



## **CONTENTIONS OF THE PARTIES**

Claimant contends his Complaint should be deemed timely filed within the statutes of limitation. Employer failed to file a Form 1. By operation of Idaho Code § 72-604, the limitations of Idaho Code §§ 72-701 and 72-706 were tolled.

Defendants contend Employer did not “willfully” fail or refuse to file a claim. Therefore, Idaho Code § 72-604 does not apply to toll the statutes of limitation. Claimant’s Complaint was filed more than one year after the accident.

## **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, his mother Delores Moore, and claims examiner Donna Cady;
2. Claimant’s Exhibit 1; and
3. Defendants’ Exhibit B;

After considering the record, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

## **FINDINGS OF FACT**

1. Claimant’s father, Employer, owned and operated a wholesale tire business.
2. Claimant occasionally worked for his father. On May 17, 2005, Claimant was injured when a jack handle struck him in the face. Claimant broke several bones, suffered a detached retina, and required multiple surgeries to repair his injuries.
3. Claimant’s father was present when the accident occurred. He drove Claimant to the hospital.
4. Claimant’s father sought advice from the independent insurance agent who sold him several different insurance policy coverages, both business and personal. They met and

## **RECOMMENDATION - 2**

discussed the accident. They questioned whether Claimant was an employee and whether workers' compensation liability had accrued. Claimant's father made a claim on Claimant's behalf against a policy other than his workers' compensation policy. A First Report of Injury or Illness form, Form IC 1-A ("Form 1"), was not filed.

5. A Form 1 was first filed on August 15, 2006.

6. Surety first made a payment related to this case on December 10, 2006.

7. Claimant filed a complaint on June 18, 2007.

8. Claimant's father died from complications of cancer on March 1, 2008. He had been receiving treatment for his cancer at least since 2001. Claimant's wife testified the treatments affected and gradually worsened his mental state as time and the disease progressed.

#### **DISCUSSION AND FURTHER FINDINGS OF FACT**

9. **Statutes of Limitation.** Idaho Code § 72-701 requires a claimant to give notice of an accident within 60 days. Employer had actual notice of the accident. He was present when it occurred. He knew medical care was required and that Claimant could not return to work. Applying Idaho Code § 72-704, the requirement of notice was satisfied.

10. Idaho Code § 72-701 also requires a claimant to make a claim for compensation within one year of the date of accident. The statute provides two exceptions to the one-year limit: "If payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be required." Surety did make voluntary payments beginning December 10, 2006, more than one year after the accident. However, by express language of the statute, such payments must "have been made" before the limitation has expired. This meaning of the Legislature's use of the past tense is more obvious when the other exception is considered. The second

exception applies when an application requesting a hearing “has been filed.” If a claimant waited more than one year, then filed an application requesting a hearing, and then argued that his claim was timely because his application requesting a hearing “has been filed,” that claimant’s argument would certainly fail. Similarly, Claimant’s argument that Surety’s voluntary payments miraculously resurrected the expired exception must fail. These payments made after the limitation had expired do not alter Claimant’s obligation to file a claim timely. Claimant wisely abandoned this argument in posthearing briefing.

11. Regarding Idaho Code § 72-706, the above analysis applies as well. The limitation of the one-year statute, section 706(1), is not made a nullity by the five-year statute, section 706(2), in cases where no payments were made during the first year but commenced thereafter.

12. The crucial exception to the statutes providing one-year limit is set forth at Idaho Code § 72-604. It states in relevant part:

When the employer has knowledge of an . . . injury . . . and willfully fails or refuses to file the report as required by section 72-602(1), 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.

There is no issue about whether Employer was required to file a report. Idaho Code § 72-602(1).

13. The key issue is the meaning of the word “willfully”. Both parties cite to *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P2d. 179 (1986). Defendants rely upon certain language in it; Claimant calls the language “dicta” and distinguishes it from Claimant’s facts. In *Bainbridge*, the Court held that Idaho Code § 72-604 did not apply to the limitations statute for occupational disease, Idaho Code § 72-448. Thus, the Court’s discussion about the meaning of the word “willfully” in section 604 is dicta. Despite the

nonbinding nature of that discussion, it remains a relevant consideration in interpreting the statute.

14. The word “willfully” means something more than “intentionally.” Else, the Legislature would not have used the phrase “wilful intention” in Idaho Code § 72-208. The addition, according to the *Bainbridge* Court, is that the word “implies a conscious wrong.” *Id.*, at 82, P.2d at 182, (quoting *Smith v. Idaho Dept. of Employment*, 107 Idaho 625, 691 P.2d 1240(1984)).

15. In *Bainbridge*, Claimant had reported inconsistently whether her occupational disease was caused by work. Her doctor’s note was ambiguous. The Court and the Commission agreed her employer’s failure to file a report was not wilful; Her employer was reasonably confused about objectively inconsistent and ambiguous reports.

16. Similarly, where an employee did not report an accident or injury – where he did not lose work time nor seek medical treatment for more than one year after an alleged accident – the Court and the Commission agreed his employer’s failure to file a report was not wilful. Under the language of section 602, his employer was not required to file a report. *Petry v. Spaulding Drywall*, 117 Idaho 382, 788 P.2d 197 (1990).

17. The facts of these cases are different than those of record here. There is no ambiguity over whether an accident occurred or caused an injury; There is no question that the elements of section 602 were met to require Employer to file a Form 1. Here, Employer met with his insurance agent to determine what should be done. The Commission need not be present at that meeting to infer that the workers’ compensation policy was discussed – indeed, the agent admitted it in his deposition. It appears Employer and the agent were uncertain whether Claimant would be deemed an “employee” and whether Surety would

ultimately be liable for Claimant's injuries.

18. Idaho Code § 72-602(1) does not give Employer the privilege of determining whether defenses are present or whether Surety would ultimately be liable. It requires the filing of a report when an accident and injury that involves medical care and lost work time occurs.

19. Employer's failure to file a report was conscious; he thought about it and sought advice about it. It was wrong; his conscious decision and failure to act violated the Idaho Workers' Compensation Law. Moreover, whether intended or not, it wronged Claimant, his own son. Thus, even if the *Bainbridge* dicta were the standard, Employer consciously violated the Idaho Workers' Compensation Law by failing or refusing to file a report.

20. Given the facts of the record before the Commission, Employers' conduct was wilful. Idaho Code § 72-604 prevented the running of the statutes of limitation against Claimant.

21. **Attorney fees.** Claimant asserts that, because Defendants unreasonably delayed or denied him payment of benefits; he is entitled to attorney fees under Idaho Code § 72- 804. The Commission has not yet determined whether Claimant is eligible for benefits; consequently, it has not yet determined if there was an unreasonable denial or delay in payment of any benefits. The issue of whether Claimant is entitled to attorney fees is not ripe for decision.

### **CONCLUSIONS OF LAW**

1. Claimant timely made a claim and filed his Complaint in this matter by operation of Idaho Code § 72-604;

2. The issue of whether Claimant is entitled to attorney fees is reserved until such time as it is ripe for decision; and

3. Nothing in this decision is intended or may be interpreted as deciding any ultimate issue of liability in this matter except as set forth in conclusions of law 1 and 2.

**RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 28TH day of November, 2008.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

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

DATED this 15TH day of DECEMBER, 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 15TH day of DECEMBER, 2008 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

John F. Greenfield  
P.O. Box 854  
Boise, ID 83701

Paul J. Augustine  
P.O. Box 1521  
Boise, ID 83701

db

/S/ \_\_\_\_\_