9-21-2018

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

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MIRANDA MOSER, Claimant-Appellant, vs. ROSAUERS SUPERMARKETS, INC., Defendant-Respondent.	)	Supreme Court No. 46004 **RESPONDENT'S REPLY BRIEF**

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHAIRMAN THOMAS E. LIMBAUGH PRESIDING

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I

STATEMENT OF THE CASE

(i)

Nature of the Case

This is a case in which Appellant's appeal from the Commission's Petition for Declaratory Ruling regarding the interpretation of Idaho Code § 72-433 is not properly before the Court because (1) Appellant's appeal is from an interim order rather than a final decision and is not appealable as a matter of right pursuant to I.A.R. 11(d)(1); (2) Appellant's appeal is not from an order deciding compensability that the Industrial Commission determined should be immediately appealable pursuant to Rule 12.4 as provided under I.A.R. Rule 11(d)(2); and (3) Appellant did not file with the Commission a motion for permission to appeal from an interlocutory order of the Commission as required by I.A.R. Rule 12(b).

Should the Court determine that the appeal is properly before the Court, Respondent contends that the reasonable construction of Idaho Code § 72-433 does not support Appellant's argument that the statute requires as a precondition to the employer obtaining a medical examination on an employee that (1) the employer must actually be paying income benefits to the employee for temporary or permanent disability at the time the employer requests the medical examination; and (2) that the Commission must first determine that the employee is disabled.

Respondent further contends that that the requirements of Idaho Code § 72-433 for an employer requested have been satisfied because Appellant has asserted that she is in a period of disability. That conclusion stems from the fact that Appellant has a pending Workers' Compensation Complaint before the Industrial Commission in which she is claiming current

entitlement to medical benefits and income benefits for total temporary disability, permanent impairment, permanent partial disability, and total permanent disability.

For relief, Respondent requests that the Court dismiss the appeal as being from a non-appealable interlocutory order. Alternatively, Respondent requests that the Court affirm the Commission, and that it conclude that the requirements of requirements of Idaho Code § 72-433 have been satisfied.

(ii)

Course of Proceedings

Appellant's recitation of the course of proceedings is incomplete. She failed to mention the following pertinent proceedings which occurred prior to the proceedings at which she begins her recitation in her Opening Brief of the course of proceedings.

Claimant filed a Workers' Compensation Complaint on January 5, 2018 regarding her accident and injury of October 9, 2016. R., pp. 1-3. In her Complaint, Claimant alleged current entitlement not only to medical benefits, but also to income benefits for total temporary disability, permanent impairment, permanent partial disability, and total permanent disability. R., p. 1. Employer filed its Answer to Complaint on January 10, 2018 R., pp.4-5. Employer denied that Claimant was entitled to the benefits she claimed, and Employer denied that the benefits Claimant was seeking were causally related to her accident and injury. R., pp. 4-5. On January 17, 2018, Employer filed a Notice of Medical Exam indicating it had scheduled an examination pursuant to Idaho Code § 72-433 with Joseph Lynch, M.D., for February 5, 2018. R., pp. 6-7. Then on January 24, 2018, Employer filed a Motion for Sanctions after Claimant, through her attorney, indicated she would not attend the medical examination scheduled for February 5, 2019. R., pp. 8-16.

Claimant also failed to mention other pertinent proceedings. The Commission's Referee on February 7, 2018 issued his Order on Defendants' Motion for Sanctions and Claimant's Motion for Protective Order. R., pp. 59-61. The Referee denied Claimant's Motion for Protective Order and granted Employer's Motion for Sanctions to the extent it sought an order from the Commission requiring attendance by Claimant at a medical examination on a date mutually available to Claimant and to either Dr. Joseph Lynch or Dr. Thomas Goodwin. R., p.60. Claimant neither filed a petition for reconsideration of the Referee's Order nor sought to appeal from that Order. Employer t on February 7, 2018 filed a Second Notice of Medical Exam, scheduling a medical examination with Dr. Joseph Lynch for April 2, 2018. On March 23, 2013, Employer filed a Notice of Cancellation of Medical Examination regarding April 2, 2018 examination. Employer has not made further attempts to schedule a medical examination of Claimant pursuant to Idaho Code § 72-433.

(iii)

Statement of Facts

Besides the facts stated by Claimant, Employer would also state that the Employer arranged for Michael Ludwig, M.D., to evaluate Claimant on September 7, 2017. R., p. 93. Dr. Ludwig noted that Claimant had a well-documented history of right shoulder dislocation pre-dating the October 9, 2016 accident. He opined that, at most, the accident aggravated her pre-existing condition, but that she had returned to her pre-injury baseline by the time of his examination. *Id.* He did not believe she required any further medical care as the causal result of the accident. *Id.* Dr. Ludwig concluded that she had a permanent impairment of 11% of the upper extremity regarding her right shoulder condition, but that all of the impairment was attributable to the pre-existing condition and none to the industrial accident. *Id.* He gave her certain permanent

restrictions to protect her right shoulder, but he felt those restrictions were also entirely related to the pre-existing condition. *Id.* On September 28, 2017, the claims examiner for the Employer issued a Notice of Claim Status in which she informed Claimant that

> Dr. Ludwig has opined you are at maximum medical improvement without further medical treatment needed as of 9/7/17. He awarded you an 11% upper extremity permanent partial disability rating with 100% apportioned to your pre-existing condition and 0% related to your industrial incident.

R., p. 46. On December 13, 2017, Adam Jelinek, M.D., a treating physician of Claimant's indicated that he would recommend a referral of Claimant to Dr. Joseph Lynch or Dr. Thomas Goodwin. R., p. 10. Claimant on January 5, 2015, filed a Workers' Compensation Complaint seeking medical benefits, and income benefits for total temporary disability, permanent partial disability, and total permanent disability. R., pp. 1-3. Subsequent to Employer's filing of its Answer to Complaint on January 10, 2018, Employer on January 17, 2011 filed a Notice of Medical Exam for an examination by Dr. Lynch on February 5, 2018. R., pp. 4-7. Claimant refused to attend the examination. R., p. 12.

II

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Is the Order from which Claimant appeals an interlocutory order and not a final order or decision?
2. Must Claimant's appeal be dismissed because Claimant does not have an appeal by right and because Claimant did not seek permission to appeal?
3. Do the claims for income benefits for temporary disability and permanent disability which Claimant raises in her pending Workers' Compensation Complaint constitute

an assertion by Claimant that she is in a period of disability, thereby satisfying the requirements of Idaho Code § 72-433 for an employer requested medical examination?

III

ARGUMENT

A. CLAIMANT'S APPEAL MUST BE DISMISSED SINCE CLAIMANT APPEALS FROM AN INTERLOCUTORY ORDER FROM WHICH SHE DOES NOT HAVE AN APPEAL BY RIGHT AND HAS NOT OBTAINED PERMISSION TO APPEAL

Rule 11(d)(1), I.A.R., permits "[a]n appeal as a matter of right" to the Idaho Supreme Court: "(1) [f]rom any final decision or order of the Industrial Commission or from any final decision or order upon rehearing or reconsideration by the administrative agency." The Court has determined that a "final decision or order" for purposes of an appeal by right is one that finally determines the rights of the parties and ends the litigation. *Fenech v. Boise Elks Lodge No. 310,* 106 Idaho 550, 682 P. 2d 91 (1984), citing with approval *City of Coeur d'Alene v. Ochs*, 96 Idaho 268, 526 P. 2d 1104 (1974); and *Idaho-Best, Inc. v. First Security Bank*, 99 Idaho 517, 519, 584 P. 2d 1241, 1244 (1978).

Claimant's Workers' Compensation Complaint seeks medical benefits and income benefits for total temporary disability, permanent impairment, permanent partial disability, total permanent disability. The Complaint also alleges entitlement to retraining benefits and seeks an award of attorney fees pursuant to Idaho Code § 72-804. Those issues have not been adjudicated by the Commission, no hearing has been requested by Claimant or scheduled by the Commission regarding those issues, the Complaint has not been withdrawn, and the Complaint remains pending. The Commission's Order on Petition for Declaratory Ruling does not adjudicate any of the issues raised in the pending Complaint. Because the Complaint and the issues raised in it

remain pending, the Order Claimant has appealed from is not a final order because it does not finally determine the rights of the parties and end the litigation regarding the Complaint. Thus, the Order on Petition for Declaratory Ruling is an interlocutory order which is not appealable as a matter of right pursuant to Rule 11(d)(1).

There are two ways in which an interlocutory order can be appealed under the Idaho Appellate Rules, but neither rule applies in the instant case.

I.A.R. Rule 11(d)(2) provides for an appeal "[f]rom any order of the Industrial Commission deciding compensability that the Commission has determined should be immediately appealable pursuant to Rule 12.4. The order from which Claimant appeals did not decide compensability. Consequently, Rule 11(d)(2) does not apply.

I.A.R. Rule 12(a) provides that

> Permission may be granted by the Idaho Supreme Court to appeal from an interlocutory order or judgment of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.

Rule 12 establishes a two-step process for obtaining permission to appeal. First, Rule 12(b) requires that a motion for permission to appeal be filed with the administrative agency within fourteen (14) days from the date of entry of the order or judgment from which permission to appeal is sought. Second, Rule 12(c)(1) requires that a motion for permission to appeal be filed with the Court within fourteen (14) days from the administrative agency's "order approving or disapproving a motion for permission to appeal[.]"

Claimant did not file with the Commission a motion for permission to appeal from the Order on Petition for Declaratory Ruling. Consequently, Claimant did not comply with the Court's rules for appeal by permission of an interlocutory order.

For the above reasons, Claimant's appeal is not properly before the Court and must be dismissed.

B. STATUTORY CONSTRUCTION DOES NOT SUPPORT CLAIMANT'S READING THAT THE PHRASE 'DURING THE PERIOD OF DISABILITY' REQUIRES AS A PRECONDITION TO THE EMPLOYER OBTAINING A MEDICAL EXAMINATION UNDER IDAHO CODE § 72-433 THAT THE EMPLOYER BE PAYING INCOME BENEFITS AT THE TIME OF THE REQUEST FOR THE EXAMINATION AND THAT THE COMMISSION DETERMINE THAT THE EMPLOYEE IS IN FACT DISABLED

If the Court determines the Claimant's appeal is properly before it, the merits of Claimant's appeal must be addressed. Claimant's argument on appeal boils down to this: because Idaho Code § 72-433 uses the phrase "during the period of disability," that means the employer must be paying income benefits to the employee at the time the employer requests the medical examination before the employer has the statutory right to request the examination and before the Commission can order the examination. Appellant's Opening Brief, Section IV, p. 10. As Claimant phrases it, "If an injured worker is not receiving income benefits, neither the employer nor the Commission have statutory authority to compel an insurance medical examination." *Id.* In view of her statutory interpretation, Claimant contends that she was justified in refusing to attend the § 72-433 medical examination that Defendants scheduled for February 5, 2018 on the following grounds: (1) the Defendants on September 7, 2017 had Claimant attend a § 72-433 examination in which the examining physician had "opined that Claimant had reached maximal medical improvement and did not require addition medical care as a result of the subject work injury"; (2) the Defendants subsequently issued a Notice of Claims Status on September 27, 2017, "stating Claimant would

not be receiving additional benefits;" and (3) because of the foregoing events in September 2017, the Defendants, when they scheduled the February 5, 2018 § 72-433 examination, "had already concluded that Claimant was not within her period of and terminated benefits[.]" Appellant's Opening Brief, Statement of Facts, pp. 1-2. As noted in the Commission's Order on Petition for Declaratory Ruling filed on April 4, 2008, Claimant initially argued

> that the term period of disability is the equivalent of "period of recovery," as use in Idaho Code § 72-408. Therefore, Claimant argues that it must be demonstrated that Claimant is in a "period of recovery" and has not reached medical stability before she may be ordered to attend and Idaho Code § 72-433 exam.

R., pp. 92-104 at 96. Claimant then expanded her statutory interpretation argument beyond solely temporary disability.

> In her reply brief, Claimant acknowledges that the term "period of disability" encompasses not only periods of temporary disability, but periods of permanent disability as well. However, she continues to take the position that it is only during periods in which Claimant is receiving either temporary or permanent disability benefits that she can be required to attend an Idaho Code § 72-433 exam. If Claimant is not receiving disability benefits at the time of an Idaho Code § 72-433 exam, Claimant argues that fore such exam can take place, the Commission must find that Claimant is entitled to disability.

Id.

The Commission summarized as follows the glaring problem with the interpretation of the phrase "period of disability" argued for by Claimant:

> At the end of the day, the reading of the statute urged by Claimant is altogether nonsensical and would deny employers the opportunity to investigate the fundamental components of a Claimant's entitlement to benefits until Claimant is found entitled to these benefits by the Commission. Only after there has been judicial confirmation that an injury or occupational disease occurred and that Claimant is entitled to temporary/permanent disability would Employer be allowed to undertake a medical evaluation intended to help it defend the Claim, at which time such an undertaking would be pointless. Such a construction would hamstring any defense to a claim for benefits, perhaps impermissibly, since it seems tantamount to a denial of due process or equal protection.
>
> We recognize that abuse of Idaho Code § 72-433 exams occur from time to time, and if they do, such issues can be addressed by the Referee, as they were in

> this case. However, it cannot have been the intention of the legislature to require that the question of whether Claimant has suffered an "injury" or "occupational disease," or is temporarily or permanently disabled, be adjudicated before Defendants are allowed to conduct the examination(s) that they feel are necessary to defend exactly those claims. Such a strange interpretation of the statue would yield an indefensible result. Employers must have timely access to an injured worker in order to promptly investigate a claim, and to defend cases in litigation.

Order on Petition for Declaratory Ruling filed April 4, 2018, R., pp. 92-104 at 102-103.

In leading up to its summarization, the Commission brought up several points. Among these, it noted that there frequently are instances in which a medical examination is desired where the Commission has made not determination "that claimant has a compensable condition, much less an entitlement to medical care and temporary/permanent disability." It also noted that the instant case

> perfectly illustrates the problem. Notwithstanding that the Defendants have accepted the subject claim, a dispute exists over the extent and degree to which Claimant's ongoing problems are causally related to the subject accident. Thee has been no Commission determination as to whether or not Claimant's need for future care is related to the accident. There has been no Commission determinations as to whether or not Claimant is medically stable, and if so, whether she is entitled to disability. There has been no Commission determination as to whether or not Claimant, if in a period of temporary disability, is temporarily disabled because of the work accident. Indeed, one of the objectives of Idaho Code § 72-433 is to allow Employer the opportunity to obtain medical opinions necessary to investigate defenses to a claim and to assist the Commission in sorting out these issues. To say that the Commission must first make a determination on the question of whether Claimant is in a period of temporary or permanent disability before Defendants are entitled to require Claimant's attendance at an Idaho Code §72-433 exam puts the cart before the horse and would make Idaho Code § 72-433 exams largely pointless.

R., 99.

The Commission also pointed out that if it adopted Claimant's interpretation of Idaho Code § 72-433, it would create a conflict between that statute and Idaho Code § 72-434, which specifies

> that an injured worker who unreasonably refuses to submit to an Idaho Code § 72-433 exam shall suffer the suspense of her right to "prosecute any proceedings under this law." Claimant argues that until it is determined by the finder of fact that an injury produce by an accident has occurred and Claimant has suffered temporary/permanent disability as a result, no right to an Idaho Code § 72-433 exam exists. In other words, after Claimant proves her case, Defendants may ask Claimant to submit to an exam. This is inconsistent, and in conflict, with the provisions of Idaho Code § 72-434, which clearly anticipates that exams may take place before a hearing on the merits, or similar determination, takes place. Otherwise, there would be no point to the penalty of suspending Claimant's right to prosecute her claim.

R., p. 100.

The Tennessee Supreme Court faced an argument similar to that of Claimant in the instant case that an employer's denial of entitlement to income benefits precludes its statutory right to a medical examination. *Overstreet v. TRW Commer, Steering Div.*, 256 S.W.3d 626 (Tenn. 2008). The Court rejected Overstreet's argument, reasoning that

> By contesting liability, an employer does not forfeit the entitlement to compel the employee to submit to an examination conducted by a physician of the employer's choosing. *Id.* When causation is in dispute, standards of fairness lend themselves to the notion that the employer should have the benefit of an expert who has had the opportunity to examine the employee's alleged injury. See Thomas v. Aetna Life & Cas. Co., 812 S.W. 2d278, 283 (Tenn. 1991) ("Medical causation and permanency of an injury must be established in most cases by expert medical testimony."). This is especially true when, under the terms of our Act, any reasonable doubt as to the cause of an injury will be construed in favor of the employee. See, e.g., White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992); Williams v. Preferred Dev.Corp.,224 Tenns. 174, 452 S.W. 2d 344, 345 (Tenn. 1970). For these reasons, we hold that the trial court erred by denying TRW's request to conduct a medical evaluation.

256 S.W.3d at 638.

As has Claimant in the instant case, the employee in *R.D. Masonry, Inc. v. Indus. Comm'n (Hunter)*, 215 Ill. 2d 397, 830 N.E.2d 584 (Ill. 2005), argued that the Illinois statute regarding employer medical examinations precluded the right to an examination unless the employer was

paying income benefits at the time the examination was requested. The employer was contesting the employee's entitlement to additional temporary total disability benefits. The examination statute provided, in pertinent part, that "An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself . . . for examination to a duly qualified medical practitioner or surgeon selected by the employer . . . ." 215 Ill. 2d at 403, 830 N.E.2d at 589. The employee argued that the phrase "entitled to receive disability payments" required the actual making of payments. The Court held that the language of the statute did not limit the right to an examination to cases in which the employer acknowledged liability to make income benefits payments, since to hold otherwise would mean that an employer could never effectively contest a claim. 215 Ill. 2d at 405-8, 830 N.E.2d at 590-2.

The Idaho Supreme Court has never construed the phrase "during the period of disability" for purposes of an Idaho Code § 72-433 examination. The interpretation of a statute is a question of law over which the Court exercises free review. *Gooding County v. City of Lewiston,* 137 Idaho 201, 46 P.3d 18 (2002). Interpretation begins with the literal language of the statute. *Thompson v. City of Lewiston, 137 Idaho 473, 50 P.3d 488 (2002).* Those words are to be given their plain, usual, and ordinary meaning. *Robinson v. Bateman-Hall, Inc.*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). But the Court must apply any pertinent statutory definitions and must read the provision in context of the workers' compensation law as a whole. *Id.,* 137 Idaho at 212, 76 P.3d at 956. If doing so reveals that the statute is not ambiguous, then the Court applies the statute as written and does not consult extrinsic evidence to determine legislative intent. *Hansen v. State Farm Mut. Auto Ins. Co.*, 112 Idaho 663, 735 P.2d 974 (1987). A statute is ambiguous, however, where the language is capable of more than one reasonable construction. *Jen-Rath Co. Inc. v. Kit Mfg. Co.,* 137 Idaho 330, 48 P.3d 659 (2007). If the statute is ambiguous, then it must be construed

to mean what the legislature intended it to mean. *Miller v. State*, 119 Idaho 298, 715 P.2d 968 (1986). Factors which the Court will then examine to determine legislative intent include the reasonableness of the proposed construction and the public policy behind the statute. *Lopez v. State Indus. Special Indem. Fund*, 136 Idaho 174, 30 P. 3d 952 (2001).

There is nothing in the language of the statute and the various provisions regarding income benefits and disability which addresses how Idaho Code § 72-433 should be applied where an employee has filed a Complaint alleging entitlement to income benefits for temporary disability and permanent disability but the employer has contested its liability for the benefits claimed and is not paying income benefits of any kind at the time the employer request the medical examination. Nor is there any language in the statute requiring that the Commission make a determination of disability as a precondition to the employer's right to a medical examination of the employee. The Court thus has to determine a reasonable construction of the statute. As the Commission observed, to interpret the statute as argued for by Claimant would make Idaho Code § 72-433 "pointless." Moreover, it would also turn on its head basic concepts of law regarding an employee's obligations regarding establishment of a compensable disability. As the Court articulated in *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 764, 605 P.2d 939, 942, (1980),

> This Court has held on numerous occasions that, in workmen's compensation cases there must be medical testimony supporting the claim for compensation with a reasonable degree of medical probability. *Bowman v. Twin Falls Const. Co., Inc.*, 99 Idaho 312, 581 P.2d 770 (1978); *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 528 P.2d 903 (1974). Workmen's compensation cases, because of their medical aspects, depend upon knowledge neither expected nor possessed by lay witnesses, and the basis for any award must rest upon and be supported by medical testimony. *Comish v. J. R. Simplot Fertilizer Co.*, 86 Idaho 79, 383 P.2d 333 (1963).
>
> Not only must the award be based upon medical testimony but it is a well-established principle of law that in workmen's compensation cases, the claimant has the burden of proving a compensable disablement in order to recover. *Wilson v. Carl Gilb, Inc., supra*; *Kern v. Shark*, 94 Idaho 69, 480 P.2d 915 (1971); *Davenport v. Big Tom Breeder Farms, Inc.*, 85 Idaho 604, 382 P.2d 762 (1963).

> The record here indicates that Sykes called no other witnesses to testify besides himself and no medical opinion testimony was introduced which established his disability and subsequent eligibility to receive total temporary disability payments after November 6, 1973.
>
> Furthermore, where the employer or its surety has paid total temporary disability payments and then terminates such payments, as in this case, this Court has held that payments of such compensation prior to termination do not constitute an admission that the employee's subsequent condition was due to a compensable cause which required the employer or surety to prove cessation of the compensable disability. *Carlson v. F. H. DeAtley & Co.*, 55 Idaho 713, 46 P.2d 1089 (1935). The burden of proof thus remains on the claimant, even where the employer or its surety originally paid disability compensation to the employee.
>
> Thus, for the above reasons, the Court should affirm the Commission.

C. BY FILING A COMPLAINT SEEKING AN AWARD OF INCOME BENEFITS FOR TEMPORARY DISABILITY AND PERMANENT DISABILITY, CLAIMANT ESSENTIALLY IS ASSERTING THAT SHE IS IN THE PERIOD OF DISABILITY

Curiously, Claimant mentions nothing in her Appellant's Opening Brief regarding the Workers' Compensation Complaint she filed with the Commission on January 5, 2018. R., pp. 1-3. The Complaint, however, needs to be reviewed to understand the scope of the workers' compensation benefits being sought by Claimant. The Commission's Complaint Form asks for a description of the "NATURE OF THE MEDICALS PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE." R., p. 1. In response, Claimant indicated that the medical problem was a "Right shoulder dislocation. R., p. 1. The Complaint Form then asks "WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? To that question, Claimant responded "See issues below[,]" and in the section of the Complaint Form for "ISSUE OR ISSUES INVOLVED" Claimant listed the following:

1. Entitlement to medical care;
2. Entitlement to temporary total disability;
3. Extent of permanent impairment;
4. Entitlement to permanent disability;
5. Entitlement to total permanent disability including total disability pursuant to the odd-lot doctrine;

6. Entitlement to retraining; [and]
7. Entitlement to attorney fees for unreasonable denial of benefits.

R., p. 1. In its Answer to Complaint, Employer admitted the occurrence of Claimant's accident; but denied "all allegations of the Complaint not admitted herein[,]" and denied that "the condition for which Claimant seeks benefits is related to any work accident, injury, or occupational disease." R., pp. 4-5. The Agency's Record does not reflect that a Hearing has been held or scheduled on the substantive issues raised in the Workers' Compensation Complaint and the Answer to Complaint. R., pp. 1-120. Those issues remaining pending.

Thus, at the time Employer filed its Notice of Medical Action, Motion for Sanctions, and Second Notice of Medical Exam, which, respectively, were filed on January 17, January 24, and February 7, 2018, R., pp. 6-16, 62-63, Employer was dealing with a situation in which Claimant had, among other claims, alleged in her Complaint the current entitlement to temporary total disability benefits, permanent partial disability benefits, and total permanent disability benefits.

Temporary total disability benefits are "income benefits" payable for total disability "during the period of recovery." Idaho Code § 72-408. The recovery period ends when the injured worker reaches "maximum medical rehabilitation[,]. Idaho Code §72-422. Further "income benefits" are payable for permanent partial disability based upon evaluation of permanent impairment and permanent disability in excess of impairment. Idaho Code §72-422, §72-423, § 72-424, § 72-425, § 72-426, §72-427, §72-428, §72-429, and §72-430. If the nature and extent of permanent disability following maxim medical rehabilitation is, however, total rather than partial, then income benefits are payable at the total temporary disability rate for as long as the employee is totally and permanently disabled. Idaho Code § 72-408(1). "Income benefits" are defined by Idaho Code § 72-102(16) as "payments provided for or made under the provisions of this law to

the injured employee disabled by an injury or occupational disease, or his depending in case of death, excluding medical and related benefits."

By claiming entitlement to temporary total disability benefits, permanent partial disability benefits, and total permanent disability benefits, Claimant necessarily was alleging that she was in a "period of disability." Claimant cannot legitimately allege that she is entitled to income benefits for "disability" and at the same time allege that the employer must prove that she is "disabled" and, thus, in a "period of disability" in order to obtain a medical examination pursuant to Idaho Code § 72-433. The Illinois Supreme Court pointed out the absurdity of that type of reasoning in *R.D. Masonry, Inc. v. Indus. Comm'n (Hunter)*, supra, when it observed that

> Claimant argues that because Masonry denied liability from the outset, it should be prevented from asserting that he was an employee entitled to receive benefits for purposes of section 12. Claimant's argument, of course, ignores that by filing an adjustment of claim with the arbitrator for his injury, claimant asserted from the outset that he was an employee entitled to compensation payments.

215 Ill. at 406, 830 N.E.2d at 591.

Therefore, the Court should conclude that a claim for income benefits for disability constitutes an assertion that the employee is in a period of disability and, therefore, is legally sufficient to entitle the employer to a medical examination of the employee pursuant to Idaho Code § 72-433.

IV

CONCLUSION

The Order from which Claimant appeals is an interlocutory order and not a final order or decision because it did not determine the rights of the parties regarding the substantive issues raised in the pending Complaint and did not end the litigation between the parties. Claimant does not have an appeal by right from the Order pursuant to I.A.R. Rule 11(d)(1) or Rule 11(d)(2). Claimant

did not comply with the Court's rules for obtaining permission to appeal from an interlocutory under I.A.R. Rule 12 since Claimant did not file with the Commission a motion for permission to appeal as required by I.A.R. Rule 12(b). For the foregoing reasons, Claimant's appeal must be dismissed.

Statutory construction does not support Claimant's argument on the merits that the phrase "during the period of disability" requires as a precondition to the Employer obtaining a medical examination under Idaho Code § 72-433 that the Employer be paying income benefits at the time of the request for the examination and that the Commission determine that Claimant is in fact disabled. Consequently, the Court should affirm the Commission.

Claimant in her Worker's Compensation Complaint, which remains pending, alleges entitlement to an award of income benefits for total temporary disability and for permanent disability. These claims essentially are an assertion by Claimant that she is in a period of disability. As such, the conditions for obtaining a medical examination of Claimant under Idaho Code § 72-433 have been satisfied.

Dated this 21st day of September, 2018.

GARDNER LAW OFFICE

Michael G. McPeek
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September, 2018, I caused a true and correct copy of the foregoing to be served by the method marked blow:

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Legal Assistant