

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GOLDEN WARDLE,)
)
 Claimant,)
)
 v.)
)
 WATER & WASTE WATER)
 EQUIPMENT COMPANY,)
)
 Employer,)
)
 and)
)
 IDAHO ASSURANCE GUARANTY)
 ASSOCIATION, as successor in interest)
 of FREMONT INDEMNITY COMPANY,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 96-006992

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

Filed August 7, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on May 12, 2006. Claimant was present and represented by Gardner W. Skinner of Boise. Glenna M. Christensen, also of Boise, represented Employer/Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken and the parties elected to present oral closing arguments in lieu of submitting post-hearing briefs. This matter came under advisement on May 24, 2006, and is now ready for decision.

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether Employer’s failure to file a Notice of Injury and Claim for Benefits (I.C. Form 1) tolls the applicable statutes of limitation; and

2. Whether Surety's conduct constitutes an estoppel or waiver of statutes of limitation defenses.

CONTENTIONS OF THE PARTIES

Claimant contends that because Employer willfully failed to file an I.C. Form 1, the applicable statute of limitations is tolled under Idaho Code § 72-604. He further contends he was misled by Surety regarding whether his "claim" would remain open beyond the applicable 5-year statute of limitation found in Idaho Code § 72-706(2). Claimant put off having a total knee replacement beyond the 5 years on the advice of his treating physician and with knowledge of Surety and he understood that all benefits to which he was entitled would be paid, not just medical.

Defendants contend that Surety explained to Claimant that income and indemnity benefits would not be paid past the 5-year period, but that the cost of his total knee replacement would be covered and he was not misled, although he may have misunderstood. They offer no explanation regarding Employer's failure to file an I.C. Form 1.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and nurse case manager Sara Burns;
2. Claimant's Exhibits 1-10 admitted at the hearing;
3. Defendants' Exhibits A-D admitted at the hearing; and
4. The pre-hearing deposition of claims examiner Harris Mithoug with two exhibits taken by Defendants on April 13, 2006.

Claimant's objection at page 12 of Mr. Mithoug's deposition is overruled.

After having considered all the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 63 years of age, retired, and residing in Boise at the time of the hearing.

2. On August 22, 1995, Claimant injured his right knee when he tripped descending some stairs at his place of employment; Surety accepted the claim.

3. On November 8, 1995, Stanley W. Moss, M.D., performed an arthroscopic medial meniscectomy on Claimant's right knee with good results. Surety paid for the surgery. On November 1, 1996, Dr. Moss rated Claimant at 20% of the right leg at the knee permanently partially impaired. Surety paid the impairment. Dr. Moss recommended that Claimant follow up every six to twelve months for the next several years due to the progressive nature of his knee degeneration.

4. On March 8, 2004, Dr. Moss performed a right total knee arthroplasty (knee replacement) with good results. Surety paid for the procedure.

5. When a dispute arose regarding Claimant's entitlement to income benefits, Claimant filed his Complaint on May 16, 2005.

DISCUSSION AND FURTHER FINDINGS

The I.C. Form 1:

Idaho Code § 72-602(1) provides: **Employer's notice of injury and reports.** – (1) First report – Notice of injury or occupational disease. As soon as practicable but not later than ten (10) days after the occurrence of an accident or occupational disease, requiring treatment by a

physician or resulting in absence from work for one (1) day or more, a report **shall** be made in writing **by the employer** to the commission in the form prescribed by the commission; the mailing to the commission of the written report within the time prescribed shall be compliance.

(Emphases added).

Idaho Code § 72-604 provides: **Failure to report tolls employee limitations.** – When the employer has knowledge of an occupational disease, injury, or death and **willfully fails** or refuses to file the report as required by section 72-602(1), Idaho Code, 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 shall have been filed.

(Emphases added).

Idaho Code § 72-706(2) provides: **Limitation on time on application for hearing.** – When compensation discontinued. When payments of compensation have been made and thereafter discontinued, the claimant shall have five (5) years from the date of the accident causing the injury or date of first manifestation of occupational disease within which to make and file with the commission an application requesting a hearing for further compensation and award.

6. Here, the Referee takes judicial notice that an I.C. Form 1 was filed with the Commission on February 28, 1996. However, a shroud of mystery surrounds its preparation and filing. The only testimony regarding the I.C. Form 1 came from Claimant at hearing. He testified as follows regarding his knowledge of that document:

Q. (By Mr. Skinner): I'd like you to look at that [the I.C. Form 1] if you would and ask you, first of all, whether you recognize the document?

A. Yes.

Q. Okay. And there is handwriting on that document, is there not?

A. Yes.

Q. Whose handwriting is on that document?

A. Mine.

Q. Do you see any one else's handwriting on that document?

A. Only the numbers at the very top that say 06992.

Q. Okay.

A. And maybe department four. That's all I see that's different.

Q. Okay. There is a second page to the document and some handwritten notes. I'd ask you if you recognize the handwriting there?

A. That's mine.

Q. Again, did you fill all of that out?

A. Yes.

Q. All right. Mr. Wardle, do you have any recollection of when it was you filled that out?

A. Well, beyond just the dates on the -- on that sheet, no.

Q. Do you have any recollection of where you got the form that you filled out, the form itself that shows your handwriting?

A. I do not know whether it was given [*sic* -- to] me by the employer or if it was provided to me by industrial. I don't know.

Q. Do you have any recollection of what you did with it, who you gave it to, or who you sent it to once you completed it?

A. No. I feel pretty comfortable, because all our mail went through the front office. So, how -- where it went from me, I would have no doubt put it in -- either the boss's box, would be my best guess, but I can't remember exactly how or what I done with it, but it was mailed out of our office.

Q. Is it possible that you mailed it yourself to the Industrial Commission?

A. No.

Q. You don't think so?

A. I didn't personally mail it, no. I didn't stamp it, because it had to go through the office stamp machine, those kind [*sic*] of things.

Hearing Transcript, pp. 37-38.

7. Claimant's testimony regarding the contents of the I.C. Form 1 on file with the Commission is consistent with the document itself. Further, the lines provided for the

Employer's signature and the date the document was prepared are blank; the only signature on the Form 1 is that of Claimant. The Referee finds that Employer failed to prepare and file the Form 1 as is mandated by Idaho Code § 72-604. The question then becomes whether such failure to so prepare and file was willful.

8. The term "willfully" is not statutorily defined within Idaho's worker's compensation law. However, the Idaho Supreme Court in *Bainbridge v. Boise Cascade Plywood Mill*, 11 Idaho 79, 721 P.2d 179 (1986) defined willful as implying a "conscious wrong." *Id.*, at page 82. Defendants offered no evidence regarding any reasoning behind Employer's failure to prepare and file the I.C. Form 1. Claimant informed Employer's owner within a few days of his accident and injury and his need to seek medical treatment. Such knowledge on Employer's part triggered his mandatory duty to prepare and file a Form 1; to not do so created a conscious wrongful act, i.e., it was "wrong" for Employer to ignore Idaho Code § 72-602(1) without providing a reasonable basis for doing so.

9. The provisions of the Worker's Compensation Law are to be liberally construed in favor of the injured employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). However, the Commission is not required to construe facts liberally in favor of a claimant when evidence is conflicting. *Aldrich v. Lamb Weston*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Here, the evidence is not conflicting. Employer knew of an industrial accident causing an injury that required medical treatment and, without explanation, failed to fulfill his statutory duty of preparing and filing an I.C. Form 1 in a timely fashion. By such willful failure, Employer has tolled the statute of limitations found in Idaho Code § 72-706(2) and Claimant's Complaint was, therefore, timely filed.

CONCLUSIONS OF LAW

1. The five-year statute of limitation found in Idaho Code § 72-706(2) is tolled by Employer's willful failure to file an I.C. Form 1 and Claimant's Complaint is, therefore, timely filed and not subject to dismissal.

2. The remaining issue regarding whether Surety misled Claimant to his prejudice is moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __21st__ day of __July__, 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __7th__ day of __August__, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

GARDNER W SKINNER
PO BOX 359
BOISE ID 83701-0359

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

_____/s/_____

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GOLDEN WARDLE,)	
)	
Claimant,)	IC 96-006992
)	
v.)	
)	ORDER
WATER & WASTEWATER)	
EQUIPMENT COMPANY,)	Filed August 7, 2006
)	
Employer,)	
)	
and)	
)	
IDAHO ASSURANCE GUARANTY)	
ASSOCIATION, as successor in interest)	
of FREMONT INDEMNITY COMPANY,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his 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 recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. The five-year statute of limitation found in Idaho Code § 72-706(2) is tolled by Employer's willful failure to file an I.C. Form 1 and Claimant's Complaint is, therefore, timely filed and not subject to dismissal.

2. The remaining issue regarding whether Surety misled Claimant to his prejudice is moot.

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

DATED this __7th__ 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 _7th_ 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:

GARDNER W SKINNER
PO BOX 359
BOISE ID 83701-0359

GLENNA M CHRISTENSEN
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____/s/_____

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