

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

STANLEY A. MORTON, JR., )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 STATE OF IDAHO, INDUSTRIAL )  
 SPECIAL INDEMNITY FUND, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**IC 2001-504012**

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

Filed December 23, 2011

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just. The matter was re-assigned to the Commissioners, who conducted a hearing in Sandpoint on April 28, 2011. Claimant, Stanley A. Morton, Jr., was not present, but was represented by James S. MacDonald, who appeared on behalf of Joseph A. Jarzabek, Claimant’s attorney of record. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF) was represented by Thomas W. Callery. Claimant did not present testimony or offer exhibits. ISIF presented oral and documentary evidence. Both parties submitted post-hearing briefs. The matter came under advisement on August 24, 2011, and is now ready for decision.

**ISSUE**

The sole issue to be decided is whether Claimant’s claim against ISIF is time-barred pursuant to Idaho Code § 72-706 or other statutory limitation.

**CONTENTIONS OF THE PARTIES**

Claimant contends that under the plain language of the statute, Idaho Code § 72-706 does not apply to complaints against ISIF. Interpreting it otherwise would be contrary to the precedent set by the Idaho Supreme Court in *Anderson v. Potlatch Forests*, 77 Idaho 263, 291 P.2d 859

(1955).

ISIF contends that Idaho Code § 72-706(2) does apply to Claimant's complaint. The rationale justifying the *Anderson* rule is obsolete. Since *Anderson*, the Court has declined to make a direct ruling on the issue of whether a statute of limitations applies to complaints against ISIF, but has implied that one does. Furthermore, policy supports the finding that Section 72-706 applies to complaints against ISIF; to hold otherwise would render ISIF vulnerable to stale claims that are difficult or impossible to investigate.

### **CLAIMANT'S MOTIONS**

In his brief, Claimant renews his motion to dismiss his complaint without prejudice. Claimant's attorney, Mr. Jarzabek, also renews his motion to withdraw as attorney of record. These motions were addressed in the Commission's Order Denying Motions, filed April 20, 2011, and Order Regarding Claimant's Motions, filed April 25, 2011. Our rationale for denying Claimant's motions remains the same and will not be repeated here. Claimant's motion to dismiss is DENIED. Mr. Jarzabek's motion to withdraw is DENIED.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Verlene Wise taken at hearing; and
3. Defendant's Exhibits 1-22.

After considering the above evidence and the arguments of the parties, the undersigned Commissioners make the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Claimant injured his lumbar spine in an industrial accident on March 1, 2001. He filed a workers' compensation complaint against Employer S. Blood Company and Surety Idaho

State Insurance Fund on April 23, 2003.

2. On August 21, 2003, Claimant filed with the Commission a notice of intent to file a workers' compensation complaint against ISIF. The notice was served on ISIF, and ISIF acknowledged receipt of the notice on August 27, 2003. Pursuant to Idaho Code § 72-334, ISIF was required to either deny the claim or make an offer of settlement within sixty days of receiving notice.

3. On October 9, 2003, ISIF attempted to file an answer to Claimant's complaint against ISIF with the Commission. In the answer, ISIF denied Claimant's claim for benefits. However, Claimant had not yet filed a complaint against ISIF, and on October 16, 2003, the Commission returned the answer to ISIF without filing it. In a letter to Thomas High, ISIF's attorney at the time, the Assistant Commission Secretary wrote, "The Answer to Complaint ... [is] being returned as the Industrial Commission does not have a Complaint against State of Idaho, Industrial Special Indemnity Fund on file at this time." Claimant's counsel was copied on the letter.

4. Claimant thereafter entered into a lump sum settlement agreement with Employer and Surety. On November 21, 2003, the Commission dismissed the complaint against Employer and Surety with prejudice.

5. In April and May 2004, Claimant's counsel corresponded with Mr. High to discuss the claim against ISIF. The correspondence appears to have ended in May 2004. Between May 2004 and May 2010, neither Claimant nor Claimant's counsel communicated with ISIF about the claim, according to ISIF records.

6. On May 20, 2010, Claimant filed a request for calendaring with the Commission. ISIF responded to Claimant's counsel that no complaint had been filed against ISIF. Claimant then filed a complaint against ISIF on June 1, 2010. ISIF filed an answer on June 10, 2010,

asserting, among other defenses, that Claimant's complaint is time-barred under the provisions of Idaho Code § 72-706(2).

### **DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW**

The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

Any claimant making a claim for benefits with ISIF shall file a notice of claim with the manager not less than sixty days prior to the date of filing a complaint against ISIF. Idaho Code § 72-334. Failure to timely file the notice shall require the involuntary dismissal of the complaint. *Id.* The manager shall evaluate the notice and shall approve or deny the claim or make an offer of settlement within the sixty-day period. *Id.*

When a claim for compensation has been made and no compensation has been paid, the claimant, unless misled to his prejudice by the employer or surety, shall have one year from the date of making claim within which to make and file a complaint. Idaho Code § 72-706(1). When payments of compensation have been made and thereafter discontinued, the claimant shall have five years from the date of the accident to file a complaint. Idaho Code § 72-706(2). If income benefits have been paid and discontinued more than four years from the date of the accident, the claimant shall have one year from the date of the last payment within which to file a complaint. Idaho Code § 72-706(3).

7. At issue in this case is whether the time limitations prescribed by Idaho Code § 72-706 apply to complaints against ISIF; or, if not, whether some other statute of limitation does.

Claimant argues that Section 72-706 does not mention ISIF; therefore, the time limitations do not apply. ISIF argues that the code sections pertaining to ISIF are silent on the issue of a statute of limitations; thus, the general limitations contained within Section 72-706 must apply. Though the Idaho Supreme Court held there is no statute of limitations for complaints against ISIF in *Anderson*, the Court has since distanced itself from that precedent. ISIF contends that the rationale underlying *Anderson* is obsolete and that subsequent Court cases have questioned the holding.

8. *Anderson*. On December 13, 1955, the Court issued its opinion in *Anderson v. Potlatch Forests*, 77 Idaho 263, 291 P.2d 259. The case involved a claimant who was injured in an industrial accident on July 11, 1949. He entered a compensation agreement with the employer and surety in September 1950. Under the agreement, he received compensation payments until April 1, 1953.

On June 15, 1953, the claimant sent a letter to the Industrial Accident Board, predecessor to the Commission, requesting additional compensation. The Board interpreted the letter as an application for hearing and scheduled a hearing for October 21, 1953. Following additional correspondence, the hearing was canceled, and the Board advised the claimant to consult an attorney with regard to his rights relating to ISIF.

The claimant hired an attorney, who filed a petition for hearing on May 10, 1954. The petition joined ISIF to the case. ISIF argued that the four-year statute of limitations then in effect barred the claimant's claim. The Board found in ISIF's favor. However, the Court overturned the Board's decision, finding that the claimant's June 15, 1953 letter seeking additional compensation was filed with the Board within four years of the accident, and that the claimant's 1954 petition related back to the earlier request. Additionally,

[t]he reason the statute of limitations relative to giving notice and making claims within a certain time after the injury does not apply

is that payments from the second injury fund are made only after completion of payments by the employer, which payments may extend beyond the period of the aforesaid statute of limitations. Further, the fund is administered by the board, and notice to the board would be notice to the fund.

*Anderson*, 77 Idaho at 268, 291 P.2d at 862.

9. In the instant case, ISIF argues that the rationale underlying the *Anderson* decision is based on obsolete circumstances. The Commission does not oversee ISIF as the Board once oversaw it. Because the Commission and ISIF are two separate entities, notice of a claim provided to the Commission does not automatically provide ISIF with notice. In order to be made aware of claims against it, ISIF must itself be served with a notice of claim, followed by a complaint, as prescribed by Idaho Code § 72-334.

10. Furthermore, ISIF argues, its liability is calculated from the date a claimant attains medical stability following his last injury. In order for ISIF to have a meaningful opportunity to assess a case and develop a defense, ISIF needs to be included in the case near enough in time to the claimant's accident to be able to interview witnesses with knowledge of the claimant's injury and medical history. ISIF should also have the opportunity to consult with vocational experts who can analyze the claimant's employment prospects and determine whether the claimant is totally and permanently disabled. Such an analysis would be difficult to conduct ten or twenty years after the subject accident, when the claimant's condition could have changed substantially for reasons unrelated to the accident or conditions that pre-existed it. In effect, ISIF argues that it should be afforded the same opportunity to timely investigate a claim as employers and sureties have.

11. ***Waltman***. In 1985, the Court appeared to distance itself from the *Anderson* precedent in *Waltman v. Associated Food Stores*, 109 Idaho 273, 707 P.2d 384. In *Waltman*, the claimant suffered a work-related knee injury on June 8, 1976. The Commission approved a settlement

between the claimant and surety on February 1, 1979, at which time the claimant was informed that he had five years from the date of his accident to reopen his claim, pursuant to Idaho Code § 72-706. Prior to expiration of the five-year period, the claimant's doctor advised the surety that the case should be reopened. Negotiations between the claimant and surety failed, and on June 29, 1982, six years after the accident, the claimant requested a hearing before the Commission. The claimant alleged he was totally and permanently disabled and joined ISIF to the proceedings.

ISIF objected, arguing that the claimant was time-barred from pursuing his claim against ISIF, as it was filed more than five years after the accident. The Commission disagreed and found ISIF liable. ISIF appealed to the Court, which, in a 3-2 decision, affirmed the decision of the Commission. However, language in the majority opinion cast doubt on the validity of the *Anderson* precedent. The Court did not base its holding in *Waltman* on *Anderson*. Rather, the Court found that the claim was not time-barred because the Commission still had jurisdiction over the case, as the claimant had reopened his claim against the employer and surety within the five-year time period set forth in Idaho Code § 72-706(2):

Because the Commission had continuing jurisdiction where the subsequent application requesting total permanent disability was made within the statutory time limits, we find the ISIF's arguments without merit, *as applied to this case*. Had the claimant failed to reopen his case within the allowable time limitations, then the arguments of the ISIF might be proper. Similarly, where an injured claimant in the first instance fails to meet the time requirements of I.C. § 72-701, and his claims against the employer-surety are barred, then the ISIF seemingly obtains the benefit of that preclusion.

*Waltman*, 109 Idaho at 275, 707 P.2d 386 (emphasis in original).

The Court went on to observe in a footnote:

At oral argument, counsel for the ISIF theorized that the ISIF might be pursued on a claim for total and permanent liability 20 or 25 years after the accidental injury, thus casting a tremendous difficulty on the ISIF in defending. The assertion was that the lapse of many years would present obstacles in the way of demonstrating that the then

current condition was the result of the original injury rather than a pre-existing condition. Hence, so it is contended, a statute of limitations is needed to protect the ISIF from burden of proof and causation problems. However, such a case is not presently before us, and we decline the invitation to manufacture any statute of limitations *other than those now in existence, of which it seems that the ISIF now has a secondary or derivative benefit — which may, over the years, afford sufficient protection.*

*Id.* at 275, 386 fn. 3 (emphasis added). Thus, the *Waltman* holding establishes that a complaint may be timely filed against ISIF so long as the Commission has continuing jurisdiction over the case. Though the majority opinion does not directly address a situation in which the Commission does not have continuing jurisdiction, the opinion implies that, at the very least, ISIF enjoys the “secondary or derivative benefit” of Section 72-706.

12. **The *Waltman* dissent.** Justice Bakes, joined by Justice Shepard, dissented from the majority opinion. The dissent objected to conflating ISIF with the surety:

The majority does not go as far as the [C]ommission’s conclusion that no statute of limitations can bar a claim against I.S.I.F. Rather, the majority implies, *ante* at 386, that the case turns on whether the claimant had properly filed a request for hearing or review with the [C]ommission within the time limitations of I.C. §§ 72-706, -719....

What the majority may be attempting to rule is that if a claim is not time barred ... against the surety, then the claim will not be time barred against I.S.I.F. Since the application for hearing in the present case was not filed within the five-year time limit, this proposed ruling would require an implicit finding that the surety waived its rights and that the waiver is imputed to I.S.I.F. To this imputed waiver I dissent.

The I.S.I.F. is a completely separate and independent party from the surety ... and is entitled to raise a legal defense regardless of another defendant’s waiver. To bind the I.S.I.F. because of conduct of the employer’s surety, when the I.S.I.F. was never joined as a party and had no knowledge of the proceedings, seems to be a denial of basic due process.

*Waltman*, 109 Idaho at 276, 707 P.2d at 387.

Furthermore, Justice Bakes objected to the majority’s failure to address the “ultimate issue”

of whether Idaho Code § 72-706 applied to claims against ISIF, observing:

If [Section 72-706 is] not applicable, there would be no time limit barring claims against I.S.I.F., a result I find not reasonably intended by the legislature. Many industrial accident victims could have pre-existing impairments which, with enough time and age, could degenerate to alleged total permanent disability. Unless there are some time limits, former claimants could file new claims against I.S.I.F. twenty or thirty years after an industrial accident. . . . These stale claims would raise impossible evidentiary questions, and the potential for fraudulent claims would be enormous. Therefore, there must be a statute of limitations on claims against I.S.I.F. It is only reasonable that the general statute of limitations contained in I.C. §§ 72-706 and -719 also apply to claims against I.S.I.F. Other jurisdictions have ruled accordingly.

*Id.* at 276-277, 387-388. Justice Bakes went on to cite court decisions from other jurisdictions holding that the general statute of limitations contained within those states' workers' compensation laws applied to claims against their second injury funds. *See e.g. Ruffin v. Albright*, 121 N.J.L. 424, 3 A.2d 135 (1938), *Grant v. Neal*, 381 S.W. 2d 838 (Mo. 1964), *Travelers Insurance Co. v. Austin*, 521 S.W.2d 783 (Tenn. 1975), *Levi v. Second Injury Fund*, 389 P.2d 620 (Okl. 1964).

13. Since *Waltman*, there has not been a Court decision that treats the issue of whether a statute of limitations applies to complaints against ISIF. The most recent Commission decisions on the issue applied the *Anderson* rule. *See e.g. Jackman v. ISIF*, 1994 IIC 1029 (September 2, 1994).

14. Claimant is correct that Idaho Code § 72-706 does not expressly apply to claims against ISIF. However, Section 706 does not expressly apply to claims against employers or sureties, either. In its entirety, the statute provides:

**72-706. Limitation on time on application for hearing.**

- (1) When no compensation paid. When a claim for compensation has been made and no compensation has been paid thereon, the claimant, unless misled to his prejudice by the employer or surety, shall have one (1) year from the date of making claim within which to make and file with the commission an application

- requesting a hearing and an award under such claim.
- (2) 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 an occupational disease within which to make and file with the commission an application requesting a hearing for further compensation and award.
  - (3) When income benefits discontinued. If income benefits have been paid and discontinued more than four (4) years from the date of the accident causing the injury or the date of first manifestation of an occupational disease, the claimant shall have one (1) year from the date of the last payment of income benefits within which to make and file with the commission an application requesting a hearing for additional income benefits.
  - (4) Medical benefits. The payment of medical benefits beyond five (5) years from the date of the accident causing the injury or the date of first manifestation of an occupational disease shall not extend the time for filing a claim or an application requesting a hearing for additional income benefits as provided in this section.
  - (5) Right to medical benefits not affected. Except under circumstances provided in subsection (1) of this section, the claimant's right to medical benefits under the provisions of section 72-432(1), Idaho Code, shall not otherwise be barred by this section.
  - (6) Relief barred. In the event an application is not made and filed as in this section provided, relief on any such claim shall be forever barred.

The section is silent as to which parties these complaints are made against. The words “employer” and “surety” are used only once, in Subsection 1, in the context of misleading a claimant to his prejudice. The fact that the statute is silent on the matter of whom these complaints are made against suggests that Section 72-706 applies to *all* claims made under the workers' compensation law, including complaints against ISIF. Certainly complaints against ISIF are nowhere expressly exempted from the terms of Section 72-706.

Additionally, the section does not specify the party paying (or not paying) compensation. What matters is not the identity of the party paying compensation; what matters is whether compensation has been paid, and, if it has, whether and when it was discontinued.

15. Equity and policy support a finding that complaints against ISIF may be time-barred, for the reasons cited by ISIF in its brief as well as by Justice Bakes in the *Waltman* dissent. ISIF is entitled to thoroughly investigate the claims at issue, as is any party in a legal dispute. This is difficult to do in cases so old that the evidence has been lost or compromised in some way. Statutes of limitation exist to protect parties from stale or fraudulent claims, and ISIF is no less entitled to such protection than an employer or surety.

16. In light of the specific phrasing of Section 72-706, the Court's holding in *Waltman*, and the policy considerations raised by both ISIF and the *Waltman* dissent, we find that complaints against ISIF can be time-barred, depending on the circumstances of the case. In determining whether a complaint is time-barred, we must first consider whether the Commission has ongoing jurisdiction over the case. If it does, a complaint against ISIF can be filed. If it does not, we must next consider whether a complaint can still be timely filed under Section 72-706.

17. Because Section 72-706 defines limitation periods, not by whom a claim is made against or by whom compensation is paid, but by whether and in what manner compensation has been paid, we find that *only one limitation period applies to each case and to all the claims arising under it*, regardless of whom a complaint is made against. The specific limitation period that applies will be triggered by the surety's decision to pay or not pay compensation. If, for example, the surety denies a claim and refuses to pay compensation, the claimant, under Section 72-706(1), shall have one year from the date of making claim to file a complaint against the employer/surety and/or ISIF. If the claimant timely files a complaint against ISIF within that one year, then the complaint may proceed. Likewise, if the claimant timely files a complaint against the surety within that one year, then the claimant will be able to file a complaint against ISIF at some point in the future, *provided the Commission still has continuing jurisdiction over the case*. If, however, the claimant does not timely file a complaint against ISIF within that one year, and

if the claimant does not timely file a complaint against the surety, thus establishing the Commission's jurisdiction, the complaint against ISIF will be time-barred. In other words, if a complaint may still be timely filed against the surety, it may still be timely filed against ISIF; if a complaint may no longer be timely filed against the surety, it may no longer be timely filed against ISIF. We believe this rule is implied by the Court's discussion of ISIF's "secondary or derivative benefit" of the statute of limitations in *Waltman* — secondary or derivative, that is, because the surety's actions determine the limitation period that will apply.

18. Stated more simply, the rule we infer from *Waltman* is this: so long as the Commission has jurisdiction over a claim for indemnity benefits, then a timely complaint may be filed against ISIF. Stated differently, so long as a timely complaint against the surety for indemnity benefits either *is pending* or *could still be filed* before the Commission, then a complaint against ISIF may be filed, provided the complaint also complies with the requirements of Idaho Code § 72-334. If, however, no complaint is pending before the Commission, and a timely complaint can no longer be made against the surety, then a timely complaint can no longer be made against ISIF, either. The limitation period has expired.

19. A couple of hypothetical scenarios illustrate how we believe the rule of *Waltman* is intended to work. Assume that a claimant was injured in an industrial accident on January 1, 2005. The next day, January 2, the claimant notified his employer of the accident and made his claim for compensation. The employer forwarded the claim to its surety, and, after an investigation, the surety denied the claim. Under Section 72-706(1), the claimant had until January 2, 2006 to file a complaint with the Commission. The claimant timely filed a complaint, but because of the claimant's need for successive surgeries, medical stability was not reached until well after the fifth anniversary of the accident. The matter was set for hearing on September 1, 2011. On June 1, 2011, the claimant filed a complaint against ISIF alleging that ISIF shared

responsibility for the claimant's total and permanent disability. In this situation, the complaint against ISIF would be timely, because the Commission had ongoing jurisdiction over the case, just as it did in *Waltman*.

On the other hand, assume that another claimant was injured in an industrial accident on January 1, 2005. The surety accepted the claim and paid compensation, with the last payment occurring on January 1, 2008, three years after the accident. The claimant, believing he was entitled to additional benefits, filed a complaint against the surety on January 1, 2011. The claimant contemporaneously filed a complaint against ISIF.

This situation would fall within the purview of Section 72-706(2), because compensation had been paid and thereafter discontinued. Under that statute's five-year limitation period, the claimant had until January 1, 2010 to file a complaint. His 2011 complaint being untimely, the claimant cannot pursue his claim against ISIF. As with the rest of his case, the complaint against ISIF is time-barred.

20. Turning to the instant case, the question before us is whether Claimant's June 1, 2010 complaint against ISIF is time-barred. Claimant's industrial accident occurred on March 1, 2001. He filed his original complaint against Employer and Surety on April 23, 2003. This complaint was dismissed with prejudice on November 21, 2003. Thus, at the time Claimant's complaint against ISIF was filed, the Commission did not have ongoing jurisdiction over the case, as it did in *Waltman*. With no complaint pending, we turn to whether a complaint could still be filed.

Commission records indicate that Surety paid compensation in this case, and that the last payment was made pursuant to the lump sum settlement agreement in November 2003. This case, as with the hypothetical above, falls within the purview of Section 72-706(2). The five-year limitation period applies, and the five-year anniversary of Claimant's accident was March 1,

2006. Without the benefit of continuing jurisdiction, Claimant had until that date to file a new complaint in this case. He failed to do so, and his June 1, 2010 complaint is time-barred pursuant to Idaho Code § 72-706(2).

21. Because Claimant's complaint is time-barred, the Commission lacks jurisdiction to consider it. The complaint is dismissed with prejudice.

**ORDER**

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant's June 1, 2010 complaint against ISIF is time-barred. The complaint is dismissed with prejudice.

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

DATED this \_\_23rd\_\_ day of December, 2011.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
/s/  
Thomas E. Limbaugh, Chairman

\_\_\_\_\_  
/s/  
Thomas P. Baskin, Commissioner

\_\_\_\_\_  
/s/  
R.D. Maynard, Commissioner

ATTEST:

\_\_\_\_\_  
/s/  
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

JOSEPH JARZABEK  
PO BOX 1049  
SANDPOINT ID 83864

THOMAS W CALLERY  
PO BOX 854  
LEWISTON ID 83501

eb

/s/ \_\_\_\_\_