Coray v. Idaho Regional Hand & Upper Extremity Center, PLLC; Idaho Supreme Court, filed June 27, 2024

Issue: Does Idaho Code § 72-433 limit an employer to only one IME physician per claim?

Short Answer: No. However, each IME is subject to a reasonableness standard, and the employer has the burden of proof to establish reasonableness.

Facts: Claimant submitted to an IME scheduled by Employer. One of the issues addressed by the IME doctor was whether employer owed for a back surgery. Employer disputed compensability for the surgery based on medical causation and asserted the surgery was necessitated by preexisting conditions. Claimant pursued surgery on her own, outside of the workers' compensation system. Surety subsequently requested a second IME, with a different provider.

Claimant refused to attend the second IME and sought a declaratory ruling from the IIC on whether Idaho Code § 72-433 required Employer to utilize the same physician to conduct multiple examinations of a single injury. The IIC evaluated the language of the statute and determined that Employer's right "to a duly qualified physician or surgeon," did not refer to a specific single physician, only that whoever conducts the examination must be qualified to perform it.

The IIC noted that Employer has the burden to prove that it is reasonable to require Claimant to submit to the evaluation with an alternate physician. Such determination is left to the Referee and the reasonableness of the second IME in this case was not adjudicated as part of the declaratory ruling which was limited to whether Employer was limited to a single IME provider. Claimant appealed the decision to the Idaho Supreme Court.

Decision: The ISC agreed with the IIC that Employer was not limited to a single IME provider per claim but reiterated the IIC's discussion that Employer has the burden to establish reasonableness of a second IME. The Court specifically rejected Employer's argument that the reasonableness standard applies only to the time and place of the IME. Rather, a prerequisite for showing that an employee unreasonably refuses to attend an IME includes a showing that the IME is reasonable.

Thompson v. Burley Inn, Inc.; Idaho Supreme Court, filed April 2, 2024

Issue: Does the holding in the *Neel* decision apply to medical bills paid by Medicaid?

Short Answer: Yes. When a surety denies a claim which is later deemed compensable by the Industrial Commission, the surety owes full invoiced medical bills, even if the bills were completely satisfied by Medicaid.

Facts: Hip replacement surgery was recommended by a treating provider. Surety denied the payment for surgery based on medical opinions that Claimant's pain generator was her back and not her hip, that Claimant's pain was caused by a pre-existing condition rather than her industrial injury, and that the degree of degenerative changes didn't warrant a hip replacement. Claimant proceeded with the hip replacement which was paid for by Medicaid.

The case proceeded to hearing and the IIC determined that the industrial injury exacerbated Claimant's previously asymptomatic arthritic left hip. Thus, the hip replacement surgery was compensable, and Claimant was awarded the full invoiced amount for the procedure. Defendants appealed to the Idaho Supreme Court.

Decision: The ISC agreed with the IIC that Surety was liable for the full invoiced amount for the hip replacement and declined to carve out an exception to the *Neel* case when medical bills are fully covered by Medicaid. Defendants argued that the policy rationale in *Neel* is inapplicable to the Medicaid context because Medicaid prohibits balance billing. Although some of Defendants' arguments were similar to those made in the *Millard* case, where the Claimant had VA and Medicare benefits, the ISC did not award attorney fees against Defendants for bringing the appeal, because application of *Neel* to Medicaid was not specifically addressed in a prior case and the appeal was not frivolous.

Tamayo v. UFP Caldwell, LLC; Idaho Industrial Commission, filed May 16, 2024
And
Boatman v. Target Corporation; Idaho Industrial Commission, filed July 12, 2024

Issue: How is the IIC using expert vocational opinions to evaluate permanent partial disability (PPD) and what happens when Defendants don't retain their own vocational expert?

Short Answer: The PPD analysis continues to be fact specific and the IIC is trending towards a somewhat informal totality of the evidence review, without the need to adopt a specific PPD percentage articulated by any one expert.

Facts: In both of these cases, Defendants did not offer an expert vocational report. In both cases Claimants' vocational experts found 0% loss of wage-earning capacity but found loss of labor market access in excess of 60%. Both experts weighted loss of labor market access more heavily than loss of wage-earning capacity when calculating PPD.

In **Tamayo**, the analysis was significantly driven by the conflicting medical opinions and less by the vocational expert's specific analysis. Defendants presented medical evidence that Claimant's industrial injury did not result in the need for permanent restrictions and offered surveillance footage showing Claimant performing activities which significantly exceeded his representation of limitations. Claimant's vocational expert agreed that, if the medical opinions relied upon by Defendants were adopted, Claimant had 0% PPD. However, if the medical evidence relied upon by Claimant was adopted, the loss of labor market access was 78% and wage loss was 0%. With weighting of the labor market access more heavily, Claimant's expert assessed PPD at 64.7%.

The Referee agreed that Claimant was overstating his physical limitations but was not persuaded that Claimant could perform full duty work on a full-time basis. Accordingly, the Referee declined to agree that Claimant had 0% PPD. However, the Referee rejected the 64.7% PPD rating assigned by Claimant's vocational expert as an overstatement of Claimant's disability in light of reliance on Claimant's IME doctor who didn't review or consider the surveillance evidence and other factors.

The Referee determined the most accurate medical opinion regarding Claimant's work ability was a comment from Defendants' medical expert that Claimant could do "at least" medium duty work. The Referee considered Claimant's past work history which included light and medium duty jobs, as well as Claimant's age and lack of proficiency in English. Based on the totality of evidence, the Referee determined Claimant had 20% PPD, inclusive of his 15% PPI rating.

In **Boatman**, the case included two companion claims, both involving the right shoulder. Claimant's treating doctor recommended a 15-pound lifting restriction, no repetitive lifting, and no cashiering. It was undisputed that Claimant had 17% upper extremity PPI as a result of the companion claims. It was further undisputed that Claimant may need a right shoulder reverse total arthroplasty in the future.

Claimant's vocational expert determined Claimant's loss of labor market access was 69% and that her loss of wage-earning capacity was 0%, weighting loss of labor market access more heavily, to arrive at a total of 46% PPD. Defendants asserted that Claimant's vocational assessment failed to consider apportionment related to pre-existing right eye blindness and back surgery. Claimant self-limited her lifting to about 25 pounds prior to the injury but had no formal restrictions. Defendants presented evidence that Claimant's pre-existing PPI was 29% based on her right eye blindness and spinal fusion.

The Referee rejected Defendants' apportionment argument and pointed out the lack of evidence that disability resulted from Claimant's pre-existing PPI. However, the Referee was not persuaded by the determination of 46% PPD as calculated by Claimant's expert. The Referee felt that loss of labor market access was inflated because it overstated the impact of Claimant's 15-pound lifting restriction by applying it bilaterally when it pertained only to the injured upper

extremity. The inflation of the loss of labor market access made the decision to weigh loss of labor market access over loss of wage-earning capacity less supported. Accordingly, the Referee found that Claimant's PPD was 35%.

Take away: The IIC utilizes various approaches when deciding which expert opinions to adopt and may arrive at a PPD rating based on the totality of the evidence which might be a PPD rating not argued by either party. The decision not to present expert vocational evidence has its risks but doesn't mean the expert vocational opinions offered by the opposing party will be adopted.

Thornton v. Enos Borntreger/RLE Tucking and So-Ida Commodities and Braden, Inc.;
Idaho Industrial Commission, filed August 2, 2024

Issue: Can companies hired as independent contractors be liable as statutory employers, in light of the holding in *Smith v. Excel Fabrication*?

Short Answer: Yes. The facts of this case are distinguishable from those in *Smith*.

[*Smith v. Excel Fabrication* is a 2023 Idaho Supreme Court case which dealt with the exclusive remedy doctrine and its impact on 3rd party liability. Amalgamated Sugar Co. hired Smith as an employee and hired Excel as an independent contractor to construct and install a flight of stairs. Smith sued Excel as a negligent 3rd party. A lower court determined that Excel was protected under the exclusive remedy doctrine because they were Smith and Excel were essentially co-employees of Amalgamated. The Court reversed the lower court ruling and found that Excel was not immune from 3rd party liability, rejecting the argument that Excel was protected under the exclusive remedy doctrine because Smith and Excel were "statutory co-employees." The Court distinguished independent contractors from contractors and subcontractors for purposes of Idaho Code 72-223, which addresses 3rd party liability and subrogation.]

Facts: Claimant was a truck driver and employee of RLE Trucking. Straw needed to be hauled from Utah to Idaho. So-Ida is a commodities broker who hired Braden, a trucking company, as an independent contractor to haul the straw. Braden, in turn, contracted with RLE Trucking to haul the straw. Claimant was injured in the course of his employment with RLE trucking, while hauling the straw.

RLE Trucking, who was Claimant's direct employer based on the right to control test, did not have workers' compensation insurance. Neither Braden nor So-Ida had workers' compensation insurance, due to a ten-day lapse in coverage which included the date of injury.

Claimant asserted that both Braden and So-Ida were liable as statutory employers. Defendants asserted that, pursuant to the *Smith* decision, only RLE Trucking is liable because RLE Trucking was an independent contractor.

Decision: Claimant prevailed. Both Braden and So-Ida qualify as category one statutory employers because both entities expressly or impliedly hired or contracted the services of another. The main holding in *Smith* is that independent contractors who cause injury to workers who are not employed by them are not immune from third party liability. The express statutory language of both Idaho Code § 72-102(12)(a) and Idaho Code § 72-223 recognize the possibility of statutory employer status even when there is an independent contractor in the chain between the employee and the statutory employer.