

CONTENTIONS OF THE PARTIES

Claimant contends she injured first her right then her left shoulders through repetitive use in consequence of her duties in Employer's bakery. She is restricted from overhead work and significant lifting and motion which results in substantial permanent disability.

Defendants contend she has failed to prove permanent disability in excess of 14% PPI which has been paid. Further, any income benefits resulting from Claimant's right shoulder are barred by applicable statutes of limitation.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and of ICRD rehabilitation counselor Kenneth M. Blanchard;
2. Claimant's Exhibits 1 through 19, including page 36A of Exhibit 1;
3. Defendants' Exhibits A through I; and
4. Post-hearing deposition testimony of Craig B Lords, D.C.

FINDINGS OF FACT

1. Claimant began working for Employer on April 18, 1997. She made doughnuts and later bagels on a full-time basis. Claimant is short in stature and, as a result, experienced some difficulty raising trays of pastries and such onto the higher slots on the racks. As her medical conditions prevented further bakery work, Claimant transferred to freight crew. Ultimately, her restrictions prevented this work as well. Unemployed for a time because Employer had no job available within her restrictions, Claimant attempted other work. Later, she returned to Employer as a cashier, but was insufficiently skilled to work the cash registers.

2. Since she began working for Employer, Claimant developed shoulder and other upper extremity problems. The repetitive motions associated with her bakery duties were deemed

to have caused these problems. Claimant alleged a date of manifestation of October 25, 2000. Defendants accepted the claim and have paid various medical and income benefits over the years.

3. Claimant underwent bilateral carpal tunnel surgery. A cyst was surgically removed from her hand. She underwent a trigger finger release.

4. Right shoulder symptoms were diagnosed as tendinitis as early as 1998 following a work accident on June 15, 1998. Her shoulder improved with conservative treatment.

5. On April 2, 2001, Claimant was evaluated by David Simon, M.D., at Surety's request. He diagnosed a subacromial impingement syndrome which was causing rotator cuff tendonitis. He opined it related to her repetitive work activity. He opined she was not yet medically stable.

6. Claimant suffered a right rotator cuff tear.

7. Overuse of her left shoulder following her right shoulder injury resulted in a left rotator cuff tear. Left shoulder symptoms arose in 2000 and were diagnosed as subacromial impingement.

8. Claimant underwent two right shoulder surgeries, October 12, 2004 and April 7, 2005, and one left shoulder surgery, June 19, 2007.

9. Bursitis prolonged and complicated her recovery.

10. On February 7, 2007, to "a reasonable degree of medical probability," Gregory Biddulph, M.D., opined Claimant's left shoulder condition was "aggravated by overuse of that extremity due to her inability to use her right shoulder which sustained injury on or about October 25, 2000."

11. On September 12, 2007, Dr. Biddulph noted Claimant was making "slow but definite progress." He okayed her to continue working full-time light-duty work.

FINDINGS, CONCLUSIONS, ORDER AND DISSENTING OPINION - 3

12. Dr. Biddulph rated PPI at 7% whole person for each shoulder, a 14% whole person PPI overall. No party has contested this rating. The left shoulder PPI was rated on January 11, 2008. Dr. Biddulph opined Claimant would have no restrictions and no further treatment.

13. Dr. Biddulph's July 23, 2009 note appears to be designed to assist Claimant in obtaining and keeping a job rather than an objective opinion about restrictions.

14. On August 6, 2009, Craig B. Lords, D.C., evaluated Claimant at Claimant's request. He opined an 11% upper extremity PPI for Claimant's left shoulder an 8% upper extremity for her right, resulting in a 12% whole person PPI. He opined Claimant's shoulder anatomy is "not suited for repetitive type of work." He imposed specific restrictions including limiting lifting and no overhead work. He well supported his opinions about restrictions in deposition testimony.

Non-Medical Factors

15. Born January 9, 1952, Claimant was 58 years of age on the date of hearing.

16. Born in Venezuela, Claimant is fluent in Spanish and English. She graduated high school in Venezuela. She attended college in both Venezuela and Kentucky. She studied international business and accounting, respectively.

17. She has worked for the Venezuelan telephone company, for Westinghouse as an assistant administrator, and for Employer. For Employer, she worked bakery, freight crew, and as a cashier at various times. She worked assembly (fishing line) for Rio Products. She washed dishes for Chili's. She sold hot dogs for a vendor at Home Depot.

18. Claimant performed a reasonable job search on her own and with the assistance of ICRD consultant Ken Blanchard. At the time of hearing, she worked as a clerk at Target for \$8.10 per hour, part time, about 17 hours per week, with no health benefits.

19. In November 2005, Claimant left Employer because Employer had no job

within her restrictions. At that time she earned \$12.70 per hour, full time, with benefits.

20. Claimant looked for and found other work, sometimes working multiple full- and/or part-time jobs at lower wages in order to resume, as nearly as possible, her former income level.

21. In April 2006, Employer rehired Claimant, this time as a cashier. Claimant was simply incapable of multitasking Employer's system of using two registers to overlap customer check-out. She was fired.

22. Other relevant non-medical factors were considered but were not deemed of sufficient salience to analyze in detail.

DISCUSSION AND FURTHER FINDINGS OF FACT

23. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. 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, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. Aldrich v. Lamb-Weston, Inc., 122 Idaho 316, 834 P.2d 878 (1992).

24. Claimant is a credible witness, both in demeanor and substance. She has demonstrated that she is a motivated, good and hard worker despite the pain of her symptoms. Because her medical condition has persisted so long and has involved so many doctors giving various restrictions at various times, where contemporaneous medical records conflict with her recollection, the documents are afforded greater weight.

Statute of Limitation

25. Defendants assert that the complaint filed with the Commission on October 23,

2007 is barred by the provisions of Idaho Code § 72-706(3). Claimant contends that the October 23, 2007 Complaint is timely, since income benefits on this claim were paid as recently as June 30, 2008.

26. Before addressing the provisions of Idaho Code § 72-706(2) and (3), as recently construed in the case *Nelson v. City of Bonners Ferry Idaho*, 232 P.3d 807 (2010), it is first necessary to understand the procedural background and payment history in this matter.

27. On or about March 19, 2001, a Notice of Injury and Claim for Benefits was filed by Claimant, or on her behalf, for a date of manifestation of October 25, 2000. The Notice of Injury and Claim for Benefits reflects that Claimant suffered a left shoulder injury as a result of the repetitive demands of her employment. However, in her hearing testimony, Claimant stated that her injuries were to her shoulders, bilaterally. (Transcript, p. 87, l. 20 and p.88, l. 14)

28. On July 10, 2006, Claimant filed her complaint for her occupational disease. In this complaint, she alleged injury to her right shoulder. Hearing was set for February 22, 2007. However, on January 24, 2007, Claimant filed her amended complaint, in which she raised the additional issue of whether she was entitled to workers' compensation benefits for a left shoulder injury, an injury which she contended was a natural and probable consequence of the occupational disease that manifested on October 25, 2000. The parties were evidently able to resolve certain of the issues before the Industrial Commission, since, on February 21, 2007, the Commission entered its Order vacating the scheduled February 22, 2007 hearing. Thereafter, on July 3, 2007, Surety resumed the payment of income benefits. The payment of income benefits continued through June 30, 2008.

29. No further action was taken by Claimant in prosecution of the case (as far as the Commission file reflects), which led the Commission to issue its Notice of Intent to Recommend Dismissal for lack of prosecution on September 6, 2007. Neither party responded to

that Notice, and on October 18, 2007, the Industrial Commission entered its Order dismissing the Complaint “without prejudice”.

30. On October 23, 2007, Claimant filed her new complaint with the Industrial Commission for the October 25, 2000 claim. As well, on October 26, 2007, Claimant filed her Motion for Reconsideration, treated by the Commission as a motion to reconsider the dismissal of the original complaint. In her motion, Claimant stated:

1. That Claimant has undergone surgery for her shoulder which has been accepted as compensable by the Surety in June 2007.
2. That she was receiving time loss benefits by the Surety.
3. Claimant is likely to have additional PPI and perhaps disability beyond impairment and therefore, it is important that Claimant have access to these income benefits.

Claimant’s Motion for Reconsideration, filed October 26, 2007.

31. In its Order of December 14, 2007, the Commission denied the Motion for Reconsideration, ruling that Claimant had failed to articulate any reason why the complaint should not have been dismissed. The case went forward on the new complaint filed on October 23, 2007. As noted, among the issues noticed for hearing is whether this complaint is barred by the applicable statute of limitation.

32. At the conclusion of hearing, the parties stipulated to the admission of Exhibit 19, to be provided after hearing. That exhibit was filed with the Commission on February 22, 2010, and consists of a summary of the payments made on the subject October 25, 2000 claim by the Western Guaranty Fund. That exhibit reflects that the payment of workers’ compensation benefits commenced on June 17, 2004, with the payment of a medical benefit. The payment history reflects that on October 18, 2004, Claimant received a time loss or PPI check in the amount of \$770.00, and on October 25, 2004, received another check in the same amount.

Additional income benefit payments were made to Claimant on a fairly consistent basis through December 15, 2005, when Claimant received a payment of \$5,958.15. Thereafter, no income benefits of any type were paid until July 3, 2007, when surety again started making income benefit payments to Claimant, this time, in connection with her left shoulder surgery. The payment of income benefits ceased on June 30, 2008.

33. As noted, surety contends that the instant complaint is not timely filed pursuant to Idaho Code § 72-706(3). Claimant, in turn, contends that under that same section, the complaint is timely, since it was filed within one year of the last payment of income benefits. Indeed, as Claimant notes, the payment of income benefits continued until June 30, 2008.

34. The provisions of Idaho Code § 72-706(2) and (3) have recently been treated in the case of *Nelson v. City of Bonners Ferry, supra*. In that case, Claimant suffered a compensable accident/injury on October 13, 2000. The fourth anniversary of the claim fell on October 13, 2004. On the fourth anniversary of his claim, Claimant was not receiving periodic payment of any income benefits. However, the payment of income benefits resumed on December 2, 2004, and ran through June 5, 2006. Claimant's complaint was filed on August 23, 2006. Surety took the position that because no income benefits were being paid to Claimant on the fourth anniversary of the claim, he had only one year from that date within which to file his complaint with the Commission.

35. Applying the rule announced in *Walters v. Blincoe's Magic Valley Packing Company*, 117 Idaho 239, 787 P.2d 225 (1989), later reiterated in *Salas v. J.R. Simplot Company*, 138 Idaho 212, 616 P.3d 569 (2002), the Industrial Commission ruled that for Claimant to take advantage of the one year window afforded by the provisions of Idaho Code § 72-706(3), it must be demonstrated that income benefits were continuous and congruent across the fourth anniversary threshold; Claimant must demonstrate that he was receiving benefits from

an award spanning that date. Thus, the so-called “fourth anniversary” rule requires Claimant to demonstrate that income benefits were paid before, during and after the fourth anniversary of the claim. On such a showing, the injured worker has an additional year from the date on which those payments eventually end within which to file a complaint. In overruling the Commission, and in the process, overturning *Salas, supra*, which dealt with the 1991 amendments to Idaho Code § 72-706, the *Nelson* court stated that nothing in the provisions of the current Idaho Code § 72-706(2) and Idaho Code § 72-706(3) supports the proposition that in order to take advantage of the one year window established by Idaho Code § 72-706(3) it must be demonstrated that income benefits were being paid to Claimant on the fourth anniversary of the claim, but discontinued at some point thereafter. The *Nelson* court recognized that because of the particular facts of a given case, there may be one or more gaps in the payment of income benefits during the history of a claim. For example, TTD benefits may be paid for a period of time until Claimant returns to work at a job consistent with physician imposed restrictions. Following the passage of several months without the payment of income benefits, Claimant may be pronounced medically stable and given an impairment rating which may be paid over a period of time. More time may pass, and Claimant may be given additional impairment, or incur a period of additional temporary disability, which would again result in the payment of additional income benefits following a significant gap. It is probably less an aberration, and more frequently the rule, that there are one or more gaps in the payment of income benefits in a typical case. The question addressed by the *Nelson* court is how the existence of such gaps in the income benefits payment history impacts the applicability of Idaho Code § 72-706(2) and Idaho Code § 72-706(3).

36. In *Nelson*, the Court first noted that by its specific language, Idaho Code §72-706(3) does not require that income benefits be paid on the fourth anniversary of the claim in

order for an injured worker to take advantage of the protections offered by that section. The statute plainly states that if income benefits are “discontinued more than four (4) years from” the date of the accident, then claimant shall have an additional year within which to file his or her complaint. For something to discontinue means that it stops, or comes to an end. In the case of income benefits, discontinuance does not refer to the dates on which payments are not being made. Rather, the term refers to a specific date on which the payment of such benefits stops. However, although the *Nelson* court stated that “[t]here is no logical reason why the application of the extended statute of limitations should depend upon the fortuity of when a gap occurs in the payment of income benefits”, it is clear, as subsequently demonstrated in *Nelson*, that the timing of such gaps is important to the application of the provisions of Idaho Code § 72-706.

37. Following *Nelson*, where income benefits are discontinued prior to the fourth anniversary of the claim, the Claimant will always have five (5) years following the date of injury within which to file his or her complaint, pursuant to Idaho Code § 72-706(2). Where income benefits are discontinued at some point in time after the fourth anniversary of the claim, the Claimant will have an additional year from the date of last payment within which to file his or her complaint, pursuant to Idaho Code § 72-706(3). However, as demonstrated by the facts of both *Nelson*, and this case, the application of this apparently straight-forward rule is complicated when there are one or more gaps in the payment of income benefits during the history of a claim, or, as in this case, multiple complaints are filed.

38. In *Nelson*, income benefits were first discontinued on October 20, 2003, prior to the fourth anniversary of the claim. Income benefits were resumed on December 2, 2004, subsequent to the fourth anniversary of the claim, and again discontinued on June 5, 2006. More than one year passed between October 20, 2003 and December 2, 2004. How then,

did the *Nelson* Court conclude that the claim was timely? The answer lies in recognizing that the first discontinuance of October 20, 2003 does not constitute a discontinuance occurring after the fourth anniversary of the claim. The second discontinuance occurring on June 5, 2006 is the discontinuance that occurred “more than four (4) years” after the accident. However, this treatment of the June 5, 2006 discontinuance is only possible because those benefits were reinstated prior to the fifth anniversary of the claim. As stated in *Nelson*:

“In this case, the four-year period expired on October 13, 2004. Although the payment of income benefits had been discontinued prior to that date and were not being made on that date, pursuant to Idaho Code § 72-306(2), *Nelson* had one more year within which to request additional income benefits. The payment of income benefits resumed on December 2, 2004, before the expiration of that statute of limitations, and continued after the statute of limitations provided in Idaho Code § 72-306(2) had run. Under those circumstances, the statute of limitations in Idaho Code § 72-306(3) should apply.”

Had those benefits not been reinstated prior to the fifth anniversary of the claim, then the claim would have been barred by the provisions of Idaho Code § 72-706(2). It is this fact that distinguishes the instant matter from *Nelson*.

39. Here, income benefits were discontinued on December 15, 2005, more than four years from the date of manifestation. Therefore, Claimant had until December 15, 2006 within which to file her complaint, per Idaho Code § 72-706(3). In the alternative, had income benefits been reinstated within one year following December 15, 2005, then Claimant would have an additional year from whenever those payments ceased within which to file her complaint. However, if the gap in payment is longer than one year, as was the case here, the claim is barred by the specific language of Idaho Code § 72-706(3).

40. Finally, Claimant could have avoided the bar of § 72-706 by demonstrating, as the Claimant did in *Nelson*, that income benefits were reinstated prior to the fifth anniversary of the claim, and her complaint filed within one year following the date on which those payments

were eventually discontinued. This, too, Claimant failed to do.

41. Accordingly, since income benefits were neither reinstated within one year following the December 15, 2005 payment, nor prior to the fifth anniversary of the claim, the October 23, 2007 complaint is time barred under Idaho Code § 72-706(2) and (3).

42. This case is also complicated by the fact that multiple complaints have been filed for the single claim. The first complaint was filed on July 26, 2006, and dismissed without prejudice on October 18, 2007. The second complaint was filed October 23, 2007. Therefore, at the time surety resumed the payment of income benefits on July 31, 2007, a complaint was in place and Defendants had no defense to the payment of benefits based on the statute of limitations. Somewhat paradoxically, the opportunity to raise the statute of limitations as a defense is created only by the dismissal of the original complaint. However, we are unaware of any authority for the proposition that the July 26, 2006 complaint, once dismissed, is any longer relevant to this matter. That the dismissal of the complaint creates a statute of limitations defense that did not previously exist is a matter that should have been raised by Claimant in response to the Commission's September 6, 2007 Notice of Intent to Recommend Dismissal. Such an argument, raised at that time, would probably have constituted good cause to retain the original complaint. However, Claimant did not respond to the Notice of Intent to Recommend Dismissal, and the complaint was dismissed. Claimant did vaguely allude to this consequence of dismissal in her motion for reconsideration, in which she stated:

1. That Claimant has undergone surgery for her shoulder which has been accepted as compensable by the Surety in June 2007.
2. That she was receiving time loss benefits by the Surety.
3. Claimant is likely to have additional PPI and perhaps disability beyond impairment and therefore, it is important that Claimant have access to these income benefits.

Claimant's Motion for Reconsideration, filed October 26, 2007.

43. However, it is only with the benefit of hindsight that one can discern from this document any concern on Claimant's part about a statute of limitations issue. At any rate, the motion for reconsideration was denied, and the time within which to appeal the dismissal or seek relief pursuant to Idaho Code § 72-719 has long since passed. The first complaint, having been dismissed, is no longer of any moment to us. The order dismissing the first complaint was essentially a final judgment that put an end to the matter. That the dismissal was without prejudice does not change the effect of the dismissal. The difference between a dismissal without prejudice and a dismissal with prejudice is that in the former case, Claimant was free to re-file her complaint, so long as she did so within the time provided by Idaho Code § 72-706. *Castle v. Hays*, 131 Idaho 373, 957 P. 2d 351 (1998). That a previous complaint, now dismissed, was once filed in this matter, has no current bearing on the question of whether the instant complaint is timely filed. We are not persuaded that the relation back doctrine, or the doctrines of equitable estoppel or equitable tolling have any application to the facts of this case. *See, O'Donnell v. Vencor Inc.*, 465 F.3d 1063 (9th Cir. 2006) Again, Claimant's appropriate remedy was to appeal the denial of the motion to reconsider the dismissal of the original complaint.

44. Because we have concluded that the October 25, 2000 claim is barred due to Claimant's failure to comply with the provisions of Idaho Code § 72-706, we do not reach the issue of the extent and degree of Claimant's disability in excess of physical impairment. The Commission recognizes the harshness of this outcome, particularly where, as here, Referee Donohue found Claimant to be a credible witness who would otherwise be entitled to disability in the range of sixty percent (60%) of the whole person, inclusive of impairment. Indeed, in furtherance of the humane purposes of the Workers' Compensation system, the Industrial Commission much prefers that all injured workers be compensated for the temporary and permanent effects of work injuries. However, just as our workers' compensation laws are

intended to foster the payment of legitimate claims, they also establish certain time frames within which a Claimant is obligated to take action in order to preserve his or her claim. These rules, too, we feel obligated to apply.

CONCLUSIONS OF LAW

1. Claimant's claim for permanent disability is time barred by the provisions of Idaho Code § 72-706.

2. The extent and degree of Claimant's permanent disability is therefore moot.

DATED this 25th day of August, 2010.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

Chairman R.D. Maynard dissenting:

After reviewing the record and progression of case law in this matter, I respectfully dissent from the conclusions of the majority.

Claimant's occupational disease manifested on October 25, 2000. Defendants accepted the claim and paid workers' compensation benefits, including income benefits, to Claimant. On December 15, 2005 — more than five years following the manifestation — Claimant received an income benefit payment of \$5,958.15. Claimant next received an income benefit payment on July 3, 2007. Claimant received her last income benefit payment on June 30, 2008.

Idaho Code § 72-706 prescribes three different deadlines for filing a workers' compensation complaint. The deadline that applies depends on the circumstances of the case.

In whole, the statute reads:

72-706. Limitation on time on application for hearing. —

- (1) When no compensation paid. When a claim for compensation has been made and no compensation has been paid thereon, the claimant, unless misled to his prejudice by the employer or surety, shall have one (1) year from the date of making claim within which to make and file with the commission an application requesting a hearing and an award under such claim.
- (2) When compensation discontinued. When payments of compensation have been made and thereafter discontinued, the claimant shall have five (5) years from the date of the accident causing the injury or date of first manifestation of an occupational disease within which to make and file with the commission an application requesting a hearing for further compensation and award.
- (3) When income benefits discontinued. If income benefits have been paid and discontinued more than four (4) years from the date of the accident causing the injury or the date of first manifestation of an occupational disease, the claimant shall have one (1) year from the date of the *last payment of income benefits* within which to make and file with the commission an application requesting a hearing for additional income benefits. (emphasis added)

To state these rules more succinctly: in cases where no compensation has been paid, the claimant has one year from the date of making claim to file a complaint; in cases where compensation has been paid and then discontinued, the claimant has five years from the date of manifestation within which to file a complaint; and in cases where *income benefits* have been paid and then *discontinued more than four years* from the date of manifestation, the claimant has *one year from the date of the last payment* to file a complaint.

This statute is clear and plain on its face, and yet it and its predecessors have been subjected to a great deal of interpretation over the years. *See e.g. Salas v. J.R. Simplot Co.*, 138 Idaho 212, 61 P.3d 569 (2002). The Idaho Supreme Court recently clarified its interpretation

of the statute in *Nelson v. Bonners Ferry*, 149 Idaho 29, 232 P.3d 807 (2010). In that case, the claimant, Nelson, suffered an industrial accident on October 13, 2000. The surety accepted the claim, and from August 15, 2001 to October 20, 2003, Nelson received income benefit payments. Between October 2003 and December 2004, Nelson received no income benefit payments. Payments resumed on December 2, 2004 and continued through June 5, 2006. The surety indicated that the June 5, 2006 payment was the final payment, and on August 23, 2006, Nelson filed his complaint with the Commission.

The Defendants argued that the complaint was untimely under the so-called “anniversary rule.” The Court had previously held that Idaho Code § 72-706(3) permitted a complaint requesting additional benefits if, and only if, income benefit payments were made across the date of the fourth anniversary of the accident. Because the fourth anniversary of Nelson’s accident — October 13, 2004 — occurred during the period that Nelson received no benefits, Nelson only had one year from that date to file a complaint.

The Commission, bound by Court precedent, found for the defendants, and Nelson appealed. The Court overturned the Commission’s decision, ruling that Nelson’s complaint was timely. The Court held that nothing in the language of the statute creates an anniversary rule. Nelson’s complaint was filed within one year of the last payment of income benefits; therefore, Nelson’s complaint was permitted under Idaho Code § 72-706(3).

The anniversary rule resulted in many inequities, and the *Nelson* decision rightfully disposed of it. However, certain nuances in *Nelson* have caused the majority in the case presently before us to issue a decision that the majority itself acknowledges is harsh. The majority appears to believe that gaps in the payment of income benefits, depending on when they occur and for how long they occur, can be fatal to a claimant’s claim. This is contrary to both Idaho Code § 72-706(3) and the holding in *Nelson*.

I disagree with the majority's interpretation of Idaho Code § 72-706(3), because the statute is unambiguous and does not need to be interpreted. Statutory interpretation "begins with the literal language of the statute." *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009). If the language is unambiguous, there is no need to engage in statutory construction: the plain meaning should be applied. *Id.* Where the workers' compensation act must be construed, it should be construed liberally in favor of the claimant. *Hattenburg v. Blanks*, 98 Idaho 485, 567 P.2d 829 (1977). The humane purpose the law serves leaves no room for narrow, technical construction. *Mulder v. Liberty Northwest*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000).

When choosing between alternative constructions of a statute, we should presume that the statute was not enacted to work a hardship or to effect an oppressive result. *Id.* "The whole idea is to get away from cumbersome procedures and technicalities of pleading so that, to the greatest extent possible, claims for compensation can be decided *on their merits*." *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 245, 787 P.2d 225, 231 (1989, Justice Bistline dissenting) (emphasis in original).

Thus, if Idaho Code § 72-706 must be construed, it should be construed liberally in favor of Claimant, and in a way least likely to effect an undue hardship. However, there is no need to construe the statute, because the statute is plain on its face.

Claimant's claim falls squarely within the purview of Idaho Code § 72-706(3) [*hereinafter* Subsection 3]. Manifestation of Claimant's occupational disease occurred on October 25, 2000. Claimant began to receive compensation, including income benefits, in 2004. Payment of those benefits extended across the fourth anniversary of manifestation; indeed, payment of these benefits extended across the *fifth* anniversary of manifestation. Only after December 2005 — that is, after the fifth anniversary of manifestation had passed — did a

lengthy gap in payments occur.

Between December 15, 2005, and July 3, 2007, Claimant received no income benefits. However, payments resumed on July 3, 2007, and payments continued to be made until June 30, 2008. This is the date of the last payment of income benefits. This is the date, under the plain, express language of Subsection 3, that the deadline to file a complaint is measured from. “If income benefits have been paid and discontinued more than four (4) years from ... the date of first manifestation ... the claimant shall have one (1) year from the *date of the last payment of income benefits*” to file a complaint. The statute is silent on the issue of gaps in payment, because it does not need to address gaps in payment. What matters is the date of the last payment of income benefits. Claimant thus had until June 30, 2009 to file her complaint. The complaint currently before the Commission was filed on October 23, 2007. This was several months after payments had resumed, several months before the last payment, and almost two years before the deadline to file a complaint.

The Supreme Court observed in *Nelson* that “there can be gaps in the payment of income benefits.” 232 P.3d at 812. So, too, did the Court observe that payment of income benefits can extend the statute of limitations. *Id.* at 811. In *Nelson*, as here, there was a gap in payments. In *Nelson*, as here, payments resumed after more than one year.

Yet here, the majority has concluded that *Nelson* stands for the proposition that: 1) gaps in payment must occur, and payments must be resumed, before the fifth anniversary of the accident or manifestation, or 2) gaps occurring after the fifth anniversary must last less than one year in duration. Nowhere does the statute say this. The fifth anniversary is not even mentioned in Subsection 3. The date that matters, for purposes of Subsection 3, is the date of the last payment.

According to the majority here, the Court in *Nelson* found the claimant’s complaint

timely because, though payments were discontinued in October 2003, they were reinstated prior to the fifth anniversary. This is a misinterpretation of the holding in *Nelson*. Nelson's complaint was timely because 1) Nelson received income benefits, 2) payment of those benefits was discontinued after the fourth anniversary of the accident, and 3) Nelson filed a complaint within one year of the last payment.

It is certainly true, as the majority observes, that the Court placed significance on the fact that Nelson's payments were stopped and then reinstated prior to the fifth anniversary of the accident. However, this is not significant for the reason the majority believes it is. Nelson's payments were first "discontinued" before the *fourth* anniversary of the accident. Thus, if Nelson's income benefits had not been reinstated, Nelson's case would have fallen under the purview of Subsection 2, not Subsection 3. Nelson's complaint was filed after the fifth anniversary of the accident; he therefore needed to qualify for the extension of the deadline prescribed by Subsection 3. Otherwise, his complaint was not timely, as it was filed more than five years after the accident.

In other words, it was necessary, under the facts in *Nelson*, for the Court to illustrate why Nelson's case was a Subsection 3 case, not a Subsection 2 case. Nelson's case became a Subsection 3 case when benefit payments resumed after the fourth anniversary of the accident, thus rendering the "discontinuance" a mere gap in payments. Payments were then genuinely discontinued long after the fourth anniversary. Hence, Nelson's deadline for filing was not the fifth anniversary, but one year after the last payment of benefits.

This case is not like *Nelson* in that regard. The first substantial gap in Claimant's payments did not occur until *after* the fourth (and even the fifth) anniversary of manifestation. Claimant's case is thus clearly in the realm of Subsection 3, and Subsection 3 only. *See Nelson*, 232 P.3d at 812 ("if the discontinuance occurs before the expiration of the four-year period,

then subsection (2) applies. If the discontinuance occurs after the expiration of the four-year period, then subsection (3) applies.”)

In Subsection 3, the date that matters is not the fifth anniversary of manifestation, but the date of the last payment of income benefits. In this case, that date was June 30, 2008. It is immaterial that there was a gap in payments between December 2005 and July 2007, because the December 15, 2005 payment was not the last payment. The payments made to Claimant, post-2005, were not charitable donations: they were benefit payments.

Subsection 3 does not define “last payment” as “the last payment before a gap in payments of one year or more that occurs after the fifth anniversary of manifestation.” The words “last payment” are plain on their face. They require no interpretation. Claimant’s last payment occurred on June 30, 2008. Her October 2007 complaint was filed prior to that. Whatever legal implications the gap between December 2005 and July 2007 might have had, the issue became irrelevant when Surety resumed making income benefit payments to Claimant, thus extending the statute of limitations.

I would further note that, under the majority’s decision, the statute of limitations ran on December 15, 2006, and yet, at that time, Defendants had no statute of limitations defense. A complaint had been filed several months prior. That complaint was ultimately dismissed — for reasons wholly unrelated to the statute of limitations or to the merits of Claimant’s claim — but the dismissal is irrelevant. By the time the complaint was dismissed, payments had resumed, and were ongoing when the October 2007 complaint was filed. The last payment of benefits, at the time of the October 2007 complaint, was not December 15, 2005, but September 6, 2007. As previously mentioned, payments continued to be made until June 2008.

I understand the majority’s commitment to upholding the statute of limitations, but the statute of limitations is not implicated here. As the Court stated in *Nelson*, in Subsection 3

cases, the “indefinite extension of the statute of limitations is no longer a concern.” 232 P.3d at 811. The deadline will always be one year following the last payment of benefits. Consequently, when considering the timeliness of a complaint in a Subsection 3 case, we should look to the date of the last payment, not to how consistently income benefits have been paid. In my dissent in the *Mabey* case — written about the now-defunct anniversary rule — I observed, “The nature of payment of workers’ compensation benefits is not fluid. Benefits ebb and flow as the claimant’s condition either stabilizes or deteriorates.” *Mabey v. J.R. Simplot Co.*, 2007 IIC 0810 (October 26, 2007, Maynard dissenting). This observation continues to be true, and the Court made similar observations in *Nelson*.

I believe that the October 2007 complaint was timely filed, and that Claimant’s claim should be decided on its merits. For these reasons, I must respectfully dissent.

DATED this 25th day of August, 2010.

INDUSTRIAL COMMISSION

/s/
R.D. Maynard, Chairman

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2010, a true and correct copy of **FINDINGS, CONCLUSIONS, ORDER AND DISSENTING OPINION** was served by regular United States Mail upon each of the following:

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