

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BONNER GENERAL HOSPITAL, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE
CORP.,

Surety,

Defendants/Petitioners.

v.

ROSE R. PINCENTI,

Claimant/Respondent.

IC 2010-031621

**ORDER DECLINING PETITION FOR
DECLARATORY RULING**

Filed August 24, 2015

On July 1, 2015, Defendants (Petitioners herein) filed a request for a declaratory ruling. Petitioners seek a declaratory ruling on the validity of Referee Donohue's March 24, 2015 Order Granting Claimant's Request for a Protective Order (Order) in this case. Petitioners argue that they previously scheduled an IME in this matter, but the Referee granted Claimant's motion for a protective order. Petitioners argue that the Referee improperly shifted the burden of proof when granting Claimant the protective order, and based the ruling on factual errors. Petitioners contend that they have a strong interest in securing an IME. Petitioners state that the issue to be decided is whether Petitioners are entitled to conduct an Independent Medical Exam (IME) under Idaho Code § 72-433.

On July 13, 2015, Claimant (Respondent herein) objected to the request for declaratory ruling. Respondent argues that Petitioners are attempting to take a second bite out of the apple to avoid complying with the Commission's August 2014 Order granting Respondent medical care.

Respondent also argues that the March 24, 2015 Protective Order was not the subject of a motion for reconsideration and became a final decision pursuant to Idaho Code § 72-718. Respondent contends that the Referee applied the appropriate burden of proof, and disputes the alleged factual errors.

JRP 15, Declaratory Rulings, provides a mechanism by which an interested party may apply to the Industrial Commission for rulings “on the construction, validity, or applicability of any workers’ compensation statute, rule, regulation or order.” (*See*, JRP 15(A)). The petitioner must demonstrate that an “actual controversy” exists over the construction, validity, or applicability of the rule or statute in question. (*See*, JRP 15(C)). The Commission is free to decline to make a ruling on a petition when it appears that there is no actual controversy or there exists some other good cause why a declaratory ruling should not be made. (*See*, JRP 15(F)(4)).

We decline to rule on the petition because we believe it fails to articulate an actual controversy over the construction or validity of the applicable statute, in this case I.C. § 72-433. Rather, what is at issue in this matter is the factual question of whether Respondent was entitled to a protective order. The Referee’s Order on Claimant’s Objection to Defendants’ Idaho Code § 72-433 Exam and Motion for Protective Order states as follows:

In the face of a specific order by the Commission requiring medical care, Defendants have not shown an adequate basis for subjecting Claimant to yet another IME without Claimant’s consent; no medical records and/or affidavit have been provided to establish that Defendants have provided treatment as required by the order. It has been only about seven months since the Commission issued its order requiring more medical care. The Commission has seen nothing to indicate the nature and extent of treatment provided pursuant to its order. In particular, the reasonableness of the BS spinal stimulator was established by evidence. That evidence showed that implantation and adjustments required time for full efficacy to be achieved. Without another evidentiary showing to identify treatment provided since August 2014, the Referee is disinclined to subject Claimant to more of the same maneuvering that gave us the opinions of Drs. Stevens and Chong.

The parties evidently dispute the facts giving rise to the protective order. Although resolving this dispute is certainly one of the Commission's obligations as the finder of fact, this assessment is not properly the subject of a JRP 15 petition for declaratory ruling.

Finally, Petitioners argue that the Petition should be entertained by the Commission because it calls for the Commission to correct the Referee's interpretation that Idaho Code § 72-433 places on Petitioners the burden of proving that Respondent must submit to an employer-ordered medical exam. Per Petitioners, they may ask of Respondent that she appear at such exam as a matter of right conferred by the statute, and that it is Respondent's burden to show cause why she should not be required to attend. While the statute makes it clear that an employer does have the right to require an injured worker to present for the purposes of an exam, that right is not unfettered. Here, in response to the notice of the exam, Respondent asserted that there had been no recent change in Respondent's condition such that an exam was warranted, and that the exam was interposed merely as a delay tactic. Petitioners failed to respond to this assertion with any evidence to the contrary. We do not believe that this constitutes improper burden shifting by the Referee. *Barton v. Seven Heaven Recreation Inc.*, 2010 IIC 0379; *Kimball v. Gooding County Memorial*, 2014 IIC 0043.

We believe that this matter is more properly handled as one of the issues to be decided by the Referee assigned to this case, and in the normal course of a proceeding before the Industrial Commission. The Referee is in charge of the case management and is fully competent to rule on such concerns as appropriate. Therefore, for these reasons we decline to entertain Defendants' petition for declaratory ruling, and dismiss the same.

///

///

ORDER

Based on the foregoing, Claimant's request for a declaratory ruling is **DECLINED**. IT IS SO ORDERED.

DATED this 25th 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 24th day of August, 2015, a true and correct copy of the **ORDER DECLINING PETITION FOR DECLARATORY RULING** was served by United States Mail upon each of the following:

STEPHEN J NEMEC
1626 LINSOLN WAY
COEUR D'ALENE ID 83814

LEA KEAR
PO BOX 6358
BOISE ID 83707-6358

/s/
Assistant Commission Secretary