BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

In the Matter of: JEFFREY JORDAN, Decedent, SUE JORDAN, Claimant, v. WALMART ASSOCIATES INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2019-017748** **ORDER ON PETITION FOR DECLARATORY RULING** **Filed January 29, 2021**

On December 17, 2020, Defendants filed a petition for declaratory ruling under Judicial Rules of Practice and Procedure Under the Idaho Workers' Compensation Law, effective December 21, 2020 ("JRP") Rule 15, along with supporting memorandum and Declaration of David P. Gardner. Claimant, representing herself in a *pro se* capacity, did not file a response to the petition. Defendants request a declaratory ruling that there is no lawful order prohibiting the dismissal of *pro se* complaints. Defendants also request a declaratory ruling that Claimant's complaint should be dismissed for failure to comply with discovery and the Order to Show Cause.

FACTS

On October 31, 2018, Decedent Jeffery Jordan was working at the Wal-Mart tire center when he suffered a fatal aneurysm, passing away two days later on November 2, 2018. On November 1, 2019, Claimant Sue Jordan filed a Complaint for death benefits as the surviving spouse. Claimant is representing herself in a *pro se* capacity. On March 23, 2020, Defendants served Claimant with a set of interrogatories and a request for discovery. Defendants aver that Claimant did send three statements of co-workers, but that the response to their discovery request was incomplete.[1] Def. Memo. in Support of Petition p. 2. Of note, Claimant has not yet provided Defendants with medical records of Decedent's previous history or at the time of the injury. *Id.* On July 9, 2020, Defendants filed a Motion to Compel Discovery. On July 30, 2020, the Commission granted the motion, requiring Claimant to respond to discovery within 15 days. The Order warned that failure to comply with said order could result in the imposition of sanctions, including, and up to, dismissal of the Complaint.

When no response was forthcoming, Defendants filed a Motion to Dismiss on August 17, 2020 for Claimant's failure to comply with the order compelling discovery. Claimant did not respond to the motion. On September 14, 2020, the Commission issued an order instructing Claimant to show cause within 14 days "why sanctions, up to and including dismissal of his [sic] claim, should not be imposed." Order to Show Cause p. 1. On September 30, 2020, the assigned Referee, Sonnet Robinson, received a telephone voice message from Claimant as follows:

> Yes, this is Jordan and I'm calling on behalf of my husband, Jeffrey Jordan, and I got a letter of [unintelligible] and I got a letter saying it was dismissed because

[1] On April 10, 2020, Claimant sent an e-mail to support staff at the Commission stating "I, Sue Jordan am requesting extra time to gather required documents regarding Jeffrey Jordan's case; however, because of the covid-19 and the mandatory stay at home set in place. [sic] The Wal-Mart Tire and Lube Express department is closed for the time being until further notice; therefore I cannot locate or contact the witnesses whom was present at time of the incident. Thank you for your time and consideration." The record reflects that on April 13, 2020, support staff at the Commission contacted Claimant via telephone to discuss this email.

> there was no response from me when there was. If you could give me call back at 559-410-0442 and the case is IC 2019-017748. If you could get back to me, I would appreciate it. Thank you and bye-bye.

Referee Robinson relayed this ex parte communication to all parties via letter on October 1, 2020 pursuant to JRP 5(B). The Referee informed Claimant that, as the presiding Referee assigned to the case, she would be unable to communicate about the case unless all parties are present. The Referee instructed Claimant to comply with the JRP regarding any communication with the Referee in the future. On October 26, 2020, Defendants inquired of Commission staff regarding the status of this case. Declaration of David P. Gardner p. 2. Counsel declares that he was informed that the Commission was not dismissing any cases with *pro se* litigants. *Id.* Defendants now ask for a declaratory ruling "that there is no lawful order preventing the dismissal of complaints brought by pro-se claimants and that this complaint may be dismissed for failure to comply with the Order to Compel and the Order to Show Cause." Petition for Dec. Ruling pp. 1-2.

DISCUSSION

Rule 15 of the JRP provides the option for a Declaratory Ruling as a mechanism to address the construction, validity, or applicability of any worker's compensation statute, rule, or order. The Rule provides, in pertinent part:

> Whenever any person has an actual controversy over the construction, validity or applicability of a statute, rule, or order, that person may file a written petition with the Commission, subject to the following requirements:
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> 1. The petitioner must expressly seek a declaratory ruling and must identify the statute, rule, or order on which a ruling is requested and state the issue or issues to be decided;
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> 2. The petitioner must allege that an actual controversy exists over the construction, validity or applicability of the statute, rule, or order and must state with specificity the nature of the controversy;
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> 3. The petitioner must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the petition; and

4. The petition shall be accompanied by a memorandum setting forth all relevant facts and law in support thereof.

JRP 15(C).

Upon receipt of a JPR 15 petition, the Commission may hold hearings, conduct investigations, issue written rulings, or decline to make a ruling for certain reasons. JRP 15(F). Because the issue raised by Defendants is implicated in other cases pending before the Commission, the Commission believes that the matter is appropriate for treatment under JRP 15 and issues the following Declaratory Ruling.

The Commission will first address Defendant's request for a declaratory judgment that Claimant's complaint should be dismissed. Defendants argue that "in accordance with the Referee's Order to Show Cause, Claimant's claim **must be dismissed**." Def. Memo. in Support of Petition p. 4 (emphasis added). Defendants cite to Idaho Rules of Civil Procedure (I.R.C.P.) 37(b)(2)(iv) to show that failure to comply with a discovery order is sanctionable by the dismissal of the Complaint in its entirety. *Id.* at 3.

The Commission does not agree with Defendants' argument that a sanction of dismissal of the Complaint is mandatory in this situation. The JRP defers to the I.R.C.P. on procedural matters relating to discovery, however the I.R.C.P. does not apply to the imposition of sanctions. JRP 7(C) states that "[p]rocedural matters relating to discovery, **except sanctions**, shall be controlled by the appropriate provisions of the Idaho Rules of Civil Procedure." (emphasis added). The controlling rule on sanctions is the following: "The Commission retains power to impose appropriate sanctions for any violation or abuse of its rules or procedures." JRP 16.

The Commission concludes that Claimant has failed to comply with the Order Compelling Discovery. However, from this it does not follow that the Complaint must be dismissed, although dismissal is certainly among the options the Commission may entertain. The Commission has

broad discretion to tailor sanctions to a specific situation. There are other sanctions, apart from dismissal of the Complaint, that the Commission could impose for Claimant's failure to respond to discovery.

We now turn to Defendants' request for a ruling that the Commission lacks authority to decline to entertain a demand for dismissal of the complaint of a *pro se* claimant who fails to prosecute her claim, despite having been afforded many opportunities to do so; and that there is no justification for treating *pro se* claimants different than claimants who have representation. Def. Memo. in Support of Petition p. 4. Defendants correctly cite the proposition that "[p]ro se litigants are held to the same standards and rules as those represented by an attorney … [p]ro se litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules." *Greenfield v. Smith*, 162 Idaho 246, 253, 395 P.3d 1279, 1286 (2017) (internal citations omitted). However, the Idaho Supreme Court has carved out special consideration for *pro se* claimants before the Industrial Commission due to the policies of simplicity and equity that led to the creation of the Commission.

The case of *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 798 P.2d 55 (1990) is very instructive. In *Hagler*, a *pro se* claimant sought benefits for fungus on her hands. *Id.* at 598. At the hearing, the claimant attempted to admit text from a medical treatise by reading the passages to the Commission. *Id.* The Commission excluded the evidence based on evidentiary rules. *Id.* On appeal, the Idaho Supreme Court ruled that the Commission erred in doing so and that the exclusion of the evidence was not consistent with the policies in Industrial Commission proceedings of "simplicity, accommodation of claimants, and justice." *Id.* at 599. The Court continued:

> The policies of simplicity and equity are underscored by the *pro se* nature of the Industrial Commission proceedings, such as this was. From the time of its creation,

> the Industrial Commission and its proceedings have contemplated *pro se* claimants. The original notion was that the Industrial Commission would be like most any other Commission. It would lend a ready ear and a helping hand to a citizen with a grievance; the overriding purpose being to do justice in the given situation. This potential for limited assistance to claimants is sensible because *pro se* claimants cannot be expected to have the legal expertise or wherewithal possessed by attorneys, many of whom specialize in workers' compensation cases either on behalf of the claimants or on behalf of sureties. For all of these doctrinal and policy reasons, the Industrial Commission erred when it refused to consider the medical treatise offered by Hagler … .

Hagler, 118 Idaho at 599, 798 P.2d at 58. (emphasis in original).

With this guidance in mind, the Commission has exercised its discretion in retaining cases on its calendar during the pandemic, particularly those involving *pro se* claimants. There is no doubt that the current pandemic has thrown lives into disarray. Many people are struggling to keep food on the table and a roof over their heads, and it is understandable that the prosecution of a workers' compensation complaint may assume a lower priority than it did in less turbulent times. We are reluctant to take action which will result in the dismissal of the complaint of a *pro se* claimant during the current emergency, and this forbearance is not inconsistent with the many actions of state and federal governments to give some relief to members of the public from eviction, unemployment, and other unavoidable impacts of the public health crisis. The consequences to a claimant of dismissing a complaint, even if the dismissal is without prejudice, in a case where the statute of limitations has lapsed, are very harsh indeed. Claimant would be barred from pursuing her case and obtaining statutory benefits she may be entitled to. However, we must balance these concerns against the right of Defendants to bring litigation to a conclusion.

Here, it is apparent that Claimant has not provided complete responses to Defendants' request for discovery, despite Commission's orders compelling her to do so. At the same time, it appears that Claimant attempted to communicate with the Referee, albeit in an improper ex parte communication, in response to the Referee's Order to Show Cause. Additionally, based on her

voicemail message of September 30, 2020, it appears that Claimant may be laboring under the misunderstanding that her case has already been dismissed.

Under JRP 16, the Commission is well within its power and discretion to impose appropriate sanctions on Claimant for her failure to comply with Court orders compelling discovery, including dismissal, if appropriate. It will be up to the Referee to determine what sanctions are appropriate, but it is our direction that before entertaining dismissal of a complaint of a *pro se* claimant, particularly where a dismissal without prejudice is the equivalent of a dismissal with prejudice, the Commission must take additional precautions to be assured that dismissal is the appropriate sanction during the current emergency. For example, the referee could satisfy herself on this point by holding a telephone conference with the parties, to better understand whether Claimant's failure to prosecute her case has anything to do with difficulties imposed by the pandemic.

Defendants' contention that the facts and circumstances in this case mandate a dismissal, and/or that the case must be dismissed for Claimant's failure to comply with the Order Compelling Discovery and the Order to Show Cause, is simply incorrect.

Based on the foregoing, the Commission concludes that Petitioner is not necessarily entitled to a dismissal of the case as a sanction under JRP 16.

DATED this 29th day of January, 2021.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Sloy
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2021, a true and correct copy of the foregoing **ORDER ON PETITION FOR DECLARATORY RULING** was served by regular United States Mail upon each of the following:

JEFFERY JORDAN
C/O SUE JORDAN
[redacted]

and by *E-mail transmission* upon:

DAVID P GARDNER
dgardner@hawleytroxell.com

Emma O. Landers