

BACKGROUND

It is undisputed that Claimant sustained an injury to his lumbar spine as the result of a July 4, 1998, industrial injury. Following a hearing of September 26, 2002, the Industrial Commission determined that Claimant sustained an injury to his left shoulder during an exercise program prescribed for treatment of his compensable back injury, and that the left shoulder injury occurred as a compensable natural consequence of an accident arising out of and in the course of employment. The Commission determined that Claimant was entitled to medical benefits for the left shoulder injury as well as temporary total disability benefits from December 1, 2000 to November 1, 2001. The decision was not appealed and became final.

Claimant filed a Complaint with the Industrial Commission on October 5, 2005, seeking additional benefits for his lumbar injury of July 4, 1998. Defendants assert that Claimant's claim (except for medical benefits) is barred because the Complaint was not filed within five years of the date of Claimant's injury pursuant to Idaho Code § 72-706. The parties seek a ruling regarding whether Claimant's claim for income benefits for his July 4, 1998, injury is time barred.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Stipulation of Material Facts 1-10 dated March 19, 2008; and
2. Joint Exhibits A-F, attached to the stipulation.

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

FINDINGS OF FACT PER STIPULATION

1. Claimant was injured in an industrial accident in Canyon County, Idaho on July 4, 1998. (See Notice of Injury and Claim for Benefits- Exhibit "A").

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2. As a result of the industrial accident, Claimant sustained a lumbar spine injury requiring surgical intervention. The insurer, Fremont Indemnity Company, paid Claimant for some medical benefits and PPI related to his back injury.

3. Between November 6-10, 2000 Claimant injured his left shoulder while rehabilitating his lower back injury in the Elks LifeFit Program. Benefits related to the shoulder injury were denied by the surety.

4. Claimant retained counsel in January 2001 to represent his claim with the Industrial Commission (I. C. No. 98-022572), as the insurer refused to pay Claimant for any benefits related to the shoulder injury sustained while rehabilitating his lower back injury in the Elks LifeFit Program.

5. Counsel, on behalf of Claimant, filed a Complaint on May 7, 2001. The benefits claimed at that time were limited to “medical benefits for left shoulder injury.” No benefits were claimed at that time relating to the original lumbar injury that occurred on July 4, 1998. (See Complaint- Exhibit “B”)

6. A hearing was held on September 26, 2002, before Referee Douglas A. Donahue on Claimant’s claim for benefits relating to only his shoulder injury.

7. The Referee concluded on April 15, 2003, that the shoulder injury was a natural consequence of the original injury arising out of Claimant’s employment (the 1998 injury to lower back); that the shoulder injury was caused by exercise prescribed for the treatment of the compensable injury; that Claimant was entitled to Temporary Total Disability Benefit payments for a period of eleven (11) months; and that Claimant was entitled to medical care benefits relating to the shoulder injury. The Referee further concluded that the decision was final and conclusive as to all matters adjudicated pursuant to Idaho Code § 72-718. The matters

adjudicated related to the shoulder injury and whether it was a natural consequence of the initial injury to the lower back. (See Order- Exhibit "C").

8. On October 5, 2005, counsel on behalf of Claimant filed a Workers' Compensation Complaint under I. C. Case No. 98-022572, seeking additional medical benefits for the lumbar injury having occurred on July 4, 1998, and the resultant surgeries, additional TTD, PPI and PPD benefits. (See Complaint- Exhibit "D"). No TTD or PPD benefits have been paid by Defendants after 2003.

9. On October 25, 2005, Defendants filed an Answer. Defendants raised as an Affirmative Defense whether the benefits (besides medical benefits) were statutorily barred under I. C. Section 72-706. (See Answer- Exhibit "E").

10. On November 16, 2005, counsel wrote a letter to Claimant regarding the passing of the statute of limitations. (See Letter- Exhibit "F").

DISCUSSION AND FURTHER FINDINGS

11. Idaho Code § 72-706(2) provides that when payments of compensation have been made and thereafter discontinued, a 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. Under JRP 3(A), the "application for hearing" described in Idaho Code § 72-706 is called a Complaint. In the event an application is not made and filed as provided, relief on such claim shall be forever barred. Idaho Code § 72-706(6).

12. Claimant sustained an industrial injury to his lumbar spine on July 4, 1998, for which Defendants initiated compensation. Claimant had five years, until July 7, 2003,¹ to file a

¹ The expiration of five years was July 4, 2003, which was a holiday that fell on a Friday. Accordingly, Claimant's time to file his complaint was July 7, 2003, which was the first day that the Industrial Commission was open for business following the expiration of five years.

Complaint. Claimant filed a Complaint on May 7, 2001, seeking benefits relating to his left shoulder as a follow-on injury sustained during exercises prescribed for his back injury. The Claimant subsequently filed a Complaint on October 5, 2005, seeking additional benefits relating to his lumbar spine. The Complaint filed on May 7, 2001, was timely filed. The Complaint filed October 5, 2005, was not timely filed.

13. Issues raised in Claimant's May 7, 2001, Complaint were fully adjudicated at hearing on September 26, 2002. The Order of the Industrial Commission states that their decision is "final and conclusive as to all matters adjudicated." The Commission did not retain jurisdiction over the disputed issues and was not requested to do so by either party.

14. Claimant's untimely Complaint filed October 5, 2005, does not constitute an Amended Complaint and can not be boot-strapped to the timely Complaint of May 7, 2001.

CONCLUSION OF LAW

Claimant's claim for income benefits for his injury of July 4, 1998, is time barred pursuant to Idaho Code § 72-706(2).

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this __1st_ day of May, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE M. PERRY,)
)
 Claimant,)
)
 v.)
)
 KELLER SUPPLY COMPANY, INC.,)
)
 Employer,)
)
 and)
)
 IDAHO INSURANCE GUARANTY)
 ASSOCIATION, as successor in interest to)
 FREMONT INDEMNITY COMPANY,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 1998-022572

ORDER

Filed May 7, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion 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 conclusion of law as its own.

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

1. Claimant's claim for income benefits for his injury of July 4, 1998, is time barred pursuant to Idaho Code § 72-706(2).
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

ORDER - 1

DATED this ___7th___ day of May, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R.D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __7th__ day of May, 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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ge _____/s/_____