

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSUE BARRIOS,

Claimant,

v.

ZING, L.L.C.,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,
Defendants.

IC 2014-002296

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

Filed August 30, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on March 31, 2016.¹ Richard Owen represented Claimant. James Ford represented Defendants Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on July 11, 2016. The Commission has reviewed the proposed decision, and agrees with the result. However, the Commission concludes that different treatment of Idaho Code § 72-432 is indicated, and therefore substitutes this decision for that proposed by the Referee.

ISSUES

The following issues are to be decided at this time:

1. Whether the Commission has jurisdiction to decide whether the fees and costs of the following individuals are compensable benefits under Idaho Workers' Compensation Law, and if so, whether Claimant is so entitled:
 - a) a Guardian ad-litem,
 - b) a court-appointed Guardian,
 - c) a court-appointed Conservator, and
 - d) an attorney hired to facilitate the appointment of the Guardian

¹ The Hearing transcript contains an inaccuracy. The Referee at hearing mistook attorney Robert Aldridge for Claimant before introductions were made. Contrary to the Referee's statement at hearing, Claimant was not present. Claimant's condition precluded any useful purpose for his attendance.

and Conservator in District Court; and

2. Whether the Commission has jurisdiction to determine whether the fees and costs charged by any or all of these people, if compensable, are reasonable.

CONTENTIONS OF THE PARTIES

The parties agree that Claimant suffered a compensable accident. He suffered a catastrophic head injury when he fell from a ladder. He is totally and permanently disabled and will require attendant care for life. The Magistrate Court of the Fourth Judicial District of Idaho appointed a guardian and conservator on his behalf because of the extent of the head injury. Those court proceedings required an attorney and a guardian ad-litem as well. (Hereinafter, these four are collectively “the Group.”)

Claimant contends a treating physician has opined that appointment of a guardian and conservator is medically necessary as a result of Claimant’s compensable accident and injury. Claimant requires constant attendant care for activities of daily living. Generally, the Commission has jurisdiction to resolve all questions in dispute under Idaho Code § 72-707. Regarding attendant care as a medical benefit, Idaho Code § 72-432(3) gives the Commission jurisdiction and discretion “to determine the necessity, character and sufficiency of any medical services furnished or to be furnished.” Claimant is entitled to benefits for each and all of the attendant-care providers in question. The charges claimed by each and all of the Group are reasonable.

Defendants contend the services of the guardian, conservator, guardian ad-litem, and attorney who secured these appointments on Claimant’s behalf do not constitute attendance or attendant care under the relevant statutes. Such services are not medical care. They do not comport with the definition of “medical services.” The Legislature did not include members of the Group within the Idaho Workers’ Compensation Law and the jurisdiction and authority of the

Commission. Idaho Code § 72-432 does not grant it. While the Commission has jurisdiction to interpret Idaho Code § 72-432, it does not have power to order Surety to pay the fees of the Group. Rules of statutory construction require this result. The guardian and conservator were appointed by an Ada County Magistrate pursuant to appropriate sections of the Uniform Probate Code, Title 15, Idaho Code. This gives the Magistrate “exclusive and continuing jurisdiction” over members of the Group. Idaho has not ruled on the question at issue, but other states have held that such services are outside their workers’ compensation laws. Claimant improperly relies upon Idaho cases which are distinguishable from the facts here. Surety has paid and continues to pay all medical and disability benefits due Claimant. In addition to all other medical and disability benefits, Surety pays the services of an attendant, Isobel Hernandez, at a rate of \$3,200 per month. None of the Group provides medical services or direct attendant care to Claimant as those terms are defined by Idaho law.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of attorney Robert Aldridge, Drew Mayes on behalf of Claimant’s guardian Castle Rock Services, Paul Seideman on behalf of Claimant’s conservator Tresco of Idaho, Isobel Hernandez who provides the certified family home where Claimant resides, and Surety senior claims examiner Donna Young;
2. Claimant’s exhibits A through K; and
3. Defendants’ exhibits 1 through 22.

FINDINGS OF FACT

1. Claimant is totally and permanently disabled after a head injury caused by a compensable accident. He fell from a ladder on January 17, 2014.
2. Claimant was hospitalized then admitted to a rehabilitation unit.
3. On May 27, 2014, treating physician Michael McMartin, M.D., opined Claimant

had reached maximum medical improvement. He noted Claimant had been discharged from the rehabilitation unit to Ashley Manor, a skilled nursing facility. Dr. McMartin was actively involved in Claimant's placement, including consideration of whether Claimant could or should be released to the care of his brother.

4. On September 10, 2014, Dr. McMartin opined Claimant "requires a controlled living environment." He noted Claimant's Spanish language was a basis for recommending the certified family home of Isobel Hernandez over Ashley Manor. Dr. McMartin further opined: "I am writing this letter of medical necessity in support of relocating Mr. Barrios to this new home for continued structured and community based living. He also requires a guardian and conservator. The appointment of a guardian and of a conservator for Mr. Barrios is medically necessary due to the traumatic brain injury."

5. Robert Aldridge is an attorney licensed to practice in the State of Idaho. He has peculiar expertise in the area of conservatorship and guardianship. He was contacted in May of 2014 by representatives of Ashley Manor and Castle Rock Services concerning Claimant's ability to care for himself. He was asked to facilitate the appointment of a guardian and conservator for Claimant. For his part, Mr. Aldridge appeared as Claimant's attorney, and as his guardian ad litem. Per Mr. Aldridge, a guardian ad litem is required to be an attorney. (Transcript 31/1-33/5.) His appointment did not require court approval. Mr. Aldridge contacted Mia Murphy, an attorney with whom he frequently works, and asked her to represent the petitioner, Castle Rock, in connection with the appointment of a guardian and conservator. A temporary guardian and conservator were initially appointed, and this eventually led to the permanent appointment of Castle Rock Services as Claimant's guardian and Tresco of Idaho as Claimant's conservator by order of the district court dated October 30, 2014. Both Mr. Aldridge

and Ms. Murphy generated bills for services rendered to their clients. Those bills remain unpaid to date.

6. The guardian meets with Claimant occasionally as needed, about once per month more or less. He makes general decisions on Claimant's behalf pertaining to living arrangements and care. The conservator manages Claimant's financial affairs.

7. Claimant's activities for his daily living are overseen and performed by Isobel Hernandez who operates a certified family home where Claimant resides. Ms. Hernandez makes daily decisions on Claimant's behalf. She provides direct attendant care. In addition to total and permanent disability benefits, Surety pays \$3,200 per month to Ms. Hernandez's home for Claimant's daily care. This covers her services as well as expenses associated with Claimant's meals and lodging at her home. (*See Defendants' Exhibit 17.*)

8. Ashley Manor charged Claimant in excess of \$4,000 per month for daily care he received there.

9. The billing records of the guardian show Claimant was charged \$16,921.63 for the period June 1, 2014 through December 31, 2015. Charges represent services at an hourly rate plus mileage and expenses. This equates to an average of \$890.61 per month.

10. The billing records of the conservator show Claimant was charged a monthly administrative fee of \$175.00 per month, increasing to \$200.00 per month in 2015, plus service charges for each activity performed. For the first year, October 30, 2014 through October 31, 2015, conservator fees were \$6,442.62. This equates to an average of \$536.89 per month.

DISCUSSION AND FURTHER FINDINGS OF FACT

11. 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).

Jurisdiction

12. The parties are in agreement that the Industrial Commission has jurisdiction, pursuant to Idaho Code § 72-707, to determine whether the expenses claimed are compensable as expenses payable by Employer/Surety pursuant to the provisions of Idaho Code § 72-432. Claimant contends that the Commission also has jurisdiction to determine the reasonableness of the charges at issue. Defendants contend that the Commission lacks jurisdiction to determine the reasonableness or necessity of the expenses in question, arguing that jurisdiction to determine whether the services are necessary and the charges reasonable lies with the district court that made the appointment.

13. We agree with Defendants that while the Commission does have jurisdiction to determine whether the workers' compensation laws of this state authorize the payment of the expenses at issue pursuant to Idaho Code § 72-432, the Commission does not have jurisdiction to determine the reasonableness and necessity of those charges. Pursuant to the provisions of Idaho Code § 15-5-101, *et seq.*, the district court has satisfied itself that the appointment of a guardian and conservator is appropriate under Claimant's circumstances. In its order appointing the guardian and conservator the district court specified that both the conservator and guardian are entitled to payment at their regular hourly rates for services rendered. Each is required to account annually to the district court. Idaho Code § 15-5-101, *et seq.*, contains provisions which allow the district court to police the activities of the conservator and guardian. Therefore, it seems clear that jurisdiction governing the necessity and reasonableness of the appointment, as well as the reasonableness of expenses incurred in connection with the appointment lies with the

district court. As the Commission perceives it, the sole question before it is whether the expenses incurred in connection with the appointment of the guardian and conservator are payable by Employer/Surety as Idaho Code § 72-432 expenses, or from some other source. The Commission's jurisdiction to determine this issue is in no wise inconsistent with the provisions of Idaho Code § 15-5-314, which recognizes that expenses associated with appointments may be paid from sources other than Claimant's estate:

Compensation and expenses. - (1) If not otherwise compensated for services rendered or expenses incurred, any visitor, guardian ad litem, physician, guardian, or temporary guardian appointed in a protective proceeding is entitled to reasonable compensation from the estate for services rendered and expenses incurred in such status, including for services rendered and expenses incurred prior to the actual appointment of said guardian or temporary guardian which were reasonably related to the proceedings. If any person brings or defends any guardianship proceeding in good faith, whether successful or not, he or she is entitled to receive from the estate his or her necessary expenses and disbursements including reasonable attorney's fees incurred in such proceeding. If the estate is inadequate to bear any of the reasonable compensation, fees, and/or costs referenced in this section, the court may apportion the reasonable compensation, fees, and/or costs to any party, or among the parties, as the court deems reasonable.

(2) If court visitor services are provided by court personnel, any moneys recovered shall be collected through the clerk of the district court of the county in which the appointment was made and the clerk shall pay the moneys to the state treasurer for deposit in the guardianship and conservatorship project fund established by section 31-3201G, Idaho Code.

Therefore, the narrow question before the Commission is whether the expenses in question are of the type that falls within some provision of Idaho Code § 72-432, and for which Defendants can be held liable.

14. It is argued that Idaho Code § 72-432 contemplates the obligation of Surety to pay only those expenses which can be fairly characterized as "medical" in nature. Since the expenses incurred by the group are not "medical" related, Defendants contend that Surety cannot be compelled to pay these expenses pursuant to the provisions of Idaho Code § 72-432. Therefore,

the group's expenses are payable, if at all, from the estate of Claimant, an estate which evidently consists of nothing more than the total and permanent disability benefits payable during his lifetime. As developed *infra*, the Commission concludes that the provisions of Idaho Code § 72-432 are not to be so narrowly read, and that the section plainly contemplates the obligation to pay benefits beyond those which might conventionally be thought of as medical in nature.

“Medical services” are defined at Idaho Code § 72-102(21) as follows:

“Medical services” means medical, surgical, dental or other attendance or treatment, nurse and hospital service medicines, apparatus, appliances, prostheses, and related services, facilities and supplies.

This definition is very nearly identical to the description of those services which employer is obligated to provide pursuant to Idaho Code § 72-432(1):

Medical services, appliances and supplies – Reports. - (1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

While the title to Idaho Code § 72-432 references “medical services, appliances and supplies ...”, the title of the section is not relevant to interpreting the provisions of the statute in the absence of some ambiguity within the body of the statute itself. (*Melendez v. Conagra Foods/Lamb Weston*, IC 2008-023987, 2015 WL 5786564 (Idaho Ind. Com. Dec. Ruling, Aug. 10, 2015).) Therefore, attention must first be directed to the language of the statute to understand whether its meaning is clear, recognizing that the words used in the statute are to be given their plain and ordinary meaning. *Id.* at 5; *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009). Idaho Code § 72-432(1) requires employer to provide “attendance or treatment” of various types, “medical”, “surgical” or, significantly, “other”.

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Defendants suggest that in the context of Idaho Code § 72-432 the term “attendance” is synonymous with “treatment”. We reject this interpretation, and assume that the Legislature had some purpose in mind in requiring the employer to provide attendance or treatment. In choosing to state the employer’s obligation in the disjunctive, we must assume that the Legislature intended employers to provide whatever qualifies as “attendance”, or whatever qualifies as “treatment”. It is a general principle of statutory construction that the Commission must assume that the term “attendance” is not mere surplusage. *Wernecke*, 147 Idaho at 282.

15. We agree with Defendants that the expenses at issue cannot fairly be characterized as medical, surgical or other treatment, and that if they are compensable as Idaho Code § 72-432(1) expenses, they must qualify as “other attendance”. The term attendance refers to the act or state of attending. (“Attendance.” *Merriam-Webster Dictionary*. 2016. <http://www.merriam-webster.com> 17 August 2016.) To attend is to take care of, administer to, devote one’s services to, to take charge of, watch over, look after, tend or guard. (“Attend.” *Dictionary.com*. 2016. <http://www.dictionary.com> 17 August 2016. “Attend.” *Merriam-Webster Dictionary*. 2016. <http://www.merriam-webster.com> 17 August 2016.) Against Defendants’ assertion that the type of attendance referenced in Idaho Code § 72-432 must be medical in nature, one need only refer to the language of the statute to reject this argument. The attendance that employer is required to provide is medical, surgical and “other”, i.e., other than medical.

16. Claimant has suffered a severe traumatic brain injury, leaving him without higher executive function. It is conceded that this disability is of such severity to render him totally and permanently disabled. The services provided by his guardian and conservator are intended to assist and protect Claimant where he no longer is possessed of the faculties to take care of himself. These services are clearly of a type that fall within the aforementioned definition of

attendance. In this regard, one might analogize Claimant's situation to a worker who has lost an arm in an industrial accident. No one would argue that such an individual's employer would not be obligated to provide whatever prosthesis might be necessary to ameliorate Claimant's loss of arm function. By the same token, Claimant has suffered a physical injury to his brain, which leaves him unable to perform certain functions necessary to day-to-day living. It does not seem unreasonable to require Employer to provide a "prosthesis" to ameliorate this loss. Claimant cannot be counted on to make day-to-day decisions about his care. Nor can he be counted on to manage his financial affairs. The attendance that he requires in this regard is of a type which falls well within the ambit of what is anticipated by the unambiguous language of the statute.

17. Because we have decided that these expenses are compensable and payable by Employer under Idaho Code § 72-432(1), we need not consider whether they are compensable under Idaho Code § 72-432(3), which makes compensable the service of an attendant when "constant service" to an injured worker is necessary by reason of a disability rendering the injured worker so helpless as to require it. We note, however, that just because the guardian and conservator are not constantly in the presence of Claimant does not necessarily mean that they are not constantly looking out for him by virtue of being always available to deal with his needs.

18. Although not at issue, the provisions of Idaho Code § 72-432(3) also seem to clearly provide for the payment of the services rendered by Ms. Hernandez.

19. For the reasons set forth above, we conclude that the guardian/conservator expenses incurred in connection with Claimant's care are payable by Employer/Surety pursuant to the provisions of Idaho Code § 72-432(1).

20. Claimant also contends that pursuant to Idaho Code § 72-432, Surety is obligated to pay the fees of Robert Aldridge, the guardian ad litem, himself an attorney, and Mia Murphy,

the attorney who secured the appointment of the guardian and conservator. Idaho Code §§ 72-803, 804 and other duly promulgated regulations adopted by the Commission articulate specific requirements relating to the payment of attorney's fees. (See IDAPA 17.02.08.033, *et seq.*) We decline to consider the payment of the fees in question under the provisions of Idaho Code § 72-432 in light of the aforementioned specific statutes and regulations dealing with the payment of attorney's fees. Nor has Claimant explained how or whether the fees in question might be payable under our attorney fee statutes and regulations.

CONCLUSIONS OF LAW AND ORDER

1. The Commission has jurisdiction under Idaho Code § 72-707 to determine whether the expenses and fees claimed by Claimant are payable under Idaho Code § 72-432.

2. The fees of the attorney and guardian ad litem responsible for securing the appointment of the guardian and conservator are payable, if at all, pursuant to the provisions of Idaho Code § 72-803, Idaho Code § 72-804 and regulations of the Commission relating to the payment of attorney's fees. Claimant has not articulated a basis pursuant to those statutes/rules sufficient to warrant payment of these fees by Employer.

3. Defendants are responsible for the payment of such fees and expenses of the guardian and conservator, authorized pursuant to Idaho Code § 15-5-101 *et seq.*, from the date of initial appointment forward pursuant to the provisions of Idaho Code § 72-432.

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

DATED this 30th day of August, 2016.

INDUSTRIAL COMMISSION

/s/
R.D. Maynard, Chairman

_____/s/_____
Thomas E. Limbaugh, Commissioner

_____/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2016, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

JAMES A FORD
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BOISE ID 83701

ka

_____/s/_____