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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRENT AUSTIN,)	
)	Supreme Court Docket No. 46081-2018
Claimant-Respondent,)	
)	I.C. Case No. 2008-038504
vs.)	
)	
BIO TECH NUTRIENTS, Employer, and)	
EMPLOYERS COMPENSATION)	
INSURANCE COMPANY, Surety,)	
)	
Defendants-Appellants.)	
<hr/>		

RESPONDENT'S 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

A. Nature of the Case

The dispute in this case is whether Claimant Brent Austin (an employee) timely filed with the Industrial Commission his application requesting a hearing for additional income benefits (complaint) after Defendants (the employer and the surety) stopped paying him worker's compensation benefits. The Industrial Commission held that Mr. Austin's complaint was timely filed and thereafter denied Defendants' motion to reconsider. Defendants now ask this Court to reverse the Industrial Commission and hold that Mr. Austin's worker's compensation complaint is time barred.

B. Procedural History

Mr. Austin filed his worker's compensation complaint with the Industrial Commission on July 22, 2016. R Vol. I, p. 1. The issues listed in the complaint include: (1) whether he is entitled to additional medical benefits; (2) whether the medical treatment for which he claims benefits was reasonable and related to the injury he sustained in his work accident; and (3) whether he is entitled to additional temporary total disability (TTD) benefits pending his ongoing medical treatment. *Id.* He reserved all other issues. *Id.*

Defendants filed their answer on July 26, 2018, which answer denied Mr. Austin was entitled to any additional benefits and alleged his complaint for indemnity benefits was barred by the statute of limitations found in I. C. § 72-706. R Vol. I, pp. 4-5. The proceedings before the Industrial Commission were bifurcated to allow the Industrial Commission to first decide whether Mr. Austin's

claim to income benefits was time barred under I. C. § 72-706(3). R Vol. I, p. 27. The Industrial Commission issued its Findings of Fact, Conclusions of Law, and Order on March 26, 2018, holding that Mr. Austin's complaint was timely filed. R Vol. I, pp. 81-96. The Industrial Commission concluded that Defendants were required to give Mr. Austin written notice of the cessation of PPI benefits as required by I.C. § 72-806, and that their failure to do so tolled the statute of limitations in I.C. § 72-706(3). R Vol. I, p. 95. Defendants' subsequent motion requesting that the Industrial Commission reconsider was denied on May 23, 2018. R Vol. I, pp. 130-34. This appeal followed.

C. Statement of Facts

The Industrial Commission's decision was based on the parties' stipulated facts, which are set forth at R Vol. I, pp. 83-85, and in the referenced exhibits, R Vol. I, pp. 59-70. Those facts have been recited by Defendants in their opening brief and will not be rehearsed here. The appellate record will be cited as appropriate throughout this brief, and a summary of the facts is set forth as follows.

While employed with Defendant-Appellant Bio Tech Nutrients in November 2008, Claimant Brent Austin was injured on the job. R Vol. I, p. 83. After his injury, Defendants provided him with medical treatment and paid him temporary total disability ("TTD") payments. *Id.* Those payments were stopped on July 18, 2014, after an independent medical evaluation concluded Mr. Austin had reached maximum medical improvement. *Id.*

Defendants provided Mr. Austin a Notice of Claim Status ("NOCS") dated July 18, 2014, when his TTD benefits stopped. *Id.*; *id* at p. 59. The NOCS also explained that Mr. Austin would

be paid \$18,694.50 for permanent partial impairment (“PPI”), which amount would be paid at the rate of \$339.90 per week in bi-weekly installments ($\$339.90 \times 2 =$ bi-weekly payments of \$679.80). *Id.* According to the NOCS, payments were to start on August 1, 2014, and continue bi-weekly until the PPI was paid in full. *Id.* At that rate, Defendants were to pay 55 weeks worth of PPI payments, R Vol. I, p. 61, that would end on August 21, 2015.

The payments ended earlier than August 21, 2015. Defendants made bi-weekly payments of \$679.80 from July 19, 2014, through June 22, 2015, at which time Defendants issued a check to Mr. Austin in the amount of \$2,379.30, as final PPI payment. *Id.* at pp. 60, 62, 84. Defendants did not issue Mr. Austin a NOCS pertaining to the last PPI payment. *Id.* at pp. 68, 84. However, the comment line of the pay stub attached to the check noted “PPI Final Payment.” *Id.* at 62.

Mr. Austin filed his worker’s compensation complaint on July 20, 2016, *id.* at pp. 1-3, 63-64, 85, which was within one year of the date PPI payments were scheduled to end (August 21, 2015), and which was well within the time during which the statute of limitation was tolled (due to Defendants’ failure to issue a NOCS to Mr. Austin regarding the end of PPI payments). As noted above, Defendants’ answer alleged Mr. Austin’s complaint was time barred. However, the Industrial Commission held that the complaint was timely filed and denied Defendants request to reconsider.

II. RESTATED/ADDITIONAL ISSUES ON APPEAL

- A. Did the Industrial Commission correctly conclude that Mr. Austin timely filed his worker’s compensation complaint where Defendants were required to provide Mr. Austin with written notice of change of status of his claim when it issued the \$2,379.30 check as final PPI payment, and their failure to do so tolled the statute of limitations?**

- B. Alternatively, did Mr. Austin timely file his worker's compensation complaint by filing it within one year of the date the last payment of his PPI benefits was due?**

III. STANDARD OF REVIEW

The facts relevant to this appeal are not disputed. The issues on appeal are matters of law. When reviewing an Industrial Commission decision, this Court exercises free review over questions of law. *Curtis v. M.H. King Co.*, 142 Idaho 383, 385, 128 P.3d 920, 922 (2005).

IV. ARGUMENT

For the reasons stated below, the Court should conclude the following: (1) the Industrial Commission correctly determined that I.C. § 72-806 required Defendants to provide a written notice of change of status to Mr. Austin when it paid him the \$2,379.30 check on June 22, 2015, as final PPI payment; (2) the Industrial Commission correctly concluded, under I.C. § 72-604, that Defendants' failure to provide a written notice of change of status was willful, thereby tolling the statute of limitations found in I.C. § 72-706(3); (3) Defendants did not substantially comply with the notice requirements in I.C. § 72-806 and IDAPA rules; (4) alternatively, Mr. Austin's complaint was timely filed within one year of the date of last payment because the date of last payment of income benefits, under I.C. § 72-706(3), is the date last payment would have actually been made had Defendants made the scheduled payments in accordance with its previous NOCS; and ultimately (5) the Industrial Commission correctly concluded Mr. Austin timely filed his worker's compensation complaint.

A. The Industrial Commission correctly determined that I.C. § 72-806 required Defendants to provide a written notice of change of status to Mr. Austin when it paid him the \$2,379.30 check on June 22, 2015, as final PPI payment

The dispute in this case centers around the interpretation and application of worker's compensation statutes (and associated regulations), including I.C. §§ 72-706(3), 72-604, and 72-806. This Court liberally construes Idaho's worker's compensation statutes in favor of finding compensation for employees. *Marquez v. Pierce Painting, Inc.*, 164 Idaho 59, 423 P.3d 1011, 1015 (2018). Doubtful cases should be resolved in favor of compensation. *Id.* (quotations and citations omitted).

In interpreting and applying statutes, a construing court's primary duty is to give effect to the legislative intent and purpose underlying a statute. *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994). The court must construe a statute as a whole and consider all sections of applicable statutes together to determine the intent of the legislature. *Id.* In construing a statute, a court must not only examine the literal wording of the statute, but must also consider the the statute in harmony with its objective. *Id.* The court also considers the reasonableness of the proposed interpretations and the policy behind the statute. *Id.*

The provisions of the worker's compensation law are liberally construed in favor of the employee, in order to serve the humane purpose for which the law was promulgated. *Id.* at 337, 870 P.2d at 1296. The purpose of the workers' compensation law is to provide sure and certain relief for injured workmen and their families and dependents. *Id.* Since as least 1921, this Court has adhered to the principle that the worker's compensation law should be liberally construed in favor of the

claimant. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990).

The parties do not dispute that the statute of limitation found in I.C. § 72-706(3) applies under the facts of this case. That section provides that “the claimant shall have one (1) year from the date of **the last payment of income benefits** within which to make and file with the commission an application requesting a hearing for additional income benefits.” I.C. § 72-706(3) (emphasis added). However, the one year statute of limitations under I.C. § 72-706(3) is tolled under the circumstances set forth in I.C. § 72-604:

When the employer . . . willfully fails or refuses to file . . . the notice of change of status required by section 72-806, Idaho Code, the limitations prescribed in section 72-701 and section 72-706, Idaho Code, shall not run against the claim of any person seeking compensation until such report or notice shall have been filed.

I.C. § 72-604. In this case, Defendants were required to issue Mr. Austin a written notice of change of status, as required by I.C. § 72-806, when Defendants issued the \$2,379.30 check on June 22, 2015. They failed to do so, thereby causing the one-year statute of limitations to be tolled.

Idaho Code § 72-806 provides, in pertinent part, the following:

A workman shall receive written notice within fifteen (15) days of **any change of status or condition** including, but not limited to, the **denial, reduction or cessation of medical and/or monetary compensation benefits**, which directly or indirectly affects the **level of compensation benefits to which he might presently or ultimately be entitled**. . . . The industrial commission shall by rule and regulation, determine by whom the notice shall be given and the **form** for such notice. (emphasis added)

Industrial Commission regulations further specify when a notice of change of status is required:

As required and defined by Idaho Code, Section 72-806, a worker shall receive written notice within fifteen (15) days of any change of status or condition, including, but not limited to, whenever there is an acceptance, commencement, denial, reduction, or cessation of medical or monetary compensation benefits to which the worker might presently or ultimately be entitled.

IDAPA 17.02.08.061.01. The regulations direct that, “[a]ny notice to a worker required by Idaho Code, Section 72-806 . . . shall be given in a format substantially similar to **IC Form 8**, available from the Commission and posted on the Commission’s website at www.iic.idaho.gov.” IDAPA 17.02.08.061.03 (emphasis added). A copy of IC Form 8 (a Notice of Claim Status, or NOCS) is part of the record on this appeal at R Vol. I, p. 36.

Payment of the \$2,379.30 check to Mr. Austin was a **change** in the status or condition of Mr. Austin’s income benefits. He was initially informed by Defendants’ NOCS dated June 18, 2014, that he would receive PPI payments at the rate of \$339.90 per week, in bi-weekly payments ($\$339.90 \times 2 = \679.80 bi-weekly), beginning August 1, 2014, and continuing until the amount was paid in full. R Vol. I, p. 59. At that rate, payments would be complete 55 weeks later on August 21, 2015.

Instead, PPI payments started on July 19, 2014. *Id.* at p. 84, ¶ 10. Fifty-five (55) weeks from July 19, 2014, is August 8, 2015. Payments were therefore due through that date. However, the final \$2,379.30 check was made June 22, 2015, supposedly for the period covering June 20, 2015 through July 3, 2015, as noted on the check stub. R Vol. I, p. 62. Thus, the change in the status of Mr. Austin’s income benefits consisted of a much larger payment amount, which covered future time periods before payments for those future time periods had come due.

Furthermore, the change in status of Mr. Austin's benefits directly or indirectly impacted the level of compensation benefits to which Mr. Austin might presently or ultimately be entitled. The level of his benefits entirely ceased after the \$2,379.30 payment, making his level of benefits go to zero, even though he was arguably entitled to additional PPI benefits. Such benefits had not been resolved between the parties merely because the independent medical examiner (Dr. Fellers) made his own conclusions regarding Mr. Austin's impairment rating, as disclosed in the June 18, 2014, NOCS. R Vol. I, p. 59. Because the income benefits to which Mr. Austin was ultimately entitled had not yet been resolved, the final PPI payment impacted the level of benefits to which he might be entitled in the future. Therefore, under the statute and regulations, a written notice of change of status in the form of a NOCS was required within 15 days of the \$2,379.30 payment. No such written notice/NOCS was issued to Mr. Austin. Therefore, the statute of limitation was tolled.

Defendants argue the Industrial Commission erred because it failed to distinguish between a type of benefit that is fixed (such as PPI) and one that is not fixed (such as TTD). Appellants' Opening Brief at p. 11. However, the Industrial Commission correctly concluded that such a distinction is not required by the plain language of the statute. R Vol. I, p. 93, ¶ 44. Section 72-806 specifically includes "medical and/or monetary compensation benefits," which encompass both TTD and PPI benefits.

The **practical** need for a written notice of change of status/ NOCS is demonstrated in this case by the fact that various PPI dates for a "last payment" can be calculated from the documents Defendants sent Mr. Austin. For example, as noted above, the NOCS dated July 18, 2014, states that

the \$18,694.50 PPI benefit would be paid at the rate of \$339.90 per week, would begin on August 1, 2014, and would be paid on a bi-weekly basis until the amount was paid in full. R Vol. I, p. 59. At such rate, the final payment would be due on August 21, 2015. Based on such information, a claimant and counsel would be able to determine that the statute of limitation is triggered by the scheduled “last payment” and plan for filing a complaint, if necessary, by August 21, 2016.

But Defendants actually started paying PPI benefits on July 19, 2014, contrary to the information contained in the NOCS, so that the final PPI payment would have been due on August 8, 2015. Did the new final payment due date of August 8, 2015 now trigger the statute of limitation so that it would expire on August 8, 2016? If so, the statute of limitation under these types of circumstances is a moving target, one that can be manipulated by an employer/surety.

To make matters worse, the check stub for the \$2,379.30 payment noted that the check was payment for benefits from June 20, 2015 through July 3, 2015. R Vol. I, p. 62. Was the statute of limitation now triggered by the last day of the period for which payment was supposedly being made (July 3, 2015), thereby making the limitation period expire on July 3, 2016? Or was the statute of limitation triggered by the date of the check for \$2,379.30 (June 22, 2015), making the limitation period expire on June 22, 2016?

In reality, the payment of \$2,379.30 covered the period through August 8, 2015 (55 weeks from the first payment date of July 19, 2014). The various payout dates shown above demonstrate the need for clarity through issuance of a written notice of change of status/NOCS in order to allow claimants and their counsel to determine the correct statute of limitation date easily and reliably

without it being changed by employers/sureties issuing early payments. The legislature must have intended such clarity when it required written notice, and the Industrial Commission must have favored clarity over confusion when it required use of IC Form 8.

1. The Industrial Commission correctly concluded, under I.C. § 72-604, that Defendants' failure to provide written notice of change of status was willful, thereby tolling the statute of limitations found in I.C. § 72-706(3)

Defendants argue that the Industrial Commission erred when it concluded Defendants “willfully” failed, under § 72-604, to issue a written notice of change of status/NOCS upon providing Mr. Austin with the \$2,379.30 PPI check. Defendants note there is no decision by this Court construing “willful” for purposes of the tolling provision in I.C. § 72-604 in circumstances where an employer/surety fails to issue a notice of change of status/NOCS when it issues a final PPI payment.

The Industrial Commission addressed the “willfully” requirement in its order denying Defendants’ request for reconsideration. R Vol. I, p. 130-34. It noted, “[t]he plain language of the statute treats the cessation or final payment of PPI benefits the same as other benefits . . . therefore, the cessation of any of these benefits triggers the need for a NCOS from Defendants.” R Vol. I, p. 132.

In reaching that conclusion, the Industrial Commission considered its prior decision in *Mead v. Swift Transportation*, where it noted the defendants believed the filing of a notice of change of status was required under the circumstance of that case. R Vol. I, p. 133. It noted that the Commission in *Mead* had found that the defendants were aware of the legal requirements of the

statute requiring filing a notice of change of status, but failed to do so. R Vol. I, p. 133.

The Industrial Commission's conclusion in this case was essentially a finding that the statute unambiguously required a written notice of change of status/NOCS when Defendants stopped paying PPI benefits to Mr. Austin, that the Defendants were aware of the unambiguous statutory requirement, and that they simply failed to follow the statute. *Id.* Thus, Defendants' failure to file an NOCS was without lawful excuse and was willful. *Id.*

The Industrial Commission followed its legal reasoning in *Mead*, which was founded upon prior decisions of this Court interpreting "willful" in other Industrial Commission cases:

The Idaho Supreme Court has held that the word "willful" implies a purpose or willingness to commit the act or make the omission referred to. While it does not require an intent to violate the law in the sense of having an evil or corrupt motive or intent, it does imply a conscious wrong. It is more nearly synonymous with "intentionally," "designedly," "without lawful excuse," and, therefore, not accidental. It refers to those who purposely, intentionally, consciously or knowingly fail to report, not those whose omission is accidental because of negligence, misunderstanding or other cause. See, *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 1240 (1979); *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

R Vol. I, p. 133.

The Industrial Commission correctly applied case law to conclude that Defendants willfully failed to issue a written notice of change of status/NOCS to Mr. Austin after payment of the \$2,379.30 PPI check. The Defendants knew about the requirement of issuing a NOCS because it had previously provided one to Mr. Austin in July 2014 when it terminated his TTD benefits. The pertinent language of I.C. § 72-806 and IDAPA 17.02.08.061.01 clearly requires that a workman

shall receive a written notice within 15 days of **any** change of status or condition, including, **but not limited to**, a reduction or **cessation** of monetary compensation benefits. The Defendants' PPI payment of \$2,379.30 on June 22, 2015, was in this case a **cessation** of monetary compensation benefits that required Defendants to give the Claimant written notice. In the context of I.C. § 72-706(3), and as exemplified by the stipulated facts in this case, when the final payment of income/PPI benefits triggers the one-year statute of limitation, the cessation of such benefits has a direct effect on the compensation benefits that a claimant **may ultimately be entitled to**. Such situation was no doubt contemplated by the legislature when it specifically referenced a "cessation of monetary compensation benefits" as a change of status requiring the filing of a NOCS with proper written notice to the effected worker.

Defendants were obviously aware of the guidance provided in the CIWCS training manual printed June 2014, because they asked the Industrial Commission to take judicial notice of that publication. R Vol. I, pp. 31-54. Page 31 of that manual provides, "[w]e understand this [I.C. § 72-604] to mean that the failure to provide notice of any change in status which directly or indirectly affects the payment of income or medical benefits will subject the surety to the consequences described in § 72-604, Idaho Code." R Vol. I, p. 35. This demonstrates that Defendants knew of the requirement to provide Mr. Austin with a written notice of change of statute/NOCS under the circumstances of this case, but willfully failed to do so.

It is important to note that other employers/sureties provide a written notice of change of status/NOCS when they issue final PPI benefits. Mr. Austin's counsel provided to the Industrial

Commission examples of such written notices/NOCSs as exhibits to Claimant's Objection to Defendants' Motion for Reconsideration and Supporting Memorandum. R Vol. I, pp. 123-29.

2. Defendants did not substantially comply with the notice requirements in I.C. § 72-806 and IDAPA rules

Defendants argue the Industrial Commission erred in concluding they "willfully" failed to issue a notice of change of status/NOCS because they had a "lawful excuse," namely, that they "substantially complied" with the NOCS requirements in I.C. § 72-806 and IDAPA rules, which the Industrial Commission did not consider. Defendants contend they substantially complied with the notice requirements because the information contained in the check stub attached to the \$2,379.30 check contained the same information called for in the prescribed NOCS form.

Assuming, for purposes of this appeal, that substantial compliance fulfills the requirements of the above statute and rules, Defendants still failed to demonstrate substantial compliance. IC Form 8 contains specific language which clearly states its purpose is to notify a claimant of a denial or change of status of his claim: "This is to notify you of the denial or change of status of your workers' compensation claim as indicated in the statement checked below." R Vol I, p. 36. Such notice was NOT given on the stub that was attached to the June 22, 2015, check Defendants gave to Mr. Austin.

IC Form 8 also specifically calls for the **effective date and reasons** for stopping benefit payments. R Vol. I, p. 36. No such information was provided on the check stub. Instead, Mr. Austin would have had to turn to the NOCS provided by Defendants 11 months earlier on July 18, 2014, to understand the reasons his PPI benefits were stopping. The comment on the check stub

attached to the \$2,379.30 payment (which says “Final PPI Payment”), when read in conjunction with the July 18, 2014, NOCS advising Mr. Austin of his PPI benefits, may be interpreted as signaling his PPI payments were being stopped. However, it is not expressly stated as required by IC Form 8. The July 18, 2014, NOCS and the \$2,379.30 check were issued approximately 11 months apart, which strains the notion that Defendants’ check stub substantially complied with the § 72-806 and IDAPA notice requirements on its own.

Furthermore, as already noted, the effective date for cessation of PPI benefits was unclear because of the inconsistent dates referenced in the two documents. Was the effective date for the final PPI payment June 22, 2015 (one year from the date of the check); July 3, 2015 (the date noted on the check stub through which benefits were being paid); August 8, 2015 (one year from the date PPI payments were to cease where the first payment for the 55 week period was July 19, 2014); or August 21, 2015 (one year from the date PPI payments would be paid in full if payments were made according to the information in the July 18, 2018, NOCS)? The above demonstrates that the check stub did not substantially comply with the notice requirements of I.C. § 72-806 nor IC Form 8.

B. The Industrial Commission’s conclusion that Mr. Austin’s complaint was timely filed is supported by alternative grounds: the complaint was filed within one year of the date of the last payment because the date of the last payment of income benefits, under I.C. § 72-706(3), is the date the last payment would have actually been made had Defendants made the scheduled payments in accordance with its previous Notice of Claim Status

Mr. Austin provided the Industrial Commission with additional grounds for finding that his complaint was timely filed. He argued that the date of the last payment of his PPI benefits, under I.C. § 72-706(3), should be interpreted as the date the last PPI payment would have been paid had

Defendants followed its prior NOCS. R Vol. I, pp. 82, 86. The Industrial Commission reached its decision (that Mr. Austin's complaint was timely filed) without relying on this alternative basis, R Vol. I, p. 95, but such basis provides this Court with an alternative for concluding the complaint was timely filed.

As discussed above, under I.C. § 72-706(3), a claimant has one year from "the date of the **last payment** of income benefits" within which to file a request for hearing (complaint). As applied to the stipulated facts in this case, the words "last payment" are ambiguous because it is not clear whether the last payment made by Defendants in June 2015 was a "lump sum payment" that extinguished the Defendants' liability for payment of Mr. Austin's present and future PPI benefits (akin to a settlement) or whether it was an "advance payment" to Mr. Austin in lieu of Defendants' obligation to make bi-weekly installment payments over the remainder of the 55 week period, which, if paid as scheduled, would have continued through August 2015. Furthermore, the date of the last payment is ambiguous because it does not specify whether the date of the last payment is the date of the last payment being due or the date of the last payment being made.

"The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *Verska v. Saint Alphonsus Reg'l Med. Ctr*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (citations and quotations omitted). A statute is ambiguous where the language is capable of more than one construction. *Struhs v. Protection Techs*, 133 Idaho 715, 718-19, 992 P.2d 164, 167-68 (1999) (citations omitted). In construing an ambiguous statute, this Court attempts to ascertain

legislative intent through examining factors such as the statute's language, the reasonableness of a proposed interpretation, and the policy underlying the statute. *Id.* Statutes must be liberally construed with a view of accomplishing their aims and purposes and attaining substantial justice. *State v. Groseclose*, 67 Idaho 71, 74, 171 P.2d 863, 864 (1946). As noted above, Idaho's worker's compensation statutes are liberally construed in favor of the employee/claimant.

Other jurisdictions have resolved the issue of how to apply a worker's compensation statute of limitation that is one-year from "last payment," similar to Idaho's. In *Hyatt v. Harvest State Coop.*, 621 N.W.2d 369 (S.D. 2001), the Supreme Court of South Dakota applied the following analysis:

We recognize that we must apply the South Dakota Occupational Disease Disability Law according to the plain meaning of the statutes. [citation omitted]

Both sections 62-8-32 and 62-8-44 refer to "the last payment" as the starting point when the one-year time frame for filing for additional compensation or a modification of award begins to run. The term "last payment" is not defined within our statutes. The majority of jurisdictions that have faced this question hold that it is not the date of the actual lump-sum payment, but rather it is the date when the last payment actually would have been made if installment payments had been made. [citations omitted]. Accordingly, the triggering date for the statutory period would be determined by deciding when the last installment payment would have been made. We find further support for this view in our own statutes, which show a preference for installment payments. [citations omitted].

We adopt the majority view that in the context of a commuted lump-sum payment, any applicable statutory limitations for further compensation or modification of the award begins to run from the date when the "last payment" would have been made had the award been paid in installments.

621 N.W.2d at 371.

As noted by the Court of Appeals of New Mexico in *West v. Home Care Res.*, 127 N.M. 78, 976 P.2d 1030 (N.M. App. 1999), a number of courts have adopted the position that, in the context of voluntary payments of compensation, “[w]hen payment is in a lump sum, the [statute of limitations] period runs not from the payment itself but from the time the last payment would have been made if the benefits had been made periodically.” 127 N.M. at 81, 976 P.2d at 1033 (quoting 7 Arthur Larson & Lex K. Larson, *LARSONS WORKER'S COMPENSATION LAW* § 78.43(a) (1998)). In *Dufrene v. Aetna Cas. & Sur. Co.*, 298 So.2nd 724 (La. 1974), the adjuster/surety made voluntary payment of \$3,500 in March 1969 to a worker for disability benefits arising from a hand amputation injury. 298 So.2nd at 725. The payment draft noted the payment was for 100 weeks of benefits at \$35.00 per week and indicated that the payment was final. *Id.* Where payment of benefits had been previously made, Louisiana's statute of limitation required that a claimant file a complaint within "one year from the time of making the last payment." *Id.* at 725 n.1 (citing La.R.S. 23:1209). The claimant filed a complaint more than one year after the March 1969 payment was made but less than one year from the 100-week period covered by the \$3,500 payment. *Id.* at 725. The court held that the \$3,500 payment in March 1969 was an advance payment of 100 weeks of benefits that was to become due, *id.* at 726, and that the complaint was timely filed within the one-year limitation period from date the last payment would have been due. *See id.* at 725.

In *Allen v. IBP, Inc.*, 363 N.W.2d 520 (Neb. 1985), a worker (Allen) was injured in January 1979. 363 N.W.2d at 522. His employer paid him 12 weeks of temporary total disability benefits

and, on October 25, 1979, the employer paid him a \$2,223.26 lump sum payment representing 288 weeks of five percent permanent partial disability. *Id.* The claimant filed a petition with the Nebraska Workmen's Compensation Court more than two years after the lump sum payment but within the period covered by the 288 week benefit payment. *Id.* The employer maintained that the claimant's petition was filed untimely under the Nebraska worker's compensation statute of limitation (which required that, when payments of compensation have been made, a petition must be filed within "two years from the time of the making of the last payment") because it was filed more than two years from the date the lump sum payment was made. *Id.* at 523. The claimant argued that the statute of limitation was triggered not by actual payment but by the date the last of the 288 weekly payments would have been made had they been paid periodically. *Id.* The court agreed with the claimant and in doing so reasoned, in part, as follows:

In *Southern Cotton Oil Co. v. Friar*, 247 Ark. 98, 444 S.W.2d 556 (1969), the employee had received two lump sum payments covering a 150-week period. Three years after the second payment, but less than 2 years after the 150-week period had expired, the employee filed a claim for additional compensation. The Arkansas court held that "the statute only commences at the date the last payment would have been due if the compensation had been paid in installments" *Id.* at 101, 444 S.W.2d at 558. See, also, *University v. Ind. Comm.*, 138 Colo. 505, 335 P.2d 292 (1959).

Although the authorities are not in complete agreement, most of the courts which have passed on this question have held that where compensation is commutated and paid in a lump sum, payment so made at the time of commutation does not constitute a "last" payment so as to start the running of the statutory period within which review may be sought; the statutory period, in such a case, does not run against a review application until the time when the payments on the original award or agreement would have run out had they continued

to have been paid in installments. As a reason for such rule, it has been pointed out that commutation does not in and of itself affect the merits as to whether in a particular case further compensation may or may not be attempted to be secured, but constitutes nothing more nor less than an advance payment. (Emphasis supplied.) *Cannot.*, 165 ALR. 9, 59-60 (1946).

While the A.L.R. citation referred to reopening or review of awards, the same rationale applies to original applications for compensation. Where compensation has been commuted by agreement and paid in a lump sum without court approval, § 48-139, such payment is not final; it is nothing more than an advance payment, and the statute of limitations, § 48-137, does not begin to run until the last periodic payment would have been paid, had payments been made in installments. To hold otherwise would, as here, permit employers to thwart claims of employees by imposing finality contrary to applicable statutes. Further, such a rule is in keeping with the general rule, "This jurisdiction has repeatedly held that the Workmen's Compensation Act is one of general interest, not only to the workman and his employer, but as well to the state and it should be so construed that technical refinements of interpretation will not be permitted to defeat it." *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 360, 258 N.W.2d 922, 926 (1977).

363 N.W.2d at 523-24.

Idaho's worker's compensation statutes do not define what is meant by "last payment." In Mr. Austin's case there had been no adjudication or settlement regarding Defendants' payment of income benefits or regarding Mr. Austin's right to receive additional income benefits in the future. Liberal construction of I.C. § 72-706(3) to promote the legislative purpose of Idaho's worker's compensation statutes (to provide sure and certain relief for injured workers and their families) precludes technical interpretation of "last payment" that would defeat Mr. Austin's claim. In this case, had Defendants continued to make the 55 weeks of bi-weekly PPI payments to Mr. Austin,

payment of those benefits would have extended to August 2015. Construing the words "last payment" in I.C. § 72-706(3) to mean the last day on which benefits were to be paid had the payments been made in the periodic installments, as set forth in Defendants' previous NOCS, gave Mr. Austin until August 2016 to file his complaint. The filing of his complaint on July 20, 2016, is well within the one-year limitation period. Such construction and application of I.C. § 72-706(3) is warranted and consistent with the legislative intent of Idaho's worker's compensation statutes and avoids technical interpretation that would defeat such legislative purpose.

Accordingly, if the Court were to determine that Mr. Austin's one-year filing limit under I.C. § 72-706(3) was not tolled by Defendants' failure to issue a written notice of change of status/NOCS to Mr. Austin, it may nonetheless find that the filing of his complaint on July 20, 2016, was timely because it was made within one year of the "last payment" of income benefits by Defendants.

V. CONCLUSION

For the reasons stated above, the Court should uphold the Industrial Commission's decision holding that Mr. Austin's complaint was timely filed.

DATED this 24th day of January, 2019.

RUCHTI & BECK LAW OFFICES



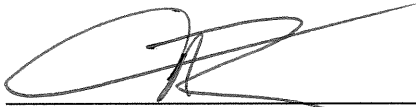
JOEL A. BECK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2019, I served a true and correct copy of the above and foregoing document to the following person:

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