

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID ROBNETT,)
)
 Claimant,)
)
 v.)
)
 KONKOLVILLE LUMBER)
 COMPANY, INC.,)
)
 Employer,)
)
 and)
)
 WAUSAU UNDERWRITERS)
 INSURANCE COMPANY,)
)
 Surety,)
)
 Defendants.)
)
 _____)

IC 98-025222

**FINDINGS OF FACT,
CONCLUSION OF LAW,
AND RECOMMENDATION**

August 7, 2006

INTRODUCTION

The Industrial Commission assigned this matter to Referee Lora Rainey Breen, who conducted a hearing in Lewiston on April 7, 2006. Danny J. Radakovich represented Claimant and Monte R. Whittier represented Defendants. The parties presented oral argument and submitted documentary evidence at hearing. They presented no witness testimony at hearing and took no post-hearing depositions. Thereafter, Claimant failed to submit a timely post-hearing brief. Defendants filed their brief and the matter came under advisement on June 19, 2006. On June 20, 2006, the Referee issued an Order striking Claimant's brief, which was received after Defendants' brief. The Referee has not considered Claimant's brief and any reference to Claimant's contentions or arguments is based on oral argument provided at hearing.

ISSUES

The sole issue to be determined at this time is whether Claimant has complied with applicable limitations set forth in Idaho Code § 72-706.

In their post-hearing brief, Defendants requested the Commission dismiss Claimant's complaint with prejudice for failing to file a brief. The Referee dealt with this issue by Order dated June 20, 2006, denying the motion to dismiss, and it will not be further addressed herein.

CONTENTIONS OF THE PARTIES

Claimant asserts that conduct on the part of Surety's adjuster misled his former attorney into letting the statute of limitations set forth in Idaho Code § 72-706 run. Given the misleading conduct, the Commission should extend the time period for Claimant to file an application requesting hearing and an award of additional income benefits.

Defendants contend no discussion regarding the filing of a complaint or the statute of limitations was ever had between Claimant and Defendants. The undisputed facts establish that Claimant did not file a complaint seeking additional benefits until after the 5-year statute of limitations had run, and he is forever barred from seeking additional income benefits.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Defendants' Exhibits A through J admitted at hearing.

After considering the record and arguments of the parties, the Referee submits the following Findings of Fact, Conclusion of Law, and Recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant sustained a knee injury on July 8, 1998, while working for Employer.

Surety accepted the claim and Claimant underwent a number of surgical procedures.

2. Claimant received income benefits (time loss and PPI) until January 25, 2002.

3. In February or March 2002, Claimant retained attorney Lori Gilmore (Gilmore) to represent him in this matter. Gilmore initiated contact with Surety's adjuster, Angie Bussert (Bussert), regarding the case and sent Bussert letters on March 5, 2002, March 27, 2002, and June 11, 2002. In each letter, Gilmore requested Bussert provide a settlement proposal. In addition, Gilmore and Bussert spoke by telephone several times prior to June 2002.

4. Bussert apparently replied to Gilmore only once in writing. In a letter dated June 13, 2002, Bussert wrote: "I will review Mr. Robnett's case with our counsel and prepare a settlement offer. The same will be forwarded to you as soon as possible." Exhibit H, p. 69. Admittedly, Bussert never did so and was uncertain as to the reason.

5. Gilmore continued to write letters to Bussert and speak with her by phone. On January 16, 2003, Gilmore wrote the following to Bussert: "In your letter of June 13, 2002, you suggested that you were going to prepare a settlement offer in the above matter. It is probably an appropriate time to talk about a settlement figure. We would like to know what the figure would be before Mr. Robnett makes a determination of whether he should leave the case open for future medical purposes or whether he should accept the settlement." Exhibit H, p. 71.

6. Gilmore wrote Bussert a final letter on August 20, 2003, which stated:

You had written to me on June 13, 2002, advising that you would review Mr. Robnett's case with your counsel and would prepare a settlement offer in the above matter. I wrote to you on January 16, 2003, concerning a settlement. You advised in March of 2003, that as long as Mr. Robnett was taking the drug Neurontin, that you wouldn't offer a settlement figure, so I wrote to you again on March 27, 2003, advising that Mr. Robnett was no longer taking the drug, as it wasn't helping him, and I again asked that you make an offer of settlement.

I have called you several times since that date, to see if you had prepared the offer. You have informed me that it is on your desk and that you would be

reviewing the matter. My client has waited patiently to hear back from you, but I think that five months is ample time to prepare an offer of settlement.

Please contact me as soon as possible, so that I can let my client know when an offer will be made.

Exhibit H, p. 73.

7. Claimant subsequently discharged Gilmore and retained his present attorney, who filed a Complaint requesting additional income benefits, medical benefits, and attorney fees on January 7, 2004. Defendants concede responsibility for future medical benefits, but deny Claimant's entitlement to any other benefits based on Idaho Code § 72-706(2).

DISCUSSION AND FURTHER FINDINGS

Statute of Limitations. Idaho Code § 72-706(2) provides that when payments of compensation have been made and thereafter discontinued, a claimant shall have five years from the date of the accident causing the injury within which to make and file with the Commission an application requesting a hearing for further compensation and award. Idaho Code § 72-706(6) further provides that, in the event an application is not made and filed as provided, relief on such claim shall be forever barred. Under JRP 3(A), the "application for hearing" described in Idaho Code § 72-706 is called a Complaint.

Claimant sustained his injury in a July 8, 1998 industrial accident and Surety paid benefits. Under Idaho Code § 72-706(2), Claimant had five years from the date of the accident, until July 8, 2003, in which to file a Complaint. He filed his Complaint on January 7, 2004.

Claimant alleges Bussert's conduct misled his former attorney into allowing the statutory limitations to run and asks the Commission to extend the time period for filing his Complaint. The Commission has previously addressed this issue, most notably in Swenson v. Estate of Fred Cranor, 88 IWCD 90, p. 2347 (Oct. 1988). In that case, like this one, the parties had initiated

negotiations prior to the expiration of the 5-year time period. Significantly, the Commission concluded:

The Commission concludes that claimant's Application for Hearing is not barred by the limitations period set out in I.C. Sec. 72-706. The Idaho Supreme Court has held that the various time limitations for giving notice and filing claims under the Worker's Compensation Law are merely statutes of limitations which may be waived by the action of the employer or surety where such action could have led the claimant to believe that his request for compensation was still under consideration by the employer. See Frisbie v. Sunshine Mining Company, 93 Idaho 169, 457 P.2d 408 (1969); Harris v. Bechtel Corp., 74 Idaho 308, 261 P.2d 818 (1953). The record in the instant case establishes that prior to the expiration of the five-year time period for filing an application for hearing, the claimant and the employer, as well as the claimant and the employer's heirs, became engaged in consultations and negotiations concerning the claim. Possibly these negotiations may have led claimant to believe that no decision had been made by the employer and that it was not necessary to file an application for hearing. Therefore, his claim is not barred.

Swenson, 88 IWCD 90 at 2349. Citing to Frisbie, *supra*, the Idaho Supreme Court upheld the Commission's decision in Swenson, finding that the limitation period under Idaho Code § 72-706 would be waived if defendant's conduct before the expiration of the period could have led claimant to believe defendant had not reached a final decision and might ultimately recognize liability for further compensation. Swenson v. Estate of Craner, 117 Idaho 57, 785 P.2d 621 (1990).

The facts of the present case fall squarely into such a scenario. The parties clearly began consultations and negotiations prior to the expiration of the statutory time period, and they continued up to and after the time period would have expired. Although Bussert testified she wrote her June 13, 2002 letter out of frustration because she could not get Gilmore to provide a settlement offer, she nonetheless wrote the letter and established the expectation that she would provide a settlement offer. Bussert also testified that as of March 27, 2003, just months before the statutory time period would have run, she and Gilmore were speaking by phone two to three

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of August, 2006, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States mail upon:

DANNY J RADA KOVICH
1624 G STREET
LEWISTON ID 83501

MONTE R WHITTIER
LAW OFFICES OF HARMON, WHITTIER & DAY
PO BOX 7507
BOISE ID 83707-7507

jkc

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID ROBNETT,)	
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Claimant,)	IC 98-025222
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v.)	
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KONKOLVILLE LUMBER)	
COMPANY, INC.,)	
)	
Employer,)	
)	ORDER
)	
WAUSAU UNDERWRITERS)	
INSURANCE COMPANY,)	August 7, 2006
)	
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Lora Rainey Breen submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Defendants have resubmitted their motion to dismiss Claimant's claim for consideration by the Commissioners. The Commission confirms and adopts the order of the Referee dated June 20, 2006 regarding Defendants' motion to dismiss the case for Claimant's failure to file a closing brief in this matter. Further, Claimant's oral argument at the hearing will be construed as his closing brief in the case.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Defendants waived the statutory limitation period set forth in Idaho Code § 72-706, and Claimant's claim is not barred.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 7 day of August, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
James F. Kile, Commissioner

/s/ _____
R. D. Maynard, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of August, 2006, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

DANNY J RADA KOVICH
1624 G STREET
LEWISTON ID 83501

MONTE R WHITTIER
LAW OFFICES OF HARMON, WHITTIER & DAY
P O BOX 7507
BOISE ID 83707

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/s/ _____