

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRENT AUSTIN,

Claimant,

v.

BIO TECH NUTRIENTS,

Employer,

and

EMPLOYERS COMPENSATION
INSURANCE COMPANY,

Surety,
Defendants.

IC 2008-038504

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Filed 3/26/18

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper. The parties submitted the issue for resolution on stipulated facts with attached exhibits and briefing. Albert Matsuura, of Pocatello, represented Claimant, and Alan Gardner, of Boise, represented Defendants. The matter came under advisement on August 31, 2017. While the matter was under advisement, the parties requested the decision be held in abeyance so they could attempt further settlement negotiations. The proceedings were suspended. On or about February 28, 2018, Defendants requested the Commission reactivate the file and render a decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1

ISSUE

The sole issue to be decided is whether Claimant's complaint was timely filed under Idaho Code § 72-706(3) so as to preserve his asserted claim for additional payment of non-medical indemnity benefits.

CONTENTIONS OF THE PARTIES

After Claimant filed his complaint, Defendants raised the statute of limitations affirmative defense under Idaho Code § 72-706(3). Claimant argues the one-year statute of limitations was tolled, pursuant to Idaho Code § 72-604, by Defendants' failure to file a required Notice of Change of Status and send proper written notice to Claimant upon the final payment of PPI benefits as required by Idaho Code § 72-806. Alternatively, Claimant argues that under the "liberal construction" requirement, he had one year to file his complaint from the date the last PPI benefit payment would have been paid had Defendants not accelerated the final payment. Under this scenario Claimant's complaint was timely filed.

Defendants argue they were under no obligation to file a Notice of Change of Status when they completed paying Claimant's PPI benefits in full, and furthermore satisfied their obligation under Idaho Code § 72-806. The statute of limitations was not tolled, and Claimant's complaint was not timely filed as a matter of law.

RECORD FOR REVIEW

The record in this matter consists of the stipulated facts, joint exhibits A through H, Defendants' Exhibit 1, Exhibit A to Defendants' Motion for Judicial Notice of Publication of the Idaho Industrial Commission, and legal briefing supplied by the parties.

STIPULATED FACTS

The facts set forth below are taken from the parties' Stipulated Facts.

1. Claimant Brent Austin was injured in the course of his employment with Defendant Employer Bio Tech Nutrients on November 20, 2008.

2. Defendants provided Claimant with medical treatment from November 21, 2008 through June 20, 2014.

3. Claimant experienced no time loss with respect to his November 20, 2008 injury until June 4, 2012.

4. Defendants paid temporary total disability ("TTD") benefits to Claimant for the period June 9, 2012 through July 18, 2014.

5. Claimant was determined by independent medical evaluation to be at maximum medical improvement on June 20, 2014.

6. Defendants advised Claimant by Notice of Claim Status ("NOCS") dated July 18, 2014 that his TTD benefits would stop effective July 18, 2014, based on Dr. Fellars' determination that Claimant was at maximum medical improvement on June 20, 2014. Joint Exhibit A.

7. Additionally, the July 18, 2014, NOCS explained that Dr. Fellars rated Claimant's permanent partial impairment ("PPI") at 11% of the whole person and that Claimant would be paid \$18,694.50 in bi-weekly installments based on \$339.90 per week beginning August 1, 2014, until the award was paid in full. Joint Exhibit A.

8. Defendants attached a copy of Dr. Fellars' June 20, 2014, medical report to the July 18, 2014 NOCS. See reference in Joint Exhibit A.

9. Claimant's counsel requested a benefit payment summary from the Surety

on October 31, 2014. The Surety mailed a summary of paid benefits that was received by Claimant on November 20, 2014. The summary included an itemization of PPI benefits paid by the Surety through the period ending November 21, 2014. A copy of the PPI payment portion of Surety's benefit summary is provided as Joint Exhibit B.

10. Payment of Claimant's PPI benefits commenced on July 19, 2014, as noted by the initial PPI benefit payment entry on Joint Exhibit B.

11. A copy of Employer/Surety's Summary of Payments dated October 31, 2014, filed with the Commission on November 4, 2014 and approved by the Commission on January 7, 2015, is provided as Joint Exhibit C.

12. Defendants issued the final payment of PPI to Claimant in care of his attorney on June 22, 2015, by check number 270024820 in the amount of \$2,379.30. See Joint Exhibit D.

13. The remittance advice attached to check number 270024820 stated a payment description of "Permanent Partial Scheduled/Impairment" and a comment of "PPI Final Payment." See Joint Exhibit D.

14. Check number 270024820, issued June 22, 2015, cleared Defendant Surety's bank on July 10, 2015.

15. In the months of June and/or July 2015, Defendant Surety did not send to Claimant nor file with the Commission any NOCS (IC Form 8) regarding Claimant's PPI benefits.

16. In the months of June and/or July 2015, Defendant Surety did not send to Claimant or Claimant's counsel any written notice regarding Claimant's PPI benefits other than the remittance advice attached to check number 270024820 dated June 22, 2015. See Joint Exhibit D.

17. Claimant filed a complaint in this case with the Commission on July 20, 2016. Joint Exhibit E.

18. In his complaint, Claimant raises the issue of additional TTD benefits and reserves issues of PPI and permanent partial disability (“PPD”). See Joint Exhibit E.

19. In their Answer to Complaint filed with the Commission July 26, 2016, Defendants asserted the affirmative defense “that Claimant is barred by the statute of limitations of 72-706, Idaho Code, as to any indemnity benefits whatsoever.” Joint Exhibit F.

20. On September 6, 2016, Defendants provided Answer to Interrogatory No. 3. Joint Exhibit G.

21. Claimant’s counsel requested a record of NOCS filed with the Idaho Industrial Commission and, on April 24, 2017, received a report from the Idaho Industrial Commission titled “Change of Status Notices Received for Claim Number 2008-038504.” Joint Exhibit H.

DISCUSSION AND FURTHER FINDINGS

22. 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 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).

23. Claimant raises two central arguments to advance his position. One involves the interpretation and interaction of several statutes; to wit, Idaho Code § 72-706(3), Idaho Code § 72-806, and Idaho Code § 72-604. Claimant reasons that Defendants' failure to send him a formal Notice of Change of Status (NOCS) when the final payment of PPI disability was delivered, as per Idaho Code § 72-806, tolls the running of the one-year statute of limitations set forth in Idaho Code § 72-706(3) by virtue of the tolling sanction found in Idaho Code § 72-604. This argument presupposes that Defendants were required to send Claimant a NOCS when it made its "final payment" of benefits on June 22, 2015, and "willfully" failed or refused to do so.

24. Claimant's second argument asserts that the Commission should consider the date the last payment of benefits would have been due had Surety not made an advance payment of seven weeks' worth of PPI benefit payments in a "lump sum" fashion. That date is no earlier than August 8, 2015. When the August date is used, Claimant timely filed his complaint.

NOCS ANALYSIS

25. Idaho Code § 72-706 is entitled **Limitation on time on application for hearing** and provides various time limitations for filing a complaint. The applicable provision in this case, Idaho Code § 72-706(3), states in relevant part;

72-706(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 ..., the claimant shall have one (1) year from the date of last payment of income benefits

within which to make and file with the commission an application requesting a hearing for additional income benefits.¹

Claimant received temporary disability benefits more than four years after his accident. Once a physician determined Claimant had reached MMI, Surety began paying Claimant PPI disability payments, as detailed below.

26. As noted in the stipulated facts and Joint Exhibit (JE) A, Surety determined Claimant was entitled to PPI benefit payments in the sum of \$18,694.50, correlated to his 11% whole-person medical impairment. Surety sent Claimant an NOCS dated July 18, 2014 informing him of this fact. Therein Surety stated that TTD benefits were stopping effective July 18, 2014, and PPI payments in the weekly sum of \$339.90 would begin on August 1, 2014. Surety informed Claimant in this NOCS that the PPI payments would be paid in bi-weekly installments “until the award has been paid in full.” Surety made it clear in the July 18, 2014 NOCS that payment of the PPI benefits would not settle his claim.

27. Surety began making bi-weekly payments on July 19, 2014 in the sum of \$679.80, and continued in this fashion until June 22, 2015, at which time it sent Claimant a check in the sum of \$2,379.30, which represented seven weekly or 3.5 bi-weekly PPI payments. On the face of the document, there was a notation under the heading “Comment” that the check was a “PPI Final Payment.” No further PPI payments were forthcoming from Surety thereafter.

28. Surety’s last payment of income benefits occurred on June 22, 2015. Under the provisions of Idaho Code § 72-706(3), it appears that Claimant had until June 22, 2016 to file his complaint, which he did not do. However, as discussed below, the requirements of Idaho Code § 72-706(3) may be tolled under certain circumstances.

¹ The term “application requesting a hearing for additional benefits” is commonly known as a complaint.

Claimant's Arguments

29. Claimant argues that under Idaho Code § 72-806, Surety should have sent Claimant an NOCS when it made its final payment, and its failure to do so tolls the running of the statute of limitation contained in Idaho Code § 72-706(3). In relevant part Idaho Code § 72-806 states;

Notice of change of status. A workman shall receive written notice within fifteen (15) days of any change of status or condition including, but not limited to, the denial, reduction, or cessation of medical and/or monetary compensation benefits, which directly or indirectly affects the level of compensation benefits to which [the worker] might presently or ultimately be entitled.

As stipulated by the parties, Surety did not send Claimant an NOCS when the final PPI benefits payment check in the sum of \$2,379.30 (the check) was tendered to, and accepted by, Claimant.

30. Idaho Code § 72-604 provides a sanction for failing to provide *required* NOCS documents. As stated therein;

Failure to report tolls employee limitations. When the employer...willfully fails or refuses to file...the notice of change of status required by section 72-806, Idaho Code, the limitations prescribed in ... section 72-706, Idaho Code, shall not run against the claim of any person seeking compensation until such ...notice shall have been filed.

31. If Surety was required to file a NOCS when it sent its final PPI check to Claimant, and willfully failed or refused to do so, the limitations of Idaho Code § 72-706(3) discussed above would not apply, and Claimant's complaint would stand. If Surety was not required to file a NOCS when it concluded its PPI payments, or conversely if it provided Claimant sufficient notice that it would be sending no further PPI checks with the notation on the face of the final benefits check, or if its omission was not willful, then Claimant's complaint was untimely filed, and would be subject to dismissal with prejudice.

32. Claimant first argues Surety had an obligation to provide an NOCS with its final PPI payment because the final payment was in effect a cessation of monetary compensation benefits which directly or indirectly affected the level of compensation benefits which Claimant might presently or ultimately be entitled, thus triggering the requirements of Idaho Code § 72-806. When Surety failed in this obligation, the statute of limitation on filing a complaint was tolled indefinitely.

33. Claimant asserts the need for an NOCS is demonstrated in this case by the fact that various PPI payout dates can be calculated from the documents provided by Surety in discovery. The July 18, 2014 NOCS states the PPI benefits of \$18,694.50 would be paid at the rate of \$339.90, would begin on August 1, 2014, and would continue bi-weekly until “the award is paid in full.” The total PPI benefits (\$18,694.50) divided by the weekly benefit amount (\$339.90) would mean PPI benefits would be paid for 55 weeks. $(18,694.50/339.90 = 55)$. Fifty-five weeks from August 1, 2014 would make the final payment due on August 21, 2015.

34. In fact, Surety began payments on July 19, 2014, so that the final installment of PPI benefits would have been due on August 8, 2015. Additionally, Surety noted on the check face that final \$2,379.30 payment was for benefits through July 3, 2015, when in reality the payment covered the period through August 8. Claimant argues “the confusing and conflicting PPI payout dates that can be derived from the Surety’s documents drives home the need for the Surety to provide proper notice of the cessation of Claimant’s PPI benefits as required by I.C. § 72-806.” Claimant’s Opening Brief, p. 7. Surety’s failure to comply with the statute tolled the statute of limitations, and thus Claimant’s complaint was timely filed on July 20, 2016.

35. Claimant relies on the case of *Mead v. Swift Transportation*, 2015 IIC 0041 (2015) to support his claim. Therein, the defendants argued

the claimant's complaint was time barred due to late filing. However, the defendants had failed to file any NOCS in the case before the complaint was filed. The Commission ruled the statute of limitation was tolled by defendants' failure to comply with Idaho Code § 72-806. Defendants' argument that the failure was not willful, but rather was an inadvertent oversight, was rejected because the Commission found the defendants were aware of their legal obligation to submit the required NOCS and had no lawful excuse for failing to do so. Claimant submits that *Mead* is on point and controlling in this matter.

36. Finally, Claimant notes that the notation of "PPI Final Payment" on the check cannot be construed as complying with the provisions of IDAPA 17.02.08.061.02 and .03 which require Surety to send the NOCS to Claimant within ten days from the change of status on an IC Form 8 or one "substantially similar" thereto. Because the outcome of this issue does not depend on whether the notations on the check were substantially similar to IC Form 8, no conclusion is made on this point, although it is noted the check did contain most of the information provided in the Form 8, but not in the same formatting.

Defendants' Arguments

37. Defendants note this issue turns on whether they were legally required to provide an NOCS on a form similar to IC Form 8 following their PPI benefits payment in full on June 22, 2015. They take the position no such notice was required, but even if it was, the information contained on the final payment check, together with the amount of the final check, supplied Claimant with adequate notice of the fact his PPI benefits payments were concluded with payment in full.

38. Defendants argue that Idaho Code § 72-806 requires notice only when the change in status or condition affects the level of compensation benefits to which a claimant might

presently or ultimately be entitled. Where a claimant has been properly notified of a fixed amount of impairment benefits which will be paid to the individual, completion of such payments, whether or not accelerated, does not change the level of benefits the claimant is presently or ultimately entitled to. Following Claimant's last PPI payment on June 22, 2015, the level of benefits to which Claimant was entitled did not change. He received exactly what he was told he would receive in the July 18, 2014 NOCS.

39. Defendants point out that if an NOCS is required when the last payment is received on the notion that Claimant's benefits level changed when such payment was made, then an NOCS would be required after each installment payment was made, since each of those payments "decrease" Claimant's level of benefits to which he is entitled going forward. This, of course, would be an absurd reading of I.C. § 72-806. In reality, Claimant's level of benefits did not change; they simply went from being prospective to realized with each payment, and fully realized with the final payment.

40. Defendants point out that the *Idaho Industrial Commission's Certified Idaho Worker's Compensation Specialist Learning Course Student Book* (of which the Referee took administrative notice by Order dated May 19, 2017) lists specific, common circumstances under which a written notice of change of status must be issued. While numerous situations are provided as examples of when a notice is required, completion of PPI benefit payments are not among them. While Defendants concede this list is not exhaustive, they argue that if notice is mandated each time a surety makes a final PPI benefits payment, which is a very common occurrence in worker's compensation cases, one would assume the Commission would have listed the event in their examples.

41. Finally, Defendants distinguish *Mead, supra*, from the instant case. In *Mead*, the Defendants failed to issue *required* notices, and later claimed the omission was simply an inadvertent mistake. Here, Defendants issued all required notices. The reality is that no notice was required under I.C. § 72-806 when the final installment payment was delivered to Claimant.

Legal Analysis and Findings

42. Idaho Code § 72-806 provides:

A workman shall receive written notice within fifteen (15) days of any change of status or condition including, but not limited to, the denial, reduction or cessation of medical and/or monetary compensation benefits, which directly or indirectly affects the level of compensation benefits to which he might presently or ultimately be entitled. If any change in compensation benefits is based upon a medical report or medical reports from any physician or any other practitioner of the healing arts, a copy of such report shall be attached to the written notice which the workman shall receive. The industrial commission shall by rule and regulation, determine by whom the notice shall be given and the form for such notice. In the absence of a rule governing a particular situation, the employer's insurer, or in the case of self-insurers, the employer, shall be responsible for giving the notice required herein.

Therefore, a worker shall be given written notice of any change of status which directly or indirectly affects the level of compensation benefits to which he is or might be entitled. Given as examples of changes that require written notice are denials, reductions, or cessations of the payment of medical/indemnity benefits. Defendants urge the Commission to conclude that following the receipt of the last payment of PPI benefits, Claimant's "level" of compensation did not change, even though he received no further payments of PPI. Necessarily, because it constitutes one of the identified examples, Defendants must also insist that with the last payment of PPI benefits, it cannot be said that those payments ceased. The argument is not as implausible as it sounds, and is best illustrated by comparing PPI benefits to TTD benefits. TTD benefits are initiated when Claimant enters a period of recovery. They are unbounded on the other end, for it

is unknown, at the outset, when Claimant will be determined to be medically stable. When Claimant eventually reaches medical stability, Claimant must be alerted to the fact that TTD benefits will be terminated because Claimant is no longer in a period of recovery.

43. In contrast, when Claimant receives an impairment rating, the amount of Claimant's entitlement to the payment of the rating admitted by Employer is known from the very outset. As in this case, a notice of change of status is issued to announce the commencement of the payment of PPI benefits, and to further alert Claimant to the fact that he is entitled to payment of a sum certain, which will be paid over a period of so many weeks in such-and-such an amount. Therefore, the initial notice of change of status alerts Claimant to both the initiation and cessation of a finite award. If Claimant, or his attorney, is paying attention, he will know when the stated award is paid in full, and he should not need to be reminded of this by another notice of change of status which only reaffirms that which he was told at the outset. In fact, the final check received in this case did remind Claimant that payments were completed.

44. Notwithstanding that a plausible case can be made for treating the payment of a finite PPI award differently from TTD or medical benefits, the statutory scheme does not appear to endorse such a distinction. I.C. § 72-806 must be examined to understand whether, with the last payment of PPI benefits, Claimant's PPI payments ceased, or, more generally speaking, his "level" of benefits was affected.

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

State v. Schulz, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011). “Cessation” is defined as the fact or process of ending or being brought to an end. *Oxford Dictionaries*, available at <https://en.oxforddictionaries.com/definition/cessation>, last accessed March 20, 2018. The last payment of PPI benefits brought Employer’s present obligation to an end. Only by contorting the ordinary meaning of the term “cessation” could it be said that Defendants did not cease paying PPI benefits with the last check; after that check was issued, Claimant received no further payments. Further, we note:

"[A]mbiguity is not established merely because differing interpretations are presented to a court; otherwise, all statutes subject to litigation would be considered ambiguous... [W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature."

Melton v. Alt, 163 Idaho 158, 408 P.3d 913, 918 (2018) (internal citations omitted).

45. Moreover, in the broader sense, Claimant’s “level” was affected by the issuance of the last check. “Level,” in this context, is most clearly synonymous with “amount.” *Oxford Dictionaries*, available at <https://en.oxforddictionaries.com/definition/level>, accessed on March 20, 2018. Defendants argue that because Claimant’s entitlement to the PPI award was finite, and because he was initially alerted to the fact that there would be an endpoint to the payment of these benefits, his level of compensation wasn’t really affected when those payments came to an end. The end was expected and nothing changed. Again, while this argument is not implausible, there is no support for it in the plain language of the statute. Claimant received periodic payment of PPI benefits, and at some point those payments came to an end. The level (amount) of money he periodically received was therefore “affected” by the receipt of the last payment, for Claimant received no further payments thereafter. Based on the foregoing, the argument that the cessation of PPI benefits did not require Defendants to issue a notice of change of status is rejected.

46. Based on our determination that an Idaho Code § 72-806 notice was required to announce that with the last check, Claimant's PPI payments would cease, we do not reach the other arguments raised by Defendants in connection with Idaho Code § 72-706. Because Defendants did not issue the required Idaho Code § 72-806 notice, the limitation provisions of Idaho Code § 72-706 are tolled by operation of Idaho Code § 72-604.

CONCLUSIONS OF LAW AND ORDER

1. Defendants were required to give Claimant written notice of the cessation of PPI benefits per Idaho Code § 72-806;
2. By operation of Idaho Code § 72-604, failure to give such written notice tolls the limitation provisions of Idaho Code § 72-706;
3. Claimant's complaint is timely; and
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive to all matters adjudicated.

DATED this 26th day of March, 2018.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
Aaron White, Commissioner

ATTEST:

/s/

Assistant Commission Secretary

