

# BREEN VELTMAN WILSON

LORA RAINEY BREEN | SUSAN R. VELTMAN | EMMA R. WILSON

## 2014 Case Summaries

### ***Corgatelli v. Steel West, Inc., and ISIF***

**Filed:** August 25, 2014

**Issued by:** Idaho Supreme Court

#### **Facts:**

Claimant was a long term employee who worked for Employer from 1973 through at least 2005. He was promoted several times during his employment and held multiple job positions. He sustained an industrial injury in 1994 to his lower back for which he was assigned a 5% PPI rating. The 1994 injury did not require surgical intervention, but an MRI study revealed significant degenerative disc and lumbar spine disease at multiple levels, as well as positive bone scan findings. There were differing opinions as to the significance of the findings and whether or not Claimant actually had PPI. The case ended up resolving with a LSS paying \$27,500.

Following the 1994 injury, Claimant could not return to his foreman job because he could not tolerate the required bending, stooping and lifting. He accepted an alternate position as safety director where his duties were less physically demanding. In addition to sedentary duties, he drove delivery trucks and observed a 35 pound lifting restriction.

In 2005, Claimant sustained a second industrial lower back injury as the result of stepping down from a semi-truck. He had two surgeries and was awarded 10% PPI. Claimant's condition deteriorated and he was diagnosed with failed back syndrome. Claimant sought total permanent disability as the result of his back condition and brought in ISIF.

In July 2012, the Industrial Commission issued its decision in which it determined that Claimant was totally and permanently disabled, with Employer liable for 66.7% of Claimant's disability (calculated to total \$99,599.78) and ISIF was liable for the remainder, pursuant to the *Carey* formula. In doing so, the Commission found that

Claimant's surgeries for which he had a poor outcome were necessitated both by the 2005 injury and his pre-existing lumbar conditions. There was vocational evidence that the combination of Claimant's restrictions from his pre-existing conditions, as well as the most recent restrictions, left him so injured that he was not regularly employable in any well-known branch of the labor market.

Following the 2012 decision, Employer sought clarification of the Commission's order with regard to its payment obligations. Employer argued that they should receive credit for PPI benefits previously paid on the 2005 claim. The Commission agreed and held that PPI was part of permanent disability and that it was appropriate to take a credit, otherwise Employer would essentially be required to pay on the same impairment rating twice.

Claimant appealed the issue of PP credit to the Idaho Supreme Court and ISIF appealed liability and challenged the "combined with" findings.

**Significant Issues:**

1. Whether Employer may take credit for PPI paid against an award of total permanent disability; and
2. What is the legal standard and necessary evidence to meet the "combined with" prong of ISIF liability?

**Holding:**

The Court vacated and remanded on the issue of whether past PPI paid could be credited against total permanent disability benefits, determining that there is no statutory basis for such a credit. Additionally, the Court reversed the finding of ISIF liability, holding that there was no substantial competent evidence to support the "combined with" prong.

The Court's analysis on the issue of PPI credit notes that IC § 72-406(2) refers to a deduction for past income benefits previously paid for "permanent disability" and does not authorize a credit for past impairment benefits paid.

As to ISIF liability and the "combined with" prong, the Court reiterated the "but for" standard set out in *Garcia v. J.R. Simplot* and determined that there must be a showing by the party invoking ISIF liability that the claimant would not have been totally and permanently disabled, but for the pre-existing impairment. In other words, if the

2005 injury alone would have caused total permanent disability, then the "combined with" criteria is not met.

The Court took the opportunity to chastise the Commission for inferring that Claimant's surgeries would not have been necessary if the 2004 injury had not occurred, in light of the fact that there was not a medical opinion which stated as much.

### **Comments:**

The holding on the issue of PPI credit makes sense if you read the statute but is inconsistent with the longstanding practice and statutory interpretation. Permanent disability has been considered as an add-on to permanent impairment and the two benefits do not generally run concurrently. In cases involving PPD, the amount is either stated as "inclusive of PPI" or "in excess of PPI." The language in IC § 72-406(2) has been interpreted to mean that prior *impairment* may be deducted. It appears that statutory revision may be necessary to address the conflicting interpretations.

I would argue that Idaho Code § 72-316 (overpayment statute) is applicable in cases when PPI payments are made prior to a determination that total permanent disability benefits are owed. This argument assumes that PPI payments were not ultimately owed because total permanent disability payment obligations begin at the date of MMI. However, this argument would fail if the Court believes that PPI and permanent disability payments run concurrently.

With regard to the "combined with" prong of ISIF liability, I have wondered whether the expert evidence should be medical or vocational. This case seems to indicate that if the pre-existing condition is to the same body part as the subject injury, that medical evidence is required. However, whether or not any given permanent impairment results in permanent disability has always seemed like more of a vocational issue.

It appears that the Court expected medical evidence along the lines of an opinion that the mechanism of injury in 2005 (stepping down from a semi-truck) would not have resulted in the need for back surgery, but for Claimant's prior lumbar impairment and the progressive degenerative changes in his spine that pre-existed the lumbar injury. This is essentially what the Commission concluded based on the medical opinions in the record. I am unsure at what point the Court considers the Commission to be substituting

its own medical opinion (not permitted) as opposed to drawing inferences from the medical evidence to resolve conflicts in the evidence (permitted).

With regard to Employer, it seems that no good deed went unpunished- they continued to promote Claimant and placed him in an alternate job that would accommodate his industrial impairment and restrictions; paid Claimant a settlement to resolve conflicting opinions on the 1994 injury; and initiated PPI based on impairment for the 2005 injury. Now they are on the hook for total perm benefits without contribution from ISIF or the ability to take a credit for PPI payments.

***Beard v. Donahue McNamara Steel, LLC***

**Filed:** April 21, 2014

**Issued by:** Commissioners, Maynard recused

**Facts:**

Although there were some factual disputes surrounding Claimant's status as an employee, it was undisputed that he agreed to pick up some welding wire in Burley and deliver it to Boise, at Employer's request. Claimant's trip originated in Hailey where he picked up his paycheck. He then drove a co-worker back to Arco, before proceeding to Burley. He picked up the wire in Burley and proceeded to Boise, through Twin Falls.

Claimant started drinking beer on the way from Hailey to Arco, and continued to drink alcohol throughout the trip. He also smoked some marijuana at one or more points between Twin Falls and Boise. Claimant stopped at the Outlaws and Angels bar in Bliss, Idaho. Although he did not recall being there, his cell phone records and credit card receipts confirmed he was there for more than an hour and spent \$52.00.

Claimant proceeded towards Boise after midnight and rolled his vehicle near Mountain Home, sustaining significant injuries. The parties stipulated that (1) alcohol was the reasonable and substantial cause of the accident/injury, therefore Claimant's recovery was no more than medical benefits pursuant to IC § 72-208; (2) the accident was the cause of Claimant's broken neck and need for surgery; and (3) Claimant's

medical bills totaled \$136,580.25. Ada County paid \$11,000.00 of Claimant's medical bills and the Catastrophic Health Care Cost Program Fund (CAT Fund) paid \$52,986.02.

Claimant sought full invoiced medical in the amount of \$136,580.25, pursuant to the *Neel* decision. Employer disputed employer/employee relationship and asserted that Claimant was not acting in the course and scope of his employment. Alternatively, Employer argued that *Neel* should not apply and Claimant's recovery should be limited to the amounts paid by Ada County and the CAT fund. Issues regarding employee/employer relationship were resolved in Claimant's favor and will not be analyzed further.

**Significant Issue:**

Under what circumstances does intoxication preclude an injury from arising out of and in the course of employment, such that medical benefits are not owed?

**Holding:**

Claimant's injuries did not arise out of or in the course of employment with Employer and no benefits are owed. The Commission agreed that travel was part of Claimant's employment and that travel may constitute a business trip, even if done in part to serve the personal purposes of the employee. The Commission further agreed that any "frolic" was completed and Claimant had returned to his necessary route to complete his job duty. Nonetheless, the Commission felt that "Claimant's penchant for drinking and driving and patronizing speakeasies along the way is a departure from the demands of his employment that it is of such significance to cut off the causal connection between the subject accident and Claimant's employment."

**Comments:**

Speakeasy. Really? I think that the end result was certainly fair and it would have been distasteful for Claimant to end up with a \$72,594.23 windfall courtesy of *Neel*. However, I think this case opens the door for uncertainty with regard to what type of circumstances surrounding intoxication are significant enough to preclude a finding of arising out of and in the course of employment.

***Dahlke v. Ash Grove Cement***

**Filed:** April 25, 2014

**Issued by:** Commissioners, Limbaugh dissenting

**Facts:**

This is a hearing loss case. Claimant was 55 at the time of hearing and worked for Employer since 1979. The parties agreed that Claimant suffered from hearing loss and that the hazards of hearing loss existed in the noisy mill where Claimant worked. However, disputes existed with regard to medical causation of Claimant's hearing loss and the date of occupational disease/timely reporting.

Both sides presented medical evidence from physicians on the issue of causation. Claimant's expert described the findings as "completely consistent with a noise induced hearing loss." Employer's expert explained that it was impossible to fully separate age-related from noise-induced hearing loss, but that he felt the majority of hearing loss was age-related and that he did not conclude there was a reasonable medical probability that Claimant's hearing loss was caused by noise exposure. Employer argued that Claimant's medical causation opinion did not explain how Claimant's hearing loss was noise induced rather than age-related. Both sides relied on medical reports and neither doctor was deposed or called to testify at hearing.

With regard to timely reporting, it was undisputed that Employer was put on notice of the occupational disease when Claimant filed his First Report of Illness on June 26, 2012. Therefore, notice was timely if the manifestation date was prior to April 28, 2012. Pursuant to IC § 72-102(19):

"Manifestation" means the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease.

Claimant asserted that his manifestation date was May 3, 2012, when he received his doctor's report indication that his hearing loss was caused by an occupational exposure. Defendants asserted that the manifestation date was likely several years earlier, based on Claimant's recorded statement when he told the adjuster that he knew his hearing loss was related to work ten years prior. At the latest, Employer contended that the manifestation date would be Claimant's medical appointment date on April 26, 2012, when Claimant had the evaluation which resulted in the issuance of the May 3, 2012 report. At hearing, Claimant testified that he suspected his condition was work-related ten years prior, but did not know it was until May 3, 2012.

**Significant Issues:**

1. What degree of medical opinion is required to establish hearing loss as industrial v. age related; and
2. What evidence is needed to establish that a claimant “knows” that he or she has an occupational disease (manifestation date)?

**Holding:**

The Commission concluded that Claimant met his burden of proof to establish an occupational disease and that he was entitled to medical benefits. The opinions of Claimant’s doctor were sufficient to constitute competent medical evidence establishing causation to a reasonable degree of medical probability. Those opinions were adopted over the medical opinions of Employer’s doctor who did not refute the possibility that noise was a factor in Claimant’s hearing loss.

With regard to timely reporting, the Commission held that the manifestation date was May 3, 2012, rendering notice to Employer timely. The Commission’s decision includes more than eight pages of analysis on the issue of what it means to “know” something and included the requirements that in order to “know” something (1) the person must believe it to be true; (2) the person must have justifying reasons for believing to be true; and (3) it must in fact be true.

Commissioner Limbaugh’s dissent indicates that the evidence supports a conclusion that Claimant knew he suffered from hearing loss related to his employment ten years prior, but he made the decision not to report the claim because he did not want to disturb the status quo or endanger his job. He asserts that the majority’s three factors nullify the statutory provision it is attempting to refine.

**Comments:**

In addition to the issues above, this case is a reminder that while “disablement” from performing work in the last occupation in which the claimant is injuriously exposed is not a required element to establish an occupational disease. Rather, it is a required element to establish entitlement to “compensation” beyond related medical benefits.

I agree with Limbaugh’s dissent on the date of injury question. The interpretation of “know” as requiring 100% certainty, along with the additional three prong criteria, is beyond how the statute has been interpreted prior to the *Gardner* case, and establishes

a nearly impossible standard that renders a portion of the "occupational disease" definition meaningless. I can understand referring to the Webster's definition of "know," but the Commission lost me when it extensively cited Plato, a 1981 article from *The Philosophical Quarterly* and the *Stanford Encyclopedia of Philosophy* with regard to what it means to "know" something.