5-18-2018

Gomez v. Crookham Company Appellant's Reply Brief Dckt. 45542

IN THE SUPREME COURT OF THE STATE OF IDAHO

BALTAZAR GOMEZ, JR.; ESTELLA GRIMALDO; ELENA GOMEZ; ELIZABETH FREEMAN; VERONICA FERRO; ZANDRA PEDROZA; ALICIA GOMEZ; YESENIA GOMEZ; AND, BALTAZAR GOMEZ, III, Plaintiffs/Appellants, -vs- CROOKHAM COMPANY, an Idaho corporation; and, JOHN DOES I-IV OR JON DOE CORPORATION I-IV, Defendants/Respondents.	)	**DOCKET NO. 45542-2017** Canyon County Case No. CV2016-6656

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Third Judicial District for Canyon County

Honorable Thomas J. Ryan, District Judge presiding.

ATTORNEYS FOR APPELLANTS
Kevin E. Dinius
Sarah Hallock-Jayne
Dinius & Associates, PLLC
5680 E. Franklin Road, Suite 130
Nampa, Idaho 83687

Nathan T. Gamel
SKAUG LAW, P.C.
1226 E. Karcher Road
Nampa, Idaho 83687

ATTORNEYS FOR RESPONDENTS
James A. Ford
Elam & Burke
P.O. Box 1539
Boise, ID 83701

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A. Several of Respondent's "Factual Statements" are not factual.

Respondent's Brief contains an inaccurate factual assertion on page 3 in which it is asserted that "[a]t the time of the accident, the drive shafts on the picking table were covered by a metal guard."[1] Respondent cites to its own Answer to Interrogatory No. 19 for this assertion.[2] Appellants dispute the veracity of this allegation. As a matter of common sense, if the drive shaft had been covered by a metal guard at the time of Ms. Gomez's death, then her hair would not have become caught in the drive shaft – but it did. Furthermore, this factual allegation as contained in Crookham's formal discovery responses and inserted into Respondent's Brief is contradicted by deposition testimony of the employee who actually built and installed the table. In this regard, as previously argued in *Plaintiff's Response to Defendant's Motion for Summary Judgment*,[3] Jim Bennett testified that there was no metal guarding covering the drive shaft underneath the table where Ms. Gomez actually got her hair caught:

Q. There is no other subsequent triangle then that goes under the machine, correct?
A. No.[4]

Furthermore, OSHA cited and penalized Crookham as a result of its failure to put machine guarding around the drive shaft underneath the table. Crookham did not dispute the citation and paid the fine.[5] Also, Crookham's own identified expert, Matthew Call, specifically noted that the drive shaft underneath the table did not have machine guarding.[6]

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[1] Respondent's Brief, p. 3.
[2] *Id*.
[3] Clerk's Record ("R"), p. 476-477 (at pp. 4-5).
[4] *Id*., p. 645 (at p. 88, ll. 19-21)
[5] *Id*., pp. 331-356.
[6] *Id*., p. 358.

Additionally, Respondent's legal counsel admitted in oral argument at the summary judgment hearing that the drive shaft under the table was not completely guarded:

> When the tables were installed, they did have certain guarding/safety features, including a metal panel or guard that covered the top of the table and between the belts that covered the drive shafts and U-joints, and this guard bent down and around over the edge of the table and under the table to some extent.[7] (emphasis added).

Therefore, OSHA, Mr. Call, and Mr. Bennet all agree that the drive shaft was not guarded under the table as discussed above. Despite these opinions, the conclusory argument was made at the summary judgment hearing that the drive shaft under the table was guarded "to some extent."[8] Then, this argument changed on appeal to the Idaho Supreme Court, again without evidentiary support, that the "drive shafts on the picking table were covered by a metal guard" and therefore "Crookham is unaware as to how the metal guard was avoided and Ms. Gomez got caught in the picking table."[9] Of interest, Respondent cited to its own discovery responses as support for this position.[10] In this regard, even the discovery response cited to as support for Respondent's position that the drive shafts were completely guarded are contradictory to that position:

> INTERROGATORY NO. 19: Please describe in complete detail all facts which form the basis of your affirmative defense that: "Plaintiffs claimed or alleged damages, if any, are the result of Ms. Gomez's own negligence." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which support this affirmative defense.

[7] Tr., p. 8, ll. 16-21.
[8] *Id*.
[9] Respondent's Brief, p. 3.
[10] R, p. 97.

> ANSWER TO INTERROGATORY NO. 19. Defendant incorporates its general objections. Defendant also objects to this interrogatory on the grounds that, as framed, it seeks disclosure of attorney work product as well as documents and things prepared in anticipation of litigation by a party or a party's representative. Subject to and without waiving these objections, at the time of the accident, the drive shafts on the picking table were partially covered by a metal guard. Because no one witnessed the circumstances leading up to the accident, Defendant is unaware as to how the metal guard was avoided and Francisca Gomez got caught in the picking table. (emphasis added).[11]

Based upon Respondent's own discovery responses, the argument that the drive shafts were completely covered by a metal guard and therefore Respondent lacks knowledge as to how Ms. Gomez could have got her hair caught in the uncovered drive shaft is patently false. There is no reasonable explanation offered by Respondent's as to why their position on metal guarding and knowledge of metal guarding changed without the addition of new evidence between the summary judgment hearing and subsequent briefing to the Idaho Supreme Court.

The next and related factual assertion made by Crookham that lacks any merit is that "Crookham is unaware as to how the metal guard was avoided and Ms. Gomez got caught in the picking table."[12] Again, as discussed above, there was no metal guarding under the picking table covering the drive shaft and the notion that the drive shaft was covered was created for the first time as part of Respondent's brief. To be blunt, Respondent is going to great lengths in Respondent's Brief to put its head in the sand regarding Ms. Gomez's cause of death. Respondent even acknowledged that Ms. Gomez was "cleaning a picking table when her hair was caught on the table's drive shaft."[13]

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[11] *Id.*
[12] Respondent's Brief, p. 3.
[13] *Id.*

Finally, Crookham alleges that "no one in the Scancore room witnessed the circumstances leading up to the accident,"[14] but the reality is that Ms. Gomez's movement in the room was actually taped on video surveillance and clearly shows Ms. Gomez in the process of cleaning the table with a compressed air wand just prior to her death.[15]

Ultimately, Respondent is blatantly trying to push heavily contradicted and even brand new factual assertions that are not supported by the evidence. The question is why? The answer to that question is strategy. Respondent is in a legal fight over what it knew and what it knows as a result of the Exclusive Remedy Rule challenge. As a result, Respondent is attempting to offer so-called "factual statements" that bring Respondent's knowledge into a positive light. In short, Respondent wants this Court to go down the argument trail that Respondent could not have had actual or consciously disregarded knowledge if it did not have any knowledge at all and somehow Ms. Gomez's cause of death was just a big mystery. Respondent made this strategy clear on page 32 of its brief when it stated ". . . that Respondent did not have actual knowledge that cleaning the picking table would cause injury or death of any employee" so it "could not consciously disregard knowledge that it did not have."[16]

For this strategy to work, Respondent needed to be consistent with its statements regarding its own knowledge about the table it designed, built, and operated. Respondent has failed to stay consistent with regards to its knowledge on one of the most fundamental issues in this case—machine guarding. Mr. Bennet testified that the machine guarding did not extend

[14] *Id*.
[15] R, p. 472 (Surveillance Video).
[16] Respondent's Brief, p. 32.

under the table to cover the drive shaft.[17] As discussed above, Mr. Bennet's testimony in this regard is consistent with the OSHA findings as well as the conclusions reached by Mr. Call. Despite this, Respondent took the position, as discussed above, in its formal discovery responses that the drive shafts were "partially covered." This was the argument asserted to the District Court during oral arguments during the summary judgment hearing. Now, before the Idaho Supreme Court, Respondent has changed the position to state that the drive shafts were completely guarded. So, at this point in time, Respondent has set forth three different versions of its knowledge of the metal guarding around the drive shaft: 1) the drive shaft under the table was not covered; 2) the drive shaft was partially covered; and 3) the drive shaft was completely covered.

It is important to note that this discrepancy was expressly pointed out to the District Court during oral arguments:

> Something I would also like to point out that was mentioned even in oral arguments today way—it's actually different than what was in briefing from the defense—this acknowledgment that the sheet metal came over the top of the machine and down the side and then the exact words were "to some extent underneath the machine." The briefing would lead you to I think it almost looked like, well, yeah, it totally covered it, but it didn't. It just came under to some extent, and left the drive shaft exposed. The person—the people that have the greatest knowledge of that exposure would be the person that designed and manufactured it which is Crookham. This wasn't designed by some other company, and they just didn't see it. They literally are the people that failed to put the sheet metal over the top of the drive shaft. Crookham did it.[18]

Clearly, the District Court was presented with a question of fact regarding Respondent's knowledge of whether or not the drive shaft under the table was guarded. This major

[17] R, p. 645 (at p. 88, ll. 19-21).
[18] Tr., p. 41, ll. 6-23.

discrepancy in Respondent's assertions regarding its own knowledge of machine guarding was expressly stated to the District Court.[19] Despite the existence of a significant question of fact regarding Respondent's knowledge of the literal mechanism of Ms. Gomez's death, the District Court granted summary judgment to Respondent and even granted costs to Respondent.[20] This was reversible error committed by the District Court. The District Court should have denied summary judgment to the Respondent and allowed this matter to move forward to a jury trial to determine the extent of Respondent's knowledge regarding the mechanism of Ms. Gomez's death. Furthermore, given this significant question of fact, the District Court certainly should not have ordered Ms. Gomez's family to foot the bill for Respondent's costs.

Frankly, it is difficult to understand how the District Court could have made determinations in Respondent's favor regarding Respondent's actual or consciously disregarded knowledge when Respondent itself cannot get its story straight regarding its own knowledge of the machine guarding around the very drive shaft that killed Ms. Gomez.

B. Death and injury are not synonymous under the Workers' Compensation Act.

Respondent asserts that although I.C. § 72-201 does not include the word death in it, it nonetheless applies to death claims because death and injury are synonymous under the Act.[21] In this regard, Appellants recognize that I.C. § 72-102(9) defines death under the Act as "death resulting from an injury or occupational disease." However, that definition merely means that for a death to be considered industrial in nature, it must have arisen from an industrial injury or

[19] *Id*.
[20] R, pp. 720-730, 747-748.
[21] Respondent's Brief, p. 10.

occupational disease. In other words, in practice, a workers' compensation surety is not liable to pay death benefits pursuant to I.C. § 72-413 unless the death had industrial origins. In the alternative, if the death arose from something else, like non-industrial cancer, then the death would not meet the definition. In short, the plain language of I.C. § 72-102(9) certainly does not mean that the Idaho legislature intended for injury to be inclusive or otherwise synonymous with death throughout the Act. In this regard, if the Idaho legislature intended for death and injury claims to be synonymous and inclusive of each other under the Act, it would be expected that the definition of "injury" or "personal injury" would include language expressly stating that those terms are inclusive of death claims.

In this regard, I.C. § 72-102(18) defines "injury" as a "personal injury caused by an accident arising out of and in the course of employment covered by the worker's compensation law."(emphasis added). I.C.§ 72-102(18)(c) also states that "injury" and "personal injury" includes "only an injury caused by an accident, which results in violence to the physical structure of the body" and does not include "an occupational disease and only such nonoccupational diseases as result directly form an injury."(emphases added). I.C. § 72-102(18)(b) defines "accident" as an "unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury."(emphasis added).

Clearly, the definitions of injury, personal injury, and even accident do not include death, let alone even mention death. That makes sense because being injured and being dead are completely different things.

C. I.C. §§ 72-201, 72-209, and 72-211 are not "mirror images" of each other.

Respondent further asserts that I.C. § 72-201, I.C. § 72-209, and I.C. § 72-211 are to be interpreted *in pari materia* (in light of each other) "since they have common purpose for comparable events or items."[22] Appellants disagree.

I.C. § 72-201 was formerly codified as I.C. § 72-102. I.C. § 72-102, before being amended and renumbered to become the modern day I.C. § 72-201, stated as follows:

> 72-102. Declaration of police power.—The common law system governing the remedy of workmen against employers for injuries received in industrial and public work is inconsistent with modern industrial conditions. The administration of the common law system in such cases has produced the result that little of the cost to the employer has reached the injured workman, and that little at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such employments formerly occasional have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-workers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes are hereby abolished, except as is in this act provided.(emphases added).

As noted above, I.C. § 72-102 was subsequently redrafted and codified as I.C. § 72-201, which states as follows:

> 72-201. Declaration of Police Power. The common law system governing the remedy of workmen against employers for injuries received and occupational diseases contracted in industrial and public work is inconsistent with modern industrial conditions. The welfare of the state depends upon its industries and even more upon the welfare of its wageworkers. The state of Idaho, therefore,

[22] Respondent's Brief, p. 10.

> exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this law provided.(emphases added).

Of interest, neither I.C. § 72-102 or I.C. § 72-201 expressly included death claims. I.C. § 72-102 only expressly applied to injury claims. As occupational diseases came into being, the Idaho legislature expressly added occupational disease claims to the injury claims when I.C. § 72-201 was enacted. However, death claims were not added. As a result, no version of the police power statute throughout the history of the Act ever included death claims.

The legislative history of I.C. § 72-203 is also important to this appeal. I.C. § 72-203 was the precursor statute to I.C. § 72-211 and stated as follows:

> 72-203. Right to compensation exclusive.—The rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury. Employer, who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under this act shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment; and all contracts of hiring in this state shall be presumed to include such an agreement.(emphases added).

This statute was subsequent redrafted and codified as I.C. § 72-211, which states as follows:

> 72-211. Exclusiveness of Employee's Remedy. Subject to the provisions of section 72-223, [Idaho Code] the rights and remedies herein granted to an employee on account of an injury or occupational disease for which he is entitled to compensation under this law shall exclude all other rights and remedies of the

> employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or disease.(emphases added).

Neither I.C. § 72-203 nor I.C. § 72-211 were expressly applicable to death claims. I.C. § 72-203 applied to injury claims by injured workmen and occupational diseases were added with the enactment of I.C. § 72-211—death claims were not added.

In reality, death claims were not <u>expressly</u> added into the statutory fray of the Exclusive Remedy Rule until the adoption of I.C. § 72-209 in 1971. No prior version of I.C. § 72-209 existed before 1971. This was a brand new creation by the Idaho State Legislature.

The problems with the Idaho Legislature's new I.C. § 72-209 statute is that it is not the "mirror image" of I.C. § 72-201 nor 72-211. It does not fit within the historical framework of the exclusive remedy rule analysis – it is very much on a new island by itself. It expressly applies to death claims where the other two statutes do not. It has a lot of third party language in it that the other statutes do not. It contains rules about damage caps and exemptions that the other statutes do not have. There is odd language in it that the statute may only be applicable "to the aggressor and shall not be imputable to the employer unless provoked or authorized by the employer." The other statutes do not contain any such qualifying language. Also, I.C. § 72-209 contains a lot of language dealing with the liability of a surety that the other statutes do not have. In many respects, I.C. § 72-209 is so different and such a massive departure from any prior historical statutory language under the Act that there really is no historical insight or comparison into its applicability prior to 1971. Finally, by its inclusion of death, it provides greater liability

protection to an employer/surety than the exclusive remedies identified in I.C. § 72-211 or the express grant of police power jurisdiction granted in I.C. § 72-201.

Ultimately, I.C. § 72-209, as it has been historically applied, is a cumbersome, vague, jumbled, and unique statute that does not "mirror" any other statutes.

D. Income benefits for personal injury and death benefits are entirely separate types of benefits.

Respondent asserts that the income benefits paid to an injured worker and the death benefits paid to the dependents of a deceased worker are one and the same and this "is further evidence of the Legislative intent that claims involving death be included within the exclusive jurisdiction of the Worker's Compensation Law and the Idaho Commission's exclusive jurisdiction."[23] This argument lacks merit because income benefits for personal injuries and death benefits are two completely different types of benefits.

It is accurate that the definition of "income benefits" found at I.C. § 72-102 includes "payments provided for or made under the provisions of this law to . . . dependents in case of death . . ."[24] However, that is not the end of the analysis. If you are a worker who is injured but not killed, you have an entirely separate scheme of rules that apply to your ability to collect income benefits from the Employer/Surety than a worker who actually died. If you are injured, an Employer/Surety does not have to pay any income benefits for the first five (5) days that the worker is off work as a result of the injury.[25] After the waiting period, and only if the Employer/Surety determines that you are actually entitled to income benefits, the income

[23] Respondent's Brief, pp. 16-17.
[24] I.C. § 72-102 (16).
[25] I.C. § 72-402

benefits payments start. Those payments are then statutorily controlled.[26] Pursuant to I.C. § 72-408, an injured worker will receive a partial percentage of their time of injury wage in an amount of sixty-seven percent (67%) of the average weekly wage for the first fifty-two (52) weeks and then sixty-seven percent (67%) of the average weekly state wage thereafter.[27] These benefits are only available during the "period of recovery."[28]

Death benefits are statutorily controlled by several completely different statutes. An analysis of these statutes leads to the singular conclusion that income benefits for personal injury and death benefits are not the same "type of benefit" as asserted by Respondent. First of all, to obtain death benefits, you must actually qualify as a dependent.[29] The only individuals who qualify for death benefits are the following:

A) Children who are unmarried and under eighteen (18) years old and incapable of self-support or up to twenty-three (23) years old if the children are full-time students.

B) The widow of the deceased worker, but only if the widow was living with the deceased or justifiably living separate from the deceased or dependent upon the deceased.

C) A parent or grandparent, but only if they are dependent upon the deceased.

D) Grandchildren, brothers, and sisters, but only if they are under the age of eighteen (18) years of age or incapable of self-support and dependent upon the deceased.[30]

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[26] I.C. § 72-408
[27] *Id*.
[28] *Id*.
[29] I.C. § 72-410.
[30] *Id*.

The general identification of classes of dependents in I.C. § 72-410 is then clarified in I.C. § 72-412. Widows only qualify for death benefits until the widow dies, remarries, or stays a widow for five-hundred (500) weeks or less, which is roughly 9.5 years.[31] Children's benefits are particularly complicated. As noted above, children must be unmarried and under the age of 18 or otherwise in school. However, handicap or special needs children are entitled to benefits after that time period but only for 500 weeks, but the Employer/Surety deducts the time period of payments already made from that 500 weeks.[32] The following is a very sad example of this statutory scheme at work:

> Employee (father) dies in an industrial accident leaving behind a four (4) year old daughter with severe mental disabilities that require extensive medical treatment and professional care. Employee father knew and planned on before his death for his daughter to likely live with him until the daughter's death so he could care for her and pay for her medical care. Employee father dies and this child receives death benefits after the father's death until the age of eighteen (18). At eighteen (18), this child, despite continuing to be completely dependent upon death benefits to pay for medical and professional care, is now on her own.

Also, keep in mind that the extension of benefits to twenty-three (23) years old for full-time students is strictly to the age of 23. If the child reaches the age of 23 during their junior year of college, the child will not receive any additional benefits through the remainder of college and/or graduate school.[33] It is unknown why the Idaho legislature based death benefits upon an arbitrary age of twenty-three (23) and not upon school completion. Although it may make some sense that college should be completed by the age of 23 for purposes of death benefits, it is not typically plausible to complete a graduate degree by 23.

[31] I.C. § 72-412(1)
[32] I.C. § 72-412 (2)
[33] I.C. § 72-412(3)

Ultimately, widows and children have their payments of death benefits further limited by IC § 72-413. Pursuant to this statute, if a worker dies and leaves a qualifying dependent spouse but no other dependents, that surviving spouse will receive forty-five (45%) of the deceased worker's average weekly wage.[34] The worker would get sixty-seven (67%) of the average weekly wage for an injury as noted above.[35] In short, the childless widow of a deceased worker will arbitrarily receive twenty-two percent (22%) less in death benefits than an injured worker receives in income benefits.

If the deceased worker leaves both qualifying dependent children and a widow, then the widow will still receive forty-five percent (45%) of the average weekly wage, but the children will receive far less. In this regard, each qualifying dependent child will receive five percent (5%) of the average weekly state wage, <u>but only up to three children</u>.[36] Obviously, this means that several of the children of large families get no benefits despite the death of a parent and despite the fact that they otherwise qualify (unmarried, under the age of 18, and dependent upon deceased parent).

The Idaho legislature found it necessary to treat the children of single parents even worse. Single parents to several children should be very careful not to die at work because all your kids will get is the following: One child will get just thirty (30%) of the average state wage and each

[34] I.C. § 72-413(1)
[35] See I.C. § 72-408
[36] I.C. § 72-413 (2)

additional child will get just ten percent (10%) and never to exceed sixty percent (60%) of the average state wage.[37]

The point of going through this analysis is to point out a simple fact: income benefits to an injured worker and death benefits to dependents are very different. Whereas income benefits are based upon medical restrictions and the period of recovery, death benefits are devoid of any similar considerations. Regardless of the financial and/or medical needs of a widow or dependent children or qualifying others, the amounts paid in death benefits are lacking in compassion and based solely upon the combination of mathematical formulas, dependent status, and an arbitrary 500 week end point – that's it. What matters is that the dependents can prove dependency, but the Idaho legislature did not deem it necessary for the Employer/Surety to pay for whatever that dependency is. In short, the Idaho legislature literally created a system where the fourth (4^{th}) child in a large family who has cancer and was wholly dependent upon the income from the deceased worker to pay for treatment would not qualify for any death benefits at all. Now, let's take that example a step further. Let's say that this is a six (6) child household, all the kids under eighteen (18), and the widow has been a stay at home mom for fifteen (15) years. This poor mom is now going to have to try to pay for the lives of herself and all her children on a personal income of forty-five percent (45%) of her husband's average weekly wage and she will even lose that minimum financial support arbitrarily in a little over nine (9) years. She cannot afford to go to school, pay for daycare for several children, cannot find a good paying job with a stay-at-home gap in her resume, and cannot afford the mortgage on the house because the little bit of

[37] I.C. § 72-413 (3)

money she gets in death benefits is going toward putting some food on the table and not much else. This poor mom has lost her husband, is going to lose her home, cannot afford healthcare insurance premiums for seven (7) people, and is going to end up on welfare and/or homeless.

This is the ugly and dark side of death benefits and the Exclusive Remedy Rule. This is the rarely spoken of reality faced by the families crushed by the so-called "grand compromise" that the Idaho Worker's Compensation Act sought out to achieve. Of all the statutory framework that exists in the Worker's Compensation Act, death benefits are likely the most arbitrary, coldly mathematically calculated, and devoid of any consideration of the financial, medical, and general well-being of the dependents.

In recognition of the reality of the application of death benefits, Appellants assert that it was the intent of the Idaho legislature to make the death benefits permissive, not mandatory and exclusive. In support of this argument, as stated above, the Idaho legislature never expressly included death claims within the statutory framework of I.C. §§ 72-201, 72-102, 72-203 or 72-211. As noted above, the Idaho legislature did not even include death claims within the statutory definition of "accident" under the Act.

Furthermore, the Idaho legislature, in enacting Idaho's wrongful death statute, did not carve out an exception to the applicability of the wrongful death statute in cases involving deaths from industrial causes.[38] In this regard, I.C. § 5-311, which is entitled "Suit for Wrongful Death by or Against Heirs or Personal Representatives—Damages" does not contain any language

[38] I.C. § 5-311

stating that it is subject to the Worker's Compensation Act.[39] Of interest, I.C. § 5-311 was enacted in 1984, thirteen (13) years after I.C. § 72-413 was enacted. I.C. § 5-311 was subsequently amended in 2010. Despite being in existence since 1984, created after the 1971 changes to the Worker's Compensation Act, and despite being amended fairly recently in 2010, I.C. § 5-311 remains silent on the preclusion of industrial death claims.

E. The District Court failed to define or apply the consciously disregarded knowledge prong of the Exclusive Remedy Rule.

Respondent asserts that the District Court not only defined the consciously disregarded knowledge prong of the Exclusive Remedy Rule, but also subsequently correctly applied the prong to the facts of this case.[40] This is patently false. The District Court, despite being tasked with doing so, completely failed to define or apply the consciously disregarded knowledge prong at all. No analysis was performed on what consciously, disregarded, or consciously disregarded means and certainly no legal authority was offered by either Respondent or the District Court into the meaning of the words in the context of the Exclusive Remedy Rule. The District Court also failed to acknowledge the disjunctive nature of the actual knowledge versus consciously disregarded knowledge language and explain the impact of the disjunctive nature. The District Court had a responsibility to define the phrase consciously disregarded and apply the facts of this case to that definition as part of the application of the Exclusive Remedy Rule. It was clear reversible error for the District Court to find in favor of Crookham's summary judgment motion without first undergoing this analysis. Ultimately, the Plaintiffs in the District Court below found

[39] *Id*.
[40] Respondent's Brief, p. 32.

themselves on the losing end of a summary judgment motion even though the District Court did not even attempt to define and apply all of the applicable legal elements of the Exclusive Remedy Rule.

F. The *Runcorn* decision is distinguishable and otherwise not applicable.

Respondent asserts that the Idaho Supreme Court held in *Runcorn v. Shearer Lumber Prod.*, 107 Idaho 389, 690 P.2d 324 (1984) that the "subject to" language contained in Idaho Code §§ 72-209 and 72-211 refers specifically and solely to statutory employer disputes concerning whether a statutory employer is considered an employer or a third party.[41] In this regard, Respondent's view of the *Runcorn* decision is far too limited. Although the *Runcorn* decision concerned itself with a statutory employer analysis, it does not then follow that the "subject to" language at issue is therefore only applicable to statutory employer cases. Rather, the clear implication of the disputed "subject to" language is that it applies to the entirety of the third party statute found at I.C. § 72-223 – not just statutory employer cases. In any event, the *Runcorn* decision is not applicable to the current matter before the Idaho Supreme Court. *Runcorn* involved personal injury, not death. Also, the main focus of the case was upon the statutory employer dispute and not upon the application of the elements of the Exclusive Remedy Rule.

G. Appellants did not raise a new issue on appeal.

Respondent asserts that Appellants raised a new issue on appeal by arguing that Ms. Gomez's death does not meet the definition of accident as defined by the Act and therefore the

[41] Respondent's Brief, pp. 20-23.

Industrial Commission does not have jurisdiction.[42] Respondent's argument in this regard lacks merit. Appellants raised the following issue on appeal: Whether the Court erred in finding that Respondent met the burden that Ms. Gomez's death is covered by the Worker's Compensation Act.[43] In this regard, Appellants asserted in *Plaintiffs' Response to Defendant's Motion for Summary Judgment* that Ms. Gomez was not working within the scope of her employment at the time she was killed.[44] This argument necessitates an analysis of the definition of "accident" as set forth at I.C. § 72-102(18)(b) because an accident requires an injury to be "connected with the industry in which it occurs." The argument made at the District Court was that Ms. Gomez was killed while engaging in an activity that was not connected with her industry.[45] As a result, her death did not meet the definition of an "accident" because 1) she was engaged in activity at the time of her death that was not connected to her industry; and 2) she died in the process. The definition of "accident" under the Act only expressly applies to industrial injuries that are connected with the industry in which those injuries occurred. Therefore, Ms. Gomez's death did not arise out of an in the course of "any employment covered by the worker's compensation law."

For the reasons set forth above, Appellanst did not raise a new issue on appeal. Rather, Appellants clarified and reiterated the argument made to the District Court.

[42] *Id.*, p. 25.
[43] R, p. 743.
[44] *Id.*, pp. 499-500 (at pages 27-28).
[45] *Id*.

H. The District Court's award of costs should be overturned.

As noted above, the District Court granted summary judgment to Crookham without defining the consciously disregarded prong of the Exclusive Remedy Rule or applying the facts of this case to that specific prong. As a result, the District Court determined that Crookham was the prevailing party without engaging in a complete legal analysis or factual application to the appropriate legal elements of the Exclusive Remedy Rule.

Furthermore, as discussed above, the District Court was presented with a significant question of fact regarding Respondent's knowledge of the machine guarding around the drive shaft that caused Ms. Gomez's death. As stated above, Respondent's statements regarding its knowledge on this fundamental issue have been very inconsistent. Despite this significant question of fact caused by Respondent's inconsistent statements regarding its own knowledge, the District Court granted summary judgment to Respondent and awarded it costs.

Under these circumstances, the District Court's award of costs to Crookham should be overturned. Generally, in order for the prevailing party to be entitled to an award of fees and costs, the "party seeking the fees must be the prevailing party and the losing party must have acted without a reasonable basis in fact or law." *City of Osborne v. Randel*, 152 Idaho 906, 909, 277 P.3d 353, 356 (2012). In the current matter, Appellants have not "acted without a reasonable basis in fact or law." In fact, Appellants presented a genuine issue of fact on the material issue of Respondent's knowledge to the District Court. Despite this, the District Court failed to analyze Respondent's inconsistent statements and found no issue of fact and then failed to define and apply the consciously disregarded knowledge prong of the Exclusive Remedy Rule.

Although Respondent was the prevailing party at the District Court, it did not prevail as a result of Appellants setting forth unreasonable legal or factual arguments. Rather, Respondent prevailed after the District Court committed reversible error.

Again, under these circumstances and the holding in *City of Osborne*, the District Court's award of costs to Respondent should be overturned.

I. Appellants are entitled to fees and costs related to this appeal.

Appellants are entitled to an award of fees and costs pursuant to I.C. § 12-121, I.R.C.P. 54(e), and I.A.R. 41 because Respondent has defended this appeal unreasonably based upon inconsistent statements it has made regarding its knowledge of machine guarding of the drive shaft that killed Ms. Gomez as discussed at length above.[46] Respondent's inconsistent statements regarding its own knowledge about machine guarding and the cause of Ms. Gomez's death, especially the assertion made without any evidentiary support that the drive shaft under the table was completely guarded, were also made without any foundation. These inconsistent statements have not only created a question of fact for a jury as to Respondent's knowledge, but have also significantly hindered and otherwise prejudiced Appellants' ability to conduct an investigation into Respondent's "actual or consciously disregarded knowledge" as required by the Exclusive Remedy Rule. In short, Respondent's inconsistent statements have had a direct impact on Appellants' ability to meet their burden and played a direct role in Appellants' loss at summary judgment at the District Court.

[46] See *Hossner v. Idaho Forest Indus., Inc.*, 122 Idaho 413, 835 P.2d 648 (1992).

Should the Idaho Supreme Court determine that Appellants are the prevailing party on appeal, Appellants would also be entitled to fees and costs pursuant to I.R.C.P. 54(d) and I.A.R. 41 because I.R.C.P. 54(d) expressly allows for costs and fees to be awarded as a matter of right to the prevailing party.

DATED this 18th day of May, 2018.

DINIUS LAW

By: _____
Kevin E. Dinius
Sarah Hallock-Jayne

SKAUG LAW

By: Nathan T. Gamel
Nathan Gamel

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2018, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

James A. Ford
Elam & Burke
251 E Front St, Ste 300
Boise, ID 83701

☒ Hand Delivery
☒ E-mail – *jaf@elamburke.com*

_____
for DINIUS LAW

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