

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA GLORIA MELENDEZ,

Claimant,

v.

CONAGRA FOODS/LAMB WESTON ,

Self-Insured Employer,
Defendant.

IC 2008-023987

IC 2009-032750

**ORDER ON PETITION FOR
DECLARATORY RELIEF**

Filed August 10, 2015

On or about January 17, 2015, L. Clyel Berry (“Berry”), Claimant’s attorney, filed his Petition for Declaratory Relief under the provisions of J.R.P. 15, in which he asked the Industrial Commission to determine the treatment to be given to an overpayment of attorney’s fees under the provisions of Idaho Code § 72-316, where Claimant has been adjudged totally and permanently disabled. Specifically, Berry asks the Commission to conclude, as it did in *Fomichev v. Lynch*, 2012 IIC 0087 (2012), that under Idaho Code § 72-316, Defendant must obtain prior approval from the Industrial Commission before applying an overpayment of benefits as an offset to an ongoing obligation to pay disability. Berry also asserts that the specific amount of the overpayment in question has not been quantified, and asks the Commission to make specific findings concerning the extent and degree of an alleged overpayment. Next, Berry argues that if there has been an overpayment of attorney’s fees in this case, it should be treated the same way that an overpayment of disability benefits is treated under Idaho Code § 72-316. Finally, Berry argues that Claimant is entitled to an additional award of attorney’s fees under Idaho Code § 72-804 as a sanction against Defendant for their unreasonable

curtailment of attorney's fees payable to Claimant without prior approval of the Industrial Commission.

In response, Defendant argues that following the Commission's November 8, 2011 Decision, it should have been obvious to Berry that Defendant was paying total and permanent disability benefits to Claimant at an inflated rate. Defendant argues that it was improper for Berry to knowingly abide the overpayments as they compounded over a period of years, and that he should not be heard at this juncture to insist that Defendant is without recourse in its attempts to recoup the repayment of attorney's fees paid to Claimant pursuant to the provisions of Idaho Code § 72-316.

Following a telephone conference with the Commission on June 10, 2015, the parties filed their stipulation, as requested by the Commission, which memorializes the agreement they previously reached concerning the amount of attorney fees payable to Claimant as a result of the Commission's November 8, 2011 decision. Accompanying that stipulation is an Addendum to Reply Brief in Support of Motion for Determination, filed by Berry. That pleading is stricken as untimely, and is not considered by the Commission.

FINDINGS OF FACTS

1. On November 8, 2011, the Industrial Commission entered the following Order following hearing on Claimant's claim for benefits relating to her bilateral upper extremity injuries:

1. Claimant has proven her osteoarthritis in her bilateral thumb CMC joints and her right middle trigger finger condition were all caused by repetitive motion injuries she sustained at work.

2. Claimant has proven that she is entitled to reasonable and necessary medical care for her bilateral thumb CMC joint injuries and right middle trigger finger

injury, including but not limited to her left thumb surgery in November 2008 and her trigger finger release in March 2009.

3. Claimant has proven that she is entitled to PPI in the amount of 8% of the whole person (6% in relation to her left thumb condition, 2% in relation to her right thumb condition and 0% in relation to her right middle trigger finger).

4. Claimant has proven that she is totally and permanently disabled as a result of her non-medical factors and either her left thumb CMC joint injury or her right thumb CMC joint injury.

5. Claimant has proven she is entitled to attorney fees under Idaho Code § 72-804 for Defendant's unreasonable denial of benefits related to her industrial injuries to her bilateral thumbs and right middle finger.

6. All other issues are moot.

2. Following the November 8, 2011 Decision of the Industrial Commission, the parties came to agreement concerning the amount of the attorney fee award payable to Claimant pursuant to the Commission Decision. The parties agreed that Defendant would pay attorney's fees calculated at 30% of the benefits payable to Claimant pursuant to the Commission Decision, subject to reduction to 15% for payments due after September 22, 2019, and for the remainder of Claimant's life. That stipulation is approved by order of the Commission filed contemporaneously herewith, and is retroactive to November 8, 2011.

3. Following the November 8, 2011, Decision, Defendant paid to Claimant those total and permanent disability benefits to which she was entitled under the Commission Decision. Defendant also paid a 30% attorney fee on those benefits as they became due.

4. Unfortunately, the total and permanent disability benefits were paid at an incorrect weekly rate. The overpayment of permanent and total disability benefits was not noted until an administrative audit by the Idaho Industrial Commission uncovered said overpayment in September of 2014. The Industrial Commission audit tends to demonstrate that from some time

in 2010 to December 31, 2013, total and permanent disability benefits were overpaid in the amount of \$22,676.83. Per the agreement of the parties, Defendant also paid to Claimant attorney's fees on this overpayment in the amount of \$6,803.05 ($\$22,676.83 \times 30\%$).

5. It is also likely that Claimant received an overpayment of permanent and total disability benefits for the period subsequent to January 1, 2014, and that she received a corresponding overpayment of attorney's fees as well. The extent and degree of the overpayment of permanent and total disability benefits subsequent to January 1, 2014, has not been quantified.

6. Following the Commission's discovery of the overpayment, and the dissemination of this information to the parties, the parties engaged in a good deal of back and forth concerning whether, or under what circumstances, Defendant should be allowed to recoup the amount of the overpayment, or in lieu thereof, apply the overpayment as a credit against their future obligation to pay benefits pursuant to the Commission Decision. These discussions were unfruitful, and at some point Defendant unilaterally made a decision to continue the payment of total and permanent disability payments to Claimant, while curtailing the payment of attorney's fees on those benefits to Berry until the overpayment of attorney's fees has been recouped. Per Defendant, the overpayment of attorney's fees is at least \$9,068.90, representing the \$6,803.05 paid through December 31, 2013, and what Defendant contends is an additional overpayment of attorney fees for the period January 1, 2014 forward.

7. The parties appear to concede that because Claimant has been found to be totally and permanently disabled, under Idaho Code § 72-316 no mechanism exists to recoup a voluntary overpayment of indemnity benefits since it is impossible to shorten the period during which total and permanent disability benefits are to be paid.

DISCUSSION

8. The Industrial Commission may entertain a petition for declaratory relief under

J.R.P. 15 when the following conditions are met:

Whenever any person has an actual controversy over the construction, validity or applicability of a statute, rule, or order, that person may file a written petition with the Commission, subject to the following requirements:

1. The petitioner must expressly seek a declaratory ruling and must identify the statute, rule, or order on which a ruling is requested and state the issue or issues to be decided;
2. The petitioner must allege that an actual controversy exists over the construction, validity or applicability of the statute, rule, or order and must state with specificity the nature of the controversy;
3. The petitioner must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the petition; and
4. The petition shall be accompanied by a memorandum setting forth all relevant facts and law in support thereof.

9. While the parties may agree that the provisions of Idaho Code § 72-316 make it impossible for Defendant to recoup the overpayment of total and permanent disability benefits there is a genuine dispute between the parties over the treatment to be given under that statute to the attorney's fees which were calculated and paid on the \$22,676.83 overpayment of indemnity owed through December 31, 2013 and on such further indemnity benefits paid thereafter. Defendant contends that the overpayment of attorney's fees is entitled to different treatment than the overpayment of indemnity benefits. Berry contends that there is no basis for differential treatment. We conclude that there is an actual controversy over the construction to be given to the provisions of Idaho Code § 72-316 under the circumstances of this case. Further, we conclude that the parties have an interest which is directly affected by the construction to be given to Idaho Code § 72-316 under these circumstances; if Defendant is correct, the

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overpayment of attorney's fees may be recouped by Defendant before Berry is again entitled to receive attorney's fees on indemnity benefits paid to Claimant. If Berry is correct then while there may technically have been an overpayment of attorney's fees, under the provisions of Idaho Code § 72-316, there is no way to recoup the same, and Berry may have his cake and eat it too.¹

10. Accordingly, we determine that this is an appropriate subject for a petition for declaratory ruling under J.R.P. 15. We do not deem it necessary to hold a further evidentiary hearing on this matter, and conclude that the issue may be decided on the basis of the briefing filed to date.

11. Idaho Code § 72-316 provides:

Voluntary payments of income benefits. – Any payments made by the employer or his insurer to a workman injured or afflicted with an occupational disease, during the period of disability, or to his dependents, which under the provisions of this law, were not due and payable when made, may, subject to the approval of the commission, be deducted from the amount yet owing and to be paid as income benefits; provided, that in case of disability such deduction shall be made by shortening the period during which income benefits must be paid and not by reducing the amount of the weekly payments.

It is clear that Defendant will not be able to recoup the overpayment of indemnity benefits made in this case; the overpayments made to Claimant were made during the period of disability and they were not due and payable when made. Therefore, those overpayments may be deducted from income benefits yet owed, but only by shortening the period during which the future income benefits are to be paid. The impediment to the operation of the statute that arises in cases of total and permanent disability is that there is no way to “shorten” the period during which Claimant is entitled to the payment of total and permanent disability.

¹ As discussed *infra*, an award of attorney fees under Idaho Code § 72-804 is an award to the claimant, not her attorney. However, it is clear that Berry has an interest which is directly affected by the interpretation of Idaho Code § 72-316. Depending on how the dispute is resolved, Berry stands to gain or lose.

12. It is to be noted that the title of the section suggests that it may only apply to the overpayment of “income benefits”, thus creating an obstacle to the application of the statute to what is conceded to be an overpayment of Idaho Code § 72-804 attorney’s fees awarded to Claimant by the Commission. Addressing this problem, Berry argues that it is well-established that attorney’s fees payable to the injured worker under Idaho Code § 72-804 constitute “compensation” as that term is defined in Idaho Code § 72-102(7). Compensation is there defined as follows:

“Compensation” used collectively means any or all of the income benefits and the medical and related benefits and medical services.

Indeed, this was, for many years, the rule in Idaho. On the question of how to characterize an award of attorney’s fees under Idaho Code § 72-804, the Court in *Mayo v. Safeway Stores*, 93 Idaho 161, 457 P.2d 400 (1969) explained:

If the award of attorney fees in an insurance case is compensatory, certainly under the Workmen’s Compensation Law, awards of attorney fees in a proper case must likewise be deemed as compensation to the injured employee or survivors, and not as a penalty.

The underlying rationale for treating an award of Idaho Code § 72-804’s attorney’s fees in this fashion is that an injured worker should not have his benefits lessened by legal expenses incurred as the result of the surety’s unwarranted conduct in delaying or denying the payment of compensation. *Clark v. Sage*, 102 Idaho 261, 629 P.2d 657 (1981). This treatment of Idaho Code § 72-804 attorney’s fees was followed in several subsequent Idaho cases. *See Hogaboom v. Economy Mattress*, 107 Idaho 13, 684, P.2d 900 (1984); *Dennis v. School Dist. No. 91*, 135 Idaho 94, 15 P.3d 329 (2000). However, as Berry well knows, or should know, the Court has since adopted a different position, as explained in *Page v. McCain Foods, Inc.*, 155 Idaho 755, 316 P.3d 671 (2014). Berry was counsel of record in that case as well, and in connection with

his claim for an award of attorney's fees higher than that granted by the Industrial Commission, he argued that Idaho Code § 72-804 attorney's fees were just another "benefit" payable to claimant and that he should be allowed to take his agreed upon attorney fee against this benefit, as well as other benefits he obtained for his client in the underlying case. The Court rejected this argument stating:

...

Looking to its plain language, Section 804 provides that "the employer shall pay reasonable attorney fees *in addition to the compensation* provided by this law." I.C. § 72-804 (emphasis added). Thus, "attorney fees" and "compensation" are not one and the same. Rather, "compensation" is defined as "any or all of the income benefits and the medical and related benefits and medical services," I.C. § 72-102. "Income benefits" are defined in I.C. § 72-102(6); "medical and related benefits" are defined in I.C. § 72-102(20); and "medical services" are defined in I.C. § 72-102(21). None of these definitions can be construed to include "attorney fees." Instead, an employer must pay attorney fees, plus any benefits that are owed. The statute's plain, unambiguous language precludes any interpretation that would allow "compensation" to include "attorney fees": a fee award under Section 804 is simply not a "benefit."

Therefore, following *Page*, an award of Idaho Code § 72-804 attorney's fees does not constitute "compensation"; it is something other than the income and medical benefits payable under the workers compensation laws. This characterization of Idaho Code § 72-804 attorney's fees thus invites the argument that Idaho Code § 72-316 does not contemplate the recoupment of an overpayment of attorney's fees since attorney's fees are not income benefits, and because the title of Idaho Code § 72-316 seems to anticipate that the provisions of the statute only apply to voluntary payments of income benefits.

13. However, the title of Idaho Code § 72-316 appears to conflict with the actual language of the statute. While the title suggests that the statute treats only the voluntary payment of income benefits, the first sentence of the statute suggests that it applies to "any payments"

made to a workman during a period of disability which were not due and payable when made. The term “any payments” admits a broader range of overpayments than appears to be contemplated by the title of the statute.

14. As a general rule of statutory construction, where the title of a statute is enacted as part of the Code (as is the case here), and the meaning of the language of the statute is ambiguous, the title may be used as an aid in understanding legislative intent. However, where the meaning of the language of the statute is clear without resort to the title of the statute, the title shall not be considered. *State v. Murphy*, 94 Idaho 849, 499 P.2d 548 (1972); *Walker v. Nationwide Financial Corp. of Idaho*, 102 Idaho 266, 629 P.2d 662 (1981); *Kelso & Irwin v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000). Here, we believe that it is only by considering the title to Idaho Code § 72-316 that a potential ambiguity is introduced to the interpretation of the statute. Absent the title to the statute, the text of Idaho Code § 72-316 makes it clear that it applies to “any payments” that were made to the Claimant during the period of disability, but which were not due and payable when made. This language is not ambiguous and includes within its embrace any payments that were made to the Claimant during the period of disability which were not due and payable when made. Such payments, with the permission and approval of the Commission, may be deducted from income benefits yet due and owing. Based on the principle of statutory construction in the cases cited above, we decline to apply the title of the statute to create an ambiguity where one does not exist within the body of the statute.

15. Another argument that might be raised against the application of Idaho Code § 72-316 to these facts is that the attorney’s fees payable under Idaho Code § 72-804 are not payments made to the injured worker, but are, instead, payments made to the injured worker’s attorney. The payment of an award of attorney’s fees under Idaho Code § 72-804 is a payment

made to the injured worker, notwithstanding that it eventually ends up in his attorney's pocket. See *State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999); *Bradley v. Washington Group Int'l*, 141 Idaho 655, 115 P.3d 746 (2005); *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990). Therefore this provision of the statute is not an impediment to its application to an overpayment of Idaho Code § 72-804 fees.

16. However, there are other provisions of the statute which do thwart Defendant's efforts to recoup the overpayment of attorney fees. Admittedly, the overpayments of attorney's fees took place during Claimant's period of total and permanent disability and they were not owed and payable when made. Therefore, the overpayment of attorney's fees may be applied as a credit against Defendant's obligation to pay "income" benefits yet due. However, there is nothing in the provisions of Idaho Code § 72-316 that would allow Defendant to apply the overpayment of Idaho Code § 72-804 attorney's fees against its future obligation to pay attorney's fees pursuant to the Commission's Decision. If Defendant is entitled to recoup an overpayment of attorney fees, that overpayment can only be recouped from income benefits yet owed. More problematic for Defendant is the fact that there is nothing in Idaho Code § 72-316 to suggest that an overpayment of Idaho Code § 72-804 attorney's fees should not be subject to the same treatment as an overpayment of indemnity benefits in a case of total and permanent disability. In other words, since there is no way to "shorten" the payment of income benefits in a case of total and permanent disability, Defendant will not be able to recover an overpayment of attorney's fees, just as it is unable to recover an overpayment of indemnity benefits. Overpayments of both indemnity and attorney fees can only be recouped from "income benefits" yet due. In a case of total and permanent disability neither type of overpayment can be recouped.

17. Having concluded that Idaho Code § 72-316 does not provide a means by which Defendant can recoup an award of attorney's fees payable to the injured worker in a case of total and permanent disability, it is not necessary for us to understand precisely what the amount of the overpayment may be, whether it is \$6,803.05, as claimed by Berry, at least \$9,068.90, as claimed by Defendant, or some other figure.

18. Berry also invites the Commission to address the fact that Defendant unilaterally curtailed the payment of attorney's fees owed to Claimant under Idaho Code § 72-804 until the overpayment of attorney's fees has been recouped. Berry argues that this treatment is specifically prohibited in Idaho Code § 72-316 which requires the Commission's approval of the recoupment of an overpayment. Clearly, the statute does anticipate Commission approval. The question before the Commission is whether Idaho Code § 72-316 requires the Commission's prior approval before the payment of amounts owed to an injured worker can be reduced by virtue of a prior overpayment. In *Fomichev v. James C. Lynch*, Order on Reconsideration, 2013 IIC 0013 (2013), the Commission had occasion to treat similar language found in the current Idaho Code § 72-435. That section provides:

Injurious practices – Suspension or reduction of compensation. – If an injured employee persists in unsanitary or unreasonable practices which tend to imperil or retard his recovery the commission may order the compensation of such employee to be suspended or reduced.

The question presented in that case was whether a surety may unilaterally suspend or reduce workers compensation benefits where it perceives that an injured worker is engaging in injurious practices, so long as it seeks subsequent ratification of its decision from the Industrial Commission. While the statute does not expressly state that prior approval is required, the Commission determined that there were a number of policy reasons supporting prior approval of

the Commission before a surety could unilaterally curtail the payment of benefits. In this regard, the Commission stated:

During an injured workers' period of recovery following an industrial injury, it is not unusual for workers' compensation benefits to provide the worker's only source of income. Interruption of the benefits stream as a punitive or coercive measure is not to be taken lightly. We are mindful of the general rule of statutory construction which applies to our application of the Act. When interpreting the Act we must liberally construe its provisions in favor of a finding of compensation in order to serve the humane purpose for which the act was promulgated. Wernecke v. St. Maries Joint School District #401, 147 Idaho 277, 207 P.3d 1008 (2009); Gibson v. Ada County Sheriff's Office, 147 Idaho 491, 211 P.3d 100 (2009); Nelson v. City of Bonners Ferry, 149 Idaho 29, 232 P.3d 807 (2010). We conclude that an employer/surety may not curtail workers' compensation benefits under I.C. § 72-435 without first having an (sic) applied for and obtained a Commission order authorizing the same.

19. We believe that the same policy considerations mandate a similar outcome in connection with the treatment of the similar language of Idaho Code § 72-316. The curtailment of amounts payable to an injured worker under the workers compensation laws of this state are not to be taken lightly, regardless of whether such payments constitute "compensation" or, as in this case, an award of attorney's fees payable to Claimant under the provisions of Idaho Code § 72-804. Consistent with *Fomichev*, we conclude that prior approval of the Commission is required before action can be taken by surety to curtail payments under Idaho Code § 72-316.

CONCLUSIONS OF LAW

For the reasons set forth above, we conclude that Idaho Code § 72-316 is not per se inapplicable to an overpayment of attorney's fees made pursuant to Idaho Code § 72-804 since such payments do constitute payments to the injured worker instead of the injured worker's attorney. In a less than total case, such an overpayment could be recouped by shortening the period during which income benefits were scheduled to be paid, but only by curtailing the payment of income benefits at the end of the period. As with the overpayment of indemnity

benefits in a case of total and permanent disability, there is simply no way to accomplish this “shortening” in a case of the overpayment of Idaho Code § 72-804 attorney’s fees in a case of total and permanent disability. Moreover, Defendant failed to obtain the Commission’s approval before taking action to recoup the overpayment of attorney’s fees. Finally, Defendant attempted to recoup the overpayment of attorney’s fees from future attorney’s fees yet owed, a practice that is not authorized by the specific language of the statute. For these reasons, we conclude that the right to recoup an overpayment of attorney’s fees under the peculiar facts of this case does not exist under Idaho Code § 72-316. We note, however, that this is an issue of first impression in Idaho. We decline to award additional attorney’s fees to Claimant as requested by Berry.

DATED this 10th day of August, 2015.

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 10th day of August, 2015, a true and correct copy of the foregoing **ORDER ON PETITION FOR DECLARATORY RELIEF** was served by regular United States Mail upon each of the following:

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ERIC S BAILEY
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ka

_____/s/_____