BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANELL RODRIGUEZ, Claimant, v. WOODGRAIN MILLWORK, INC., Employer, and TWIN CITY FIRE INSURANCE CO., Surety, Defendants.	**IC 2014-001999** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND CONCURRING OPINION** Filed 12/29/17

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Boise, Idaho, on March 14, 2017. On November 28, 2017, the matter was reassigned to the Commissioners. Claimant and Defendants filed letters of no objection to this reassignment. Claimant was represented at hearing by Bryan Storer, of Boise.[1] Lora Rainey Breen, of Boise, represented Woodgrain Millwork, Inc., ("Employer"), and Twin City Fire Insurance Company, ("Surety"), Defendants. Oral and documentary evidence was admitted. No post-hearing depositions were taken. The parties submitted post-hearing briefs. The matter came under advisement on July 8, 2017.

[1] Subsequent to post-hearing briefing, Matthew Steen substituted in as counsel of record for Claimant.

ISSUES

The issues the parties agreed to have decided are:

1. Whether Claimant complied with the notice and claim limitations set forth in Idaho Code § 72-701 through § 72-703;

2. If Claimant is precluded from receiving workers' compensation benefits, whether Defendants are entitled to reimbursement of benefits paid;

3. Whether Idaho Code § 72-706 precludes Defendants from denying benefits or asserting Claimant has not complied with the notice limitations set forth in Idaho Code § 72-701 through 72-703;

4. Whether Defendants are equitably estopped from asserting Claimant has failed to comply with the notice limitations in question because of Defendants' acceptance of the claim and payment of compensation;

5. Whether Defendants complied with the notice requirements of Idaho Code § 72-706,[2] and if not, whether the statute of limitations was tolled pursuant to Idaho Code § 72-604; and

6. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 based upon an unreasonable denial of benefits by Defendants.

CONTENTIONS OF THE PARTIES

On August 4, 2012, Claimant sustained a knee injury while acting within the course and scope of her duties for Employer. Her employer was aware of the accident requiring medical care from the day it happened onward. Claimant did not miss work, but sought medical treatment for her knee on October 10, 2012. Employer was contemporaneously informed of this treatment. In spite of its awareness of the need to file a First Report of Injury under Idaho Code § 72-602, Employer willfully failed to do so until January 15, 2014, after Claimant notified Employer that she needed an MRI for her inured knee. As such, Claimant timely made her claim for compensation, because her one year time

[2] At several places in her briefing, as well as in these listed issues, Claimant argues that Idaho Code § 72-706 tolls the time for her to file her notice of injury. It appears from the arguments that Claimant erroneously cited to Idaho Code § 72-706 when she meant Idaho Code § 72-604. There is no justiciable issue involving the workings of Idaho Code § 72-706 under the facts of this case.

limitation was tolled by the workings of Idaho Code § 72-604. Claimant should not be ordered to repay any benefits paid to her under this claim, and is entitled to additional benefits as they come due.

Defendants contend that Claimant did not make a written claim for compensation within one year of her accident as required by Idaho Code §§ 72-701 through 72-703. Consequently, the statute of limitations has run and was not tolled. Claimant is not entitled to benefits. Claimant missed no work from this accident, and failed to inform Employer she had sought treatment for her industrial knee injury until January 2014, almost a year and a half after her accident. Defendants had no legal obligation to file a First Report of Injury prior to January 2014. Further, Defendants are entitled to recover from Claimant the PPI benefits paid to her in good faith, even while contesting Claimant's right to benefits for this accident. Defendants are not seeking to recoup the more than $200,000 paid in medical and time loss benefits paid to Claimant to date, although they contest their obligation to pay any further benefits for this claim.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing and during a pre-hearing deposition; and

2. Joint Exhibits (JE) 1 through 12, admitted at hearing.

FINDINGS OF FACT

UNDISPUTED FACTS

1. On August 4, 2012, Claimant fell while at work. The parties agree this fall constituted an industrial accident.

2. As a result of the fall, Claimant began experiencing pain and swelling in her left knee which grew progressively worse over the course of her work day. Claimant informed her supervisor of her condition.

3. Per company protocol her supervisor took Claimant to the office where he called a telephonic-triage provider known as Medcor. Claimant related her condition and symptoms to a Medcor nurse-representative. The exact contents of that conversation are disputed. However, Medcor did fax Employer documents shortly after the conversation, indicating that Claimant "has sought, or is seeking a medical evaluation at St. Alphonsus Medical Group" in Nampa. Furthermore, the Medcor documents indicated that the Medcor RN recommended and the Employee (Claimant) decided to seek treatment within 24 hours. JE 2, pp. 2, 3. Claimant's unrebutted testimony was that she never saw these documents.

4. Claimant did not immediately seek medical care for her knee injury. She missed no work in the days following her industrial accident.[3] She did not at that time file a written claim for benefits.

5. Nearly two months later, on October 10, 2012, Claimant finally sought medical care for her left knee, which she claims had had remained symptomatic since the accident. She was seen by Dominic Gross, M.D., an orthopedic surgeon with whom she had treated for various issues over the past two decades.

6. Dr. Gross' records of that visit do not indicate or even suggest that Claimant's left knee was work related. Handwritten notes state that Claimant had fallen on her knee, but she could not recall the exact date. Typewritten notes state that Claimant fell when her leg went numb. Dr. Gross noted Claimant had "underlying arthritis" and

[3] Claimant testified at hearing that she left work early on the day of the accident, albeit by just a few minutes. At deposition, Claimant indicated she did not leave early. Whether or not Claimant left a few minutes early is immaterial to resolution of the issues herein.

patellofemoral crepitus in her left knee. No films were undertaken based on Claimant's wishes. She also declined a Cortisone injection. Dr. Gross prescribed ice, rest, and anti-inflammatories. JE 8, p. 19.

7. After October 2012, the medical records are silent on any continuing treatment for Claimant's left knee until August 2013[4], although during that time frame she Dr. Gross for shoulder surgery, as well as issues involving severe bi-lateral foot pain and pain in her right thumb.

8. Dr. Gross' medical records of August 19, 2013 state that Claimant's left knee symptoms were indicative of a torn meniscus. Claimant underwent a Cortisone injection on her knee on that date. Dr. Gross suggested an MRI.

9. On or around January 14, 2014, Claimant spoke with Judy Wise, a senior human resources manager for Employer, about obtaining a left knee MRI. By that point in time Defendants had not filed a First Report of Injury with the Industrial Commission, but did so soon thereafter.

DISCUSSION AND FURTHER FINDINGS

10. 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). However, "where the language of a statute is unambiguous, the clear expressed intent of the legislature must be given effect and there is no occasion for construction." *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993). Where a statute is plain, clear, and

[4] Dr. Gross' records indicate on March 4, 2013, Claimant "still has knee pain but is not willing to do anything about it at this time." No treatment was provided, and the main purpose of Claimant's visit with Dr. Gross on that date was a post-operative follow up for a right shoulder surgery performed twelve weeks earlier.

unambiguous, it must be given the interpretation the language clearly implies. If the statute is socially unsound, it is the up to the legislature, not the courts, to correct it. *Verska v. St. Alphonsus Regional Medical Center,* 151 Idaho 889, 265 P.3d 502 (2011).

STATUTE OF LIMITATIONS AND TOLLING

This is a statute of limitations case which involves the interplay of several statutes – Idaho Code §§72-701 through 703; Idaho Code §72-602; and Idaho Code §72-604.

11. Idaho Code §72-701, entitled **Notice of injury and claim for compensation for injury – Limitations.**, states in relevant part;

> No proceedings under this law shall be maintained … unless a claim for compensation … shall have been made within one (1) year after the date of the accident ….

12. The specifics for claim content and filing are set out in Idaho Code §§72-702 and 703, and require the claimant to make the claim in writing, signed by the claimant or by someone on the claimant's behalf (I.C. §72-702), and deliver the claim to the employer or certain representatives thereof (I.C. §72-703).

13. It is undisputed in the current case that Claimant did not file a signed, written claim, delivered to Employer, within one year of her accident. However, the filing requirements found in I.C. §72-701 may be tolled under certain circumstances based upon an employer's willful failure or refusal to perform its reciprocal duties.

14. Idaho Code §72-602(1) places obligations on the employer after certain industrial accidents. As set forth therein;

> First report -- … As soon as practicable but not later than ten (10) days after the occurrence of an injury … requiring treatment by a physician or resulting in absence from work for one (1) day or more, a report thereof shall be made in writing by the employer to the commission ….

15. Idaho Code §72-604 provides consequences for an employer's failure to file the First Report of Injury (FROI) required under I.C. §72-602(1). The statute states in relevant part;

> When the employer has knowledge of an … injury, … and willfully fails or refuses to file the report required by section 72-602(1), Idaho Code, … the limitations prescribed in section 72-701 ... Idaho Code, shall not run against the claim of any person seeking compensation until such report … shall have been filed.

16. Applying the above statutes, a claimant is required (with caveats discussed below) to deliver to her employer a written, signed claim for compensation within one year from the date of her accident. Failure to due so will preclude (with caveats) a claimant from pursuing benefits under the Idaho's workers' compensation statues (the Act). The worker's employer, when provided with the written claim, or knowledge of the accident even in the absence of a written claim, must file with the Industrial Commission a report of the accident if the accident required medical treatment or resulted in the employee missing work for one day or longer. Should the employer willfully fail or refuse to file the report when obligated to do so, the obligation on the worker to file a written signed claim is suspended until the employer files the report. The worker's one year limit does not begin to run until after the employer files the report.

17. In the present case, since Claimant did not file a written claim for benefits within one year of her industrial accident, the issue becomes whether her obligation to do so was suspended by Employer's failure to file the required report with the Commission. Under the facts of this case, there are two points in time which could arguably have triggered Employer's obligation to file the report; on the day of the accident, or on October 10, 2012, when Claimant first sought medical care for her industrial knee injury.

Day of Accident Obligation

18. Defendants knew of Claimant's industrial accident and resultant knee injury as of the day it happened. In fact, Employer initiated contact with Medcor with respect to Claimant's knee to ascertain whether or not Claimant needed medical care for the injury. That same day Medcor sent Employer an Incident Report form indicating that Claimant had, in the view of the telephonic triage nurse who spoke with Claimant, suffered a sprain/strain which needed medical care within 24 hours from Employer's preferred provider, St. Alphonsus Medical Group in Nampa.

19. Claimant did not seek immediate medical care. As a result, Employer sent Gallagher Bassett (GB), the TPA for Surety, a "record only" report, meaning the employee did not go to the doctor or miss time from work. According to Ms. Wise and a representative witness from GB, if Claimant had sought medical care, the report to Gallagher Bassett would have so indicated, and GB would have filed a FROI with the Commission. Since Claimant did not seek medical care, GB did not send the Commission an FROI. This procedure was routinely followed by Employer and GB.[5]

20. Defendants argue the procedure utilized above was correct, and no FROI was required immediately after the accident since Claimant did not seek medical care at the time of her injury. Defendants support their position with *Petry v. Spaulding Drywall,* 117 Idaho 382, 788 P.2d 197 (1990). Therein, the claimant injured his shoulder while lifting sheetrock at work. He told his boss about the accident, but declined the employer's

[5] If the employee does seek medical care, or misses time from work, Employer sends the TPA a "med call" report, which would trigger the filing of an FROI from the TPA, as discussed herein. A representative from GB testified that when it receives a "records only" or what GB calls an "incident only" report, there is no requirement to send an FROI to the Commission, and GB does not do so. Hearing Transcript p. 179. The GB representative called at hearing had no knowledge of a report from Employer to GB concerning Claimant in 2012, but further noted she did not work for GB in 2012, so her knowledge on this subject was limited.

suggestions that he seek medical care. Thereafter, the claimant continued to work the same job for the next fourteen months, although he continued to experience pain in his shoulder during this time. On occasion he was even given lighter duty work to accommodate his condition. Eventually Claimant elected to seek care for his injured shoulder. His doctor recommended surgery. Eighteen months after his industrial accident, Claimant filed a written claim for benefits. His employer promptly filed an FROI thereafter. The Supreme Court framed the issue as whether the claimant could still recover benefits when he gave oral notice to his employer at the time of the accident, but did not file a claim for benefits within the one-year time limit prescribed by statute. Ultimately the Court ruled against the claimant, noting the time frame was from the date of accident, even when the severity of the injury was not known until much later. Furthermore, the Supreme Court held the employer's duty to file an FROI was triggered by an injury requiring medical treatment or the employee's absence from work. Since the claimant did not miss work and did not consult a physician until more than one year had passed, no FROI was due at the time of injury. The Court also noted that even if an FROI should have been filed, the employer did not willfully fail to file. Rather the failure was due to misinformation or ignorance, and thus not willful.

21. The facts in *Petry* are similar to the instant facts. In both, the employer knew of the injury at the time of occurrence. Both claimants declined medical care initially. Both employers did not file FROIs due to the fact the claimants did not seek medical care or miss work. Both claimants had lingering symptoms which eventually led to surgery. Both claimants failed to prepare a claim for benefits within one year of the accident.

22. While Defendants argue *Petry* is controlling precedent, there is one significant distinction between the two cases. In *Petry* the employer had no independent knowledge that the claimant required medical care. Instead the employer relied on the claimant's assertions that his condition would improve with time. There was no evidence the employer had any medical training, much less would qualify as a medical expert. In the present case, Employer contacted a medical professional (nurse) whose job it was to preliminarily diagnose the injury and inform the parties, including Employer, whether medical care was required. Within hours, Employer knew Claimant's injury required medical care, and gained that knowledge from a medical professional hired for the very purpose of informing Employer as to whether the injury required medical treatment.

23. Ms. Wise testified that she could not "make" Claimant seek medical treatment, and although Claimant needed treatment, when she chose to not immediately treat that decision obviated the need to file an FROI. However, nothing in Idaho Code §72-602(1) suggests the trigger for filing is actual medical treatment. Instead the statute states that the employer must file a first report when the injury is one "requiring treatment by a physician." Claimant's injury fit that classification, and Employer was made known of that fact by a medical professional hired by Employer.

24. Going forward, the Commission will interpret the phrase "requiring treatment" as used in § 72-601(1) to mean "needing treatment."

25. Employer should have filed an FROI when it was informed by Medcor that Claimant needed medical treatment, even if Claimant chose not to seek such needed care. However, Employer's failure to file an FROI on the day of the accident, or within ten days thereafter does not automatically toll the running of Claimant's statute of limitation for

filing a claim for benefits. Under Idaho Code §72-604, the statute of limitations for filing a claim is only tolled if the employer's failure to file a first report is willful.

26. In *Mead v. Swift Transportation*, 2015 IIC 004.1 (2015), the Idaho Industrial Commission noted;

> The Idaho Supreme Court has held that the word "willful" implies a purpose or willingness to commit the act or make the omission referred to. While it does not require an intent to violate the law in the sense of having an evil or corrupt motive or intent, it does imply a conscious wrong. It is more nearly synonymous with "intentionally," "designedly," "without lawful excuse," and, therefore, not accidental. It refers to those who purposely, intentionally, consciously or knowingly fail to report, not those whose omission is accidental because of negligence, misunderstanding or other cause. See, *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 1240 (1079); *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

In *Mead,* the Commission noted the Defendants did not mistakenly believe a filing (of change of status) was not required in the situation presented therein. Instead, the Commission found that Defendants were aware of the legal requirements of the statute requiring filing, but failed to do so. Although not malicious such failure to file the document when aware such filing was required was willful.

27. The present case presents a different scenario. Herein, the Defendants did not believe it was required to file an FROI until Claimant actually sought medical treatment. Defendants had an established protocol which it applied routinely; namely to submit to GB a "record only" report when its employees did not seek medical treatment for an injury, and file a "med call" report when the employee sought treatment. GB filed an FROI when it received a "med call" report from Employer. There is nothing in the evidence to suggest that Defendants understood they needed to file a first report for untreated injuries. At most, their omission was

due to a misunderstanding. At best, it was due to their understanding of the precedence of cases such as *Petry.*

28. Defendants' failure to file a First Report of Injury within ten days of the date of Claimant's industrial accident was not willful, and did not serve to toll the running of the statute of limitation contained in Idaho Code §72-701.

October 10, 2012 Obligation

29. Claimant argues that even if Defendants had no obligation to file an FROI immediately after the accident due to her failure to seek medical care at that time, then certainly when she did seek treatment on October 10, 2012, such treatment would have triggered Defendants' obligation to submit an FROI in October.

30. Defendants agree that when they acquired knowledge Claimant had sought medical treatment for her industrial injury they had an obligation to file an FROI. Defendants dispute the claim that they knew Claimant was seeking treatment for an industrial injury in October 2012. Instead they testified that the first time they became aware that Claimant was treating for her industrial injury was in January 2014. Resolution of this issue rests on an analysis of seemingly conflicting testimony between the parties.

Claimant and Daughter's Testimony

31. Claimant testified with regard to her first medical treatment post-accident for her industrial knee. Her hearing testimony of relevance is below;

> Q. And so do you recall when the first time was you saw him [Dr. Gross] after this injury? And the record states October 10th, 2012. Does that sound about right?
>
> A. Yeah. I don't – my time – I don't keep track of time at all. So, it was probably around then. I thought it was sooner, but it probably was in October.
>
> ***

Q. Okay. When you went to that appointment did you have anybody else with you?

A. My middle daughter.

Q. Okay. And when you were at that appointment did you explain to Dr. Gross how this injury occurred?

A. Yes. I told him that I fell at work.

***

Q. Okay. And could you tell us about what time of day you went to that appointment?

A. I left work early that day. My daughter come [sic] and picked me up.

Q. Okay.

A. I went and – went in and told Judy [Wise] I was going to go and, then, we left.

Q. Okay. Was there anything else in that conversation with Judy before you left?

A. She said to call and let her know what he said.

Q. And she knew you were going to see Dr. Gross?

A. Yes.

Q. Okay. And then what did you say to your daughter when you got into the car?

A. To remind me to call Judy when we got done.

***

Q. Okay. And so do you distinctly remember talking to Judy after this appointment with Dr. Gross about your knee?

A. Yes.

***

Q. Because you – do you recall anything that you said to her in particular about this appointment?

A. No.

Hearing transcript, pp. 41-45.

32. On cross examination Claimant was reminded that in her deposition Claimant had testified that she did not talk to anybody at work about seeking treatment for her knee at the time she initially saw Dr. Gross in October 2012. Claimant responded that she thought the deposition question was directed toward co-workers in her area at work, not to Judy Wise. Claimant testified that if the question had been whether Claimant spoke with her supervisor she would have said yes. Claimant's answer was sufficient to avoid impeachment on that topic.

33. Claimant then was asked;

> Q. Okay. Tell me again, then, what you are testifying to today that you told Judy Wise and tell me when you told her that.
>
> A. What, that I was going to the doctor?
>
> Q. Is that what you told her, then, you were going to the doctor?
>
> A. I told her I was going to go see Dr. Gross for my knee. She said call mean let me knew [sic] what he says.
>
> Q. And on what date did you do that?
>
> A. I don't remember.
>
> ***
>
> Q. -- you have seen Dr. Gross a lot of times. Do you know what date it was before you saw Dr. Gross that you told Judy Wise that – or you allegedly told her that?
>
> A. No, I don't.

After an objection and discussion, the cross examination continued;

> Q. I will try to restate the question. So, what you're testifying here to today is that prior to one of the appointments – and you're not sure which one – with Dr. Gross you talked to Judy Wise; is that correct?
>
> A. Correct.

Another objection was interposed and overruled. Claimant then continued;

A. For my knee.

Hearing transcript, pp. 61-64.

34. Claimant's daughter also testified. She recalled taking Claimant to see Dr. Gross on October 10, 2012. She also recounted Claimant asking her to remind Claimant to call Judy Wise after the appointment. As noted at hearing;

> Q. Okay. And after the appointment do you recall what happened?
>
> A. When we were leaving – as soon as we got in the car [Claimant] called Judy.
>
> Q. And did she actually connect with her?
>
> A. Yes.
>
> Q. Okay. And you overheard their conversation?
>
> A. Yes.
>
> Q. And she explained about the appointment?
>
> A. Yes.
>
> Q. For the knee?
>
> A. Yes.

Hearing transcript, p. 82. Upon cross examination and Referee examination, the witness convincingly testified as to how she specifically recalled the events of early October. Her testimony was not impeached or diminished by any cross examination questions.

Judy Wise's Testimony

35. Judy Wise testified that she did not have a conversation with Claimant in October 2012 wherein Claimant informed Ms. Wise that she was seeking medical care with Dr. Gross for

a work-related knee injury. When asked about her level of confidence that no such conversation took place, Ms. Wise stated;

> A. The main reason I'm certain that [the conversation] did not happen, because I'm methodical about the first reports and when they turn over from a record only to a medical that we would make another report showing that it was – now the person went to the doctor. As we did in January [2014] when she notified me. So, she did come talk to me about it, but I have no recollection of any October conversation.
>
> Q. Okay.
>
> A. And I would have filled that out at that time.
>
> Q. Okay. So, had she actually talked to you about it in October of 2012 you would have finalized that documentation, you would never have let that just slide informally?
>
> A. Absolutely not, because I know the importance of – of getting things reported timely and, you know, I have had many conversations with [Claimant] about filling out accident reports period, because she never wanted to do that and she already testified I think to the fact that I yell at her and make her do stuff and that's true.

Hearing Transcript, pp. 120, 121.

36. Judy Wise also testified about how she and Claimant spoke in 2014, and how Ms. Wise helped Claimant obtain workers' compensation benefits once it was determined that Claimant had sought medical treatment for her industrial knee within one year after her accident. To date, those benefits exceed $200,000.

Testimony Analysis

37. While the parties may argue that one witness is more credible than the other, and admittedly Claimant is a fair historian at best, this is not a situation where credibility choices must be made. It is more probable than not that all witnesses were attempting to be honest in light of the fact this conversation took place 4.5 years' previously to their testimony.

38. Much like all words in a statute are to be given meaning if possible, so too, if there is a way to analyze the various witnesses' testimony harmoniously in this case there is no need to weigh credibility. When carefully considering all testimony on this subject, it is most likely that Claimant did discuss the fact that she was heading out to see Dr. Gross for her knee. However, Claimant did not ever testify that she informed Ms. Wise that she was seeing Dr. Gross for a knee problem arising from her industrial accident nearly two months' previous. While Claimant may have assumed that Ms. Wise would link the fact that Claimant needed to see Dr. Gross in October because her knee was hurting, with Claimant's August work accident, even though Claimant did not seek care or miss work immediately thereafter,[6] it appears in hindsight that Ms. Wise made no such connection. After all, Claimant had seen Dr. Gross for a number of medical issues spanning two decades, so Claimant informing Employer she was leaving work to see Dr. Gross for a knee issue would not necessarily implicate the August work accident.

39. Ms. Wise's testimony – and more importantly, her subsequent action when Claimant specifically informed her that due to the August 2012 injury Claimant needed additional medical treatment in 2014 – supports the idea that whatever conversation she and Claimant had in October 2012, it was not specific enough to alert Employer as to the casual relationship between the October treatment and the August accident.[7] Knowledge that Claimant was seeing a doctor for right knee complaints does not equate to knowing Claimant's right knee complaints resulted from a work accident nearly two months' earlier. As such, Employer did not

[6] In fact, when asked why Claimant waited two months to first see Dr. Gross after the accident, Claimant stated "[b]ecause it didn't bother me." Hearing Transcript, p. 66.

[7] Despite Claimant's testimony to the contrary, Dr. Gross' notes from that October visit likewise make no mention that Claimant was being seen for knee problems stemming from her August industrial accident; thus casting some question on whether Claimant was relating her knee issue to her previous accident at the time of that October visit.

have sufficient information in October 2012 to implicate the duties of Idaho Code §72-602(1). Furthermore, even if Employer should have understood the connection between Claimant's medical treatment in October and her previous work accident in August, the failure to file an FROI was not willful, as discussed above. *Accord, Semancik v. Contract Floors, Inc.*, 2013 IIC 0083 (2013); *Crambit v. Bearable Dentistry*, 2012 IIC 0042 (2012).

40. Claimant has failed to prove that Defendants had a duty to file a First Report of Injury in October 2012.

41. Even if Defendants' had a duty to file a First Report of Injury in October 2012, Defendants' failure to file the FROI within ten days from October 10, 2012, when Claimant first sought medical care for industrial injury was not willful, and did not serve to toll the running of the statute of limitation contained in Idaho Code §72-701.

Summary on Statute of Limitations and Tolling

42. Claimant did not file a signed, written claim for benefits within one year of the date of her industrial accident as required by Idaho Code § 72-701.

43. Claimant has failed to prove that her obligation under Idaho Code § 72-701 was tolled by Defendants' failure to comply with Idaho Code § 72-602(1), as provided for in Idaho Code § 72-602(1).

44. Claimant's claim is barred under the provisions of Idaho Code § 72-701, and she has failed to prove she is entitled to seek further benefits under the Act.

ESTOPPEL

45. Claimant argues that the doctrine of equitable estoppel prevents Defendants from asserting that she failed to timely file her claim for benefits.

46. Equitable estoppel requires four elements: (1) a false representation or concealment of material fact with actual or constructive knowledge of the truth; (2) the party asserting estoppel did not know or could not discover the truth; (3) the false representation or concealment of facts was made with the intent that it be relied upon; and (4) the person to whom the representation was made or from whom the facts were concealed relied and acted upon the falsehood or concealment to her detriment. *See, e.g., Clearwater REI, LLC v. Boling,* 155 Idaho 954, 318 P.3d 944 (2013).

47. Nowhere in her briefing did Claimant even attempt the slightest argument in support of her claim of equitable estoppel. It is certainly not self-evident that the elements of the claim are present in this case; in fact just the opposite is true. Since Claimant completely failed to even mention the doctrine of equitable estoppel in either her first or reply brief, and furthermore since it appears from the record that the elements establishing the doctrine are absent in this case, Claimant has waived, and the facts do not support, such a claim.

PPI REIMBURSEMENT

48. Defendants seek reimbursement of PPI benefits paid to Claimant voluntarily and in good faith during the pendency of this litigation. They rely on *Selzer v. Ross Point Baptist Camp,* 2013 IIC 0015 (2013) as authority for their claim.

49. In *Selzer* the Commission first noted that Idaho Code §72-316 provides a mechanism for reimbursement of income benefits voluntarily paid when not due. The statute provides;

> 72-316. 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.

However, the Commission noted in *Selzer* that no additional benefits were due, so the statute did not directly address the situation before them. The Commission argued that the purpose underlying the statute is that an employer ought to have some ability to recoup benefits which were paid but were not owed, and the only way to advance the goal of the statute is to order Claimant to reimburse Defendants in the amount of the PPI award. The Commission pointed out that nothing in the language of Idaho Code § 72-316 *prohibited* the Commission from entering such an award.[8] Based on such analysis, the Commission held that because employers are encouraged to err on the side of promptly making payments to injured workers in situations of questionable liability, and because the Commission is imbued with certain equitable powers designed to simplify proceedings and enhance the likelihood of equitable and just results, the Commission could, on a case-by-case basis, decide if reimbursement would be allowed.[9] The Commission found that the defendants in *Selzer* were entitled to reimbursement.

50. Under the holding in *Selzer* Defendants herein have a valid case for reimbursement of PPI payments made to Claimant. However, certain more recent cases cast doubt on the continuing viability of *Selzer*. Specifically, the 2017 case of *Tonsmeire v. Idaho River Adventures, Inc.* 2017 IIC 0013 and recent Supreme Court cases seem to indicate the

[8] Certainly nothing in the language of the statute specifically *authorizes* the Commission to do so either.

[9] The Commission cited to *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 599, 798 P.2d 55, 58 (1990), and *Brooks v. Standard Fire Insurance Company*, 117 Idaho 1066, 793 P.2d 1238 (1990) as providing the precedent for such equitable powers.

"equitable powers" of the Commission may not extend to the extra-statutory remedy sought herein, in spite of the earlier case to the contrary.

51. In deciding the issue of the defendants' right to recoup overpayment of benefits in *Tonsmeire*, the Commission pointed out that the case of *Corgatelli* v. *Steel West, Inc*, 157 Idaho 287, 335 P.3d 1150 (2014) made it clear that absent statutory authority, the right to apply an overpayment as a credit to subsequent obligations does not exist.[10] So too in the present case, the Defendants have not cited to any statute which would allow them to obtain an Order from the Commission granting them a right to reimbursement of PPI payments made to Claimant, albeit "under protest" as it were. While this result seems harsh, and penalizes sureties who voluntarily make benefit payments knowing there is a chance such benefits are not due, and while the logic of *Selzer* makes sense, recent Supreme Court admonitions stand in the way of Defendants' right to reimbursement absent statutory authority.

52. Defendants have not established a statutory mechanism for, and thus a right to, reimbursement of PPI payments made to Claimant.

ATTORNEY FEES

53. Claimant asserts entitlement to attorney fees pursuant to Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing

[10] *See also, Deon v. H&J, Inc., d/b/a Best Western Coeur D'Alene Inn & Conf. Center, et.al.,* 157 Idaho 665, 339 P.3d 550 (2014), *fn 2*, "the Commission derives its authority solely from statutory law and does not have the ability to operate in the equitable realm."

> to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

54. On the facts herein, and in light of the fact Claimant did not prevail on her claims, Claimant has failed to prove a right to attorney fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW AND ORDER

1. Claimant did not file a signed, written claim for benefits within one year of the date of her industrial accident as required by Idaho Code § 72-701.

2. Claimant has failed to prove that her obligation under Idaho Code § 72-701 was tolled by Defendants' willful failure to comply with Idaho Code § 72-602(1), as provided for in Idaho Code § 72-602(1).

3. Claimant's claim is barred under the provisions of Idaho Code § 72-701, and she has failed to prove she is entitled to seek further benefits under the Act.

4. Defendants are not entitled to reimbursement of PPI payments made to Claimant.

5. Claimant has failed to prove a right to attorney fees under Idaho Code § 72-804.

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

DATED this __29th__ day of __December__, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

____/s/_____
R.D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

COMMISSIONER THOMAS P. BASKIN, CONCURRING:

I agree with the outcome in this case, in particular with the Commission's conclusion that Employer/Surety did not "willfully fail" to file an employer's first report even though it knew, as of August 4, 2012, that Claimant required treatment by a physician. However, I believe that this is an important issue warranting closer examination, including some discussion of the possible consequences of what some will consider the unnecessary retirement of a perfectably serviceable bright line rule.

First, I agree that the Commission correctly concluded that the evidence establishes that as of August 4, 2012 Employer was aware that Claimant required medical treatment for the effects of her injury. Claimant did not obtain medical care after being so advised by the MedCorp. representative on August 4, 2012. Since the care was not obtained, Employer, following its policy, determined that the accident did not trigger the obligation to file an employer's first report under Idaho Code § 72-602; Claimant did not miss time from work and her injury was not one requiring treatment by a physician, that is to say, she did not receive any medical treatment. Therefore, as understood by Employer, the term "requiring treatment by a physician" refers to medical care that has been obtained, and not to medical evaluation that is recommended or needed prospectively.

It is a fundamental precept of statutory construction that the words used in a statute are to be given their plain and ordinary meaning. *State v. Schulz,* 151 Idaho 863, 264 P.3d 970 (2011). "Requiring" is defined as follows: "To have use for as a necessity; need." American Heritage Dictionary of the English Language. In the context of Idaho Code § 72-602, there's no reason to believe that the legislature intended the phrase "requiring treatment by a physician" to reference only care that has been obtained. Rather, the plain and ordinary meaning of "requiring" suggests that in the context of statute the word is more closely synonymous with "need." Therefore, the obligation of an employer to file an employer's first report under Idaho Code § 72-602 does not arise only where medical care has been provided, but also where the employer can fairly be charged with the knowledge that such care is needed, albeit prospectively. Here, a registered nurse employed by Employer's medical triage contractor recommended that Claimant needed medical care for her work related injuries. This is sufficient to implicate Employer's responsibility to file an Idaho Code § 72-602 report even though Claimant did not avail herself of the opportunity to receive such care. Although the care was not obtained, all evidence demonstrates that it was needed. Pursuant to this interpretation of Idaho Code § 72-602, Defendants should have filed Employers First Report within 10 days following the date of the accident.

I recognize that in applying the dictionary definition of the term "require" to Idaho Code § 72-602 we are abandoning a bright line rule for when an employer must file an Idaho Code § 72-602 report, in favor of a rule that admits a little more ambiguity. Under the facts of the instant matter, where employer was aware that a medical care professional recommended medical treatment for Claimant, it is relatively easy to conclude that Employer was aware that Claimant needed further medical treatment and should therefore have filed an employers Idaho Code § 72-

602 report. However, it will frequently happen that following the occurrence of a work accident there is no medical professional on-site to speculate as to whether or not the injured workers injury is of a type which needs treatment by a physician. For example, let us say that a worker suffers a laceration that may or may not be significant enough to warrant stitches. If the worker's foreman examines the wound and wonders out loud whether this is something the worker should "get looked at" is this sufficient to put employer on notice that claimant needs to be evaluated by a physician? When does the possibility that a worker may benefit from evaluation by a physician evolve into a need implicating the provisions of Idaho Code § 72-602? It is also not lost on us that by defining "require" as we have, claims will be filed that in the past were not filed, and this, in turn, may have some impact on experience. Notwithstanding the aforementioned difficulties, we do not believe that it is our province to employ a definition of "require" that seems inconsistent with the plain and ordinary meaning of the word. Difficulties with this treatment must necessarily be dealt with as they arise.

Equally interesting is the Commission's treatment of the question of whether Employer's failure to file a timely Idaho Code § 72-602 report was "willful," such that Employer is not entitled to rely on the applicable statute of limitations, as anticipated by Idaho Code § 72-604. I agree that the Commission has correctly cited to our decisions and Supreme Court case law which relies on the definition of willfulness first described in *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89 (1979). While *Meyer* involved the question of whether or not an unemployment compensation Claimant had willfully misstated a fact relevant to his claim for unemployment compensation, *Meyer* has found wide application in interpreting "willfulness," as used in Idaho Code § 72-604. In evaluating whether Employer's conduct was willful, we must recognize what actually happened; Employer was aware of the requirements of Idaho Code § 72-

602. It had a procedure in place to file an employer's first report for those claims in which the injured worker actually received medical treatment. Employer wrongly believed that Idaho Code § 72-602 did not require the filing of an employer's first report until, and unless, medical care for a work related injury was actually received. As explained by the Commission, that is an incorrect interpretation of the requirements of Idaho Code § 72-602. Therefore, the questions boils down to whether Employer can be said to have willfully refused to file an Idaho Code § 72-602 report where it had a good faith misunderstanding concerning the requirements of the statute. In *Mead v. Swift Transportation*, 2015 IIC 004 (2015) it was shown that Surety was aware of the legal requirement imposed by Idaho Code § 72-806 to file a notice of change of status on the occurrence of a particular event. As with an employer's willful failure to file an Idaho Code § 72-602 report, an employer's willful failure to file a timely notice of change of status results in the tolling of the statute of limitations. In *Mead,* although surety acknowledged that it was aware of the legal requirement imposed by Idaho Code § 72-806, the record demonstrated that surety failed to submit a notice of change of status when there was a legal responsibility to do so. On these facts, the conclusion was rather easily reached that employer's failure to comply with the requirements of statute was willful within the meaning of Idaho Code § 72-604. What would have happened in *Mead* had it been demonstrated that surety was, for whatever reason, unaware of the provisions of Idaho Code § 72-806? Must one have actual knowledge of the requirements of the law before a failure to comply with Idaho Code § 72-806 can be deemed "willful"? Does ignorance equal bliss? The answer is emphatically "no." Knowledge of the reporting requirements of the workers' compensation laws of the state is imputed to employers and sureties. It would never suffice for an employer to plead ignorance of the requirement of Idaho Code § 72-602, or Idaho Code § 72-806, in an effort to avoid the tolling of the statute of

limitations. So how is the instant case different? Rather than claiming ignorance of the statute, Employer misunderstood the construction placed on the statute by the Industrial Commission. As far as we can tell, the construction that we have placed on what it means for medical treatment to be required is introduced for the first time in this case. Had this construction long been known to people in the industry i.e. had it, for example, been the subject of previous decisions or included in regulations implementing the statutory scheme, it would be harder to conclude that Employers' failure to abide by that construction was not willful. However, since Employer's misunderstanding appears to have been honest we are unable to conclude that its failure to abide but what we now believe is the correct interpretation of the relevant term is anything but a good faith misunderstanding. Accordingly, I agree that under the facts of this case, Employer did not willfully fail to file an employer's first report of injury within 10 days following August 4, 2012. From this point forward, however, employers and sureties should take note of the Commission's expectation that "required" is synonymous with "needs," and the obligation to file an Idaho Code § 72-602 report arises as soon as an employer can be changed with understanding that Claimant needs medical care as the result of a work related mishap/event.

DATED this _29th__ day of __December__, 2017.

_____/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _29th_ day of __December__, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND CONCURRING OPINION** was served by regular United States Mail upon each of the following:

MATT K STEEN
4850 N ROSEPOINT WAY, SUITE 104
BOISE ID 83713

LORA RAINEY BREEN
1703 W HILL ROAD
BOISE ID 83702

_____/s/_____

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