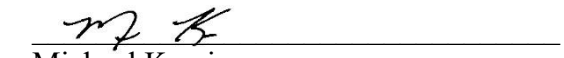

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