

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE KURT HANER,

Claimant,

v.

GLANBIA FOODS, INC.,

Employer,

and

AMERICAN ZURICH INSURANCE
COMPANY,

Surety,

Defendants.

IC 2015-023179

**ORDER ON PETITION FOR
DECLARATORY RULING**

Filed February 3, 2021

On November 24, 2020, Defendants filed a Petition for Declaratory Ruling with supporting memoranda pursuant to Rule 15 of the Judicial Rules of Practice and Procedure (JRP). Claimant filed a timely reply. Defendants seek a Declaratory Ruling to prevent Claimant from claiming any additional compensation for a left shoulder injury relating to a 2015 industrial accident that has already been adjudicated, as well as to prevent a claim for additional income benefits stemming from a 2014 accident.

The following issues have been presented:

1. Whether Claimant's claim for additional income benefits related to I.C. No. 2014-32215 is barred by the statute of limitations or judicial estoppel; and
2. Whether Claimant's entitlement to disability beyond impairment including Claimant's left shoulder surrounding I.C. No. 2015-023179 has been properly adjudicated and is therefore barred by res judicata.

BACKGROUND

This instant dispute arises out of two separate accidents. The first occurred on November 23, 2014, and caused injuries to Claimant's left shoulder. The claim was accepted, and Claimant received medical treatment for several months. Claimant participated in therapy and was placed on light duty for approximately three months. Hearing at p. 45 (October 5, 2018). He subsequently returned to regular duty and resumed all activities he had been involved in prior to his shoulder injury. *Id.* A complaint was not filed in that case until June 29, 2020. In his complaint Claimant provided the following information concerning the alleged accident:

Nature of medical problems alleged as a result of Accident or Occupational disease: Left Shoulder Pain.

Describe how injury or Occupational Disease Occurred (what happened):
Replacing bag sealer with outstretched left arm, caught and injured shoulder.

What workers' compensation benefits are you claiming at this time?: Medical bills past, present, future, TTD's, PPI, Disability, wrongful denial of benefits.

The second accident occurred on August 24, 2015. On that date claimant suffered amputation injuries to the fingers of his right hand when it was caught in a fan pulley on which he was working. He also suffered injuries to his left hand and arm while attempting to free his right hand from the machinery. A timely claim was filed, the claim was accepted, and medical and income benefits were paid. A complaint was filed on January 9, 2018, alleging injuries as follows: "Claimant lost most of the index fingers and long fingers on right hand. Fractures on long and ring finger of left hand. Tendon damage on left arm." This case went to hearing on the issue of Claimant's disability on October 5, 2018, and by order dated April, 22, 2019, the Commission adopted Referee Brian Harper's Findings of Fact, Conclusion of Law, and Recommendation, concluding that Claimant had proven disability of 70%.

On April 23, 2020, Claimant filed a complaint related to his left shoulder stemming from the August 24, 2015, accident. The Complaint makes the following assertions:

Nature of medical problems alleged as a result of Accident or Occupational disease: Tendon and shoulder damage left arm.

Describe how injury or Occupational Disease Occurred (what happened): Claimant working on Indus. Fan. Power went on and pulled right hand into pullies. Used left arm to dislocate hand and injured left arm and shoulder.

What workers' compensation benefits are you claiming at this time?: Medical bills, past and present, TTDs, PPI and Disability.

An order to consolidate these cases was filed by Referee Harper on September 30, 2020. A Notice of Hearing was filed October 1, 2020, and Hearing was set for January 29, 2021. The issues set for hearing were:

1. Whether and to what extent Claimant is entitled to additional medical care and treatment related to his left shoulder; and
2. Whether and to what extent Claimant is entitled to attorney fees.

That hearing has since been vacated due to the filing of the instant petition for declaratory ruling.

DISCUSSION

Defendants' Petition for Declaratory Ruling seeks the following:

Defendants are entitled to a declaratory judgment that (1) claims for income benefits related to the November 2014 injury are barred by the statute of limitations, (2) claims for additional medical benefits are barred by judicial estoppel in light of Claimant's representations that there was no pre-existing conditions related to the 2015 claim. Defendants are also entitled to a declaratory ruling that the Commission's adjudication of Claimant's 2015 injury included any injury to the left shoulder, which was included in the determination of both his impairment and his disability beyond impairment based on his own testimony, his physician's impairment rating, and his rehabilitation expert's opinions.

Mem. In Supp. Of Pet. For Declaratory Relief p. 7.

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:

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;
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;
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).

Further, JRP 15(F)(4) authorizes the Commission to decline to act on a Petition for Declaratory ruling where any of the following circumstances exist:

- a. The Commission lacks jurisdiction over the issue or issues presented;
- b. There is no actual controversy;
- c. The petitioner would not be directly affected by a resolution of the issue presented;
- d. The petitioner does not provide sufficient facts or other information on which the Commission may base a ruling;
- e. The issue on which a determination is sought is or should be the subject of other administrative or civil litigation or appeal; or
- f. It appears to the Commission that there is other good cause why a declaratory ruling should not be made.

Upon receipt of a JRP 15 petition, the Commission may hold hearings, conduct investigations, issue written rulings, or decline to make a ruling for certain reasons. JRP 15(F).

A.) Whether Defendants are entitled to a Declaratory Ruling that Claimant's claim I.C. No. 2014-32215 is barred by the statute of limitations or judicial estoppel.

Defendants allege that:

Idaho Code section 72-706(2) requires a claimant to file a request for hearing within 5 years of the date of the accident if medical benefits had been provided to the claimant. Claimant was provided with certain medical benefits after the accident, which required him to file a Complaint no later than November 23, 2019. He did not file a Complaint until June 29, 2020. Because he did not, his claim for additional income benefits is barred.

Idaho Code § 72-706(2) states:

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.

We agree that Defendants have identified the statute on which a ruling is requested, as well as the specific issue involved. JRP 15(C)(1). Further, we agree that Defendants have an interest which is directly affected by the statute. JRP 15(C)(3). However, we do not agree that an actual controversy exists over the construction, validity or applicability of the statute such as to necessitate consideration under JRP 15. JRP 15(C)(2). Simply, an adequate remedy to test Defendants' assertions is readily available; Defendants assert that any further claim for indemnity benefits related to the 2014 accident is time barred by the provisions of I.C. § 72-706. Should Claimant raise such a claim, the provisions of I.C. § 72-706 may be raised as a defense, and the Commission will resolve the matter at hearing, if called upon to do so. Therefore, the Commission declines to entertain this issue. *See* JRP 15(F)(4)e.

B.) Whether Defendants are entitled to a Declaratory Ruling that Claimant's entitlement to disability beyond impairment, including his left shoulder has already been adjudicated, or is otherwise barred.

Defendants assert that Claimant is judicially estopped from arguing that he has any injury referable to the 2014 accident because he made the opposite representation in post-hearing briefing generated in connection with the hearing on the 2015 claim. Defendants state:

Claimant argued to the Referee in his post-hearing brief that he had no pre-existing injury, i.e., that his injury was not caused in the 2014 accident. Now, two years later, he is trying to claim that he did, in fact, have a pre-existing injury. This is exactly the type of gamesmanship that the doctrine of judicial estoppel is designed to prevent.

Def. Reply in Supp. of Pet. for Declaratory Ruling p. 2.

Judicial estoppel, also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *Simmons v. Winco Foods*, 090809 IDWV, IC 2001-008816.

An examination of Claimant's Post-Hearing Brief does not support the assertion that Claimant is now taking a position inconsistent with a position he took in connection with the earlier hearing. In his Post-Hearing Brief Claimant made the following representations about conditions predating the 2015 accident:

"Prior to this accident, the Claimant had no previous history of any hand injuries or work restrictions related to the use of his hands...Prior to his industrial injury on August 24, 2015, [Claimant] suffered a left shoulder injury. He has no previous injury or restrictions to his hands."

Claimant's Post-Hearing Brief pp. 2-3.

Therefore, Claimant denied any prior hand injuries, but admitted to a prior shoulder injury. He did not assert that he did not suffer a shoulder injury as a result of the 2015 accident. These statements are not inconsistent with Claimant's current assertion that he suffered a shoulder injury

related to either the 2014 or 2015 accidents, or both of them. The instant proceedings are not barred by the doctrine of judicial estoppel.

Next, Defendants allege that “[t]he Commission adjudicated Claimant’s existing disability in excess of impairment based on the evidence adduced at hearing on the 2015 claim, which included Dr. Collins’ report which relied on the restrictions and limitations attributable to his left shoulder.” Mem. In Supp. Of Pet. For Declaratory Relief p. 5. Defendants aver:

Claimant’s treating provider prepared a permanent impairment rating on May 1, 2017, and assigned impairment of 8% *to the left shoulder*, which was combined with the impairment for the hands. See Ex. 6 at 318-19. Claimant’s own vocational expert, Dr. Collins, clearly considered the left shoulder limitations when determining his access to the job market, and included the left shoulder in nature of the injuries sustained in the accident. See Exhibit 10 generally, and p. 2. Significantly, no restrictions on use of the left shoulder were considered to be pre-existing. *Id.* As such, the Commission’s determination regarding disability in excess of impairment adjudicated any claim relating to the left shoulder, as well as the hand injuries. The Commission’s decision is final with regard to all of Claimant’s injuries resulting from the August 2015 accident.

Mem. In Supp. Of Pet. For Declaratory Relief pp. 5-6.

While Defendants’ assertions are not incorrect, there is no indication that Claimant’s left shoulder limitations were relied upon in reaching the conclusion that Claimant was entitled to permanent partial disability (PPD) of 70%, inclusive of his 33% PPI. This determination appears to have been made solely on the basis of Claimant’s bilateral finger injuries. Indeed, what evidence there is establishes that consideration of Claimant’s left shoulder was reserved for future treatment by the Commission and would not be considered in resolving Claimant’s claim for disability.

Here, the Notice of Hearing describes a number of issues to be heard at the scheduled hearing. At hearing, the parties and the referee revisited the noticed issues to make sure that everyone was still on the same page as to the matters at issue. In this case, as in many, the parties wished to revise the list of issues to be heard. While the transcript reflects that there was some off the record discussion about the issues, that discussion is not recapped on the record. The record

does reflect that the parties agreed that the only issue to be tried was the issue of disability. It is worth quoting from the transcript to help understand how the parties intended to treat issues relating to the left shoulder. Referee Harper goes on the record stating:

The first issue is: Whether the condition for which the Claimant seeks benefits was caused by the industrial accident. We had some discussion of this particular issue off the record before we started this morning. Apparently Claimant has suffered from a shoulder injury, and it may have more than one component to it. There is a component of a torn rotator cuff, which Defendants stated was present prior to the industrial accident in question, and if in fact that's what the records show, the Claimant is, my understanding -- I don't want to put words in your mouth, but it's my understanding -- if in fact that's what the medical records show, that this torn rotator cuff predated the industrial accident in question, then the Claimant will not argue that the torn rotator cuff was caused by the accident. *However, there may be some other issues with regard to the Claimant's shoulder that are still being ferreted out as to whether they could be causally related to the industrial accident in question or not, but those are not [ripe] for adjudication today.*

Hearing p. 9.

Defendants appear to acquiesce that the left shoulder is not on the table for the hearing noting:

The only thing I'd put on the record is just that we will not then be responsible for any medical treatment relative to the left shoulder rotator cuff tear, or any treatment, until there is some opinion from a physician that there is an injury that is related to the August, 2015 accident.

Hearing p. 10.

Referee Harper acknowledges the shoulder may not have been ripe for adjudication at that time. He reiterates:

I think related to that [first issue] is No. 2: Whether the Claimant is medically stable and if so, the day thereof. It's my understanding, with regard to the Claimant's hand, those are medically stable. That's not in dispute. So again, *this medical stability would go back to the shoulder that is still in the process as to being ferreted out as to whether it [the 2015 industrial accident] may or may not be the cause of that shoulder.*

Hearing p. 10.

Defendants address what they think the main issue for hearing is as such:

In relation to the TTD benefits and medical care, I guess up to this point I don't think there's any dispute with regard to past TTD or medical care. So I don't know that either of those are at issue. Obviously with the meds open, if there are issues in the future, they would have to be dealt with. *I think the case really is a question of what is the permanent disability beyond impairment.* Because there's no dispute that I know of with regard to the impairment rating itself. We have one rating, and *I think the main issue is just disability beyond impairment.*

Hearing pp. 11-12.

From these on the record discussions we distill the following: Claimant's left shoulder injury may have more than one component. There may be a rotator cuff component, which may or may not predate the 2015 accident, and another component, which is unspecified. The parties agree that if the medical evidence demonstrates that the rotator cuff tear predates the 2015 accident, then Claimant will not argue that this condition is causally related to the 2015 accident. Of course, this would not prevent Claimant from pursuing a claim for medical benefits only under the 2014 claim, even if a claim for indemnity benefit is time barred.

However, as to the other alleged component of Claimant's shoulder injury, the parties are still figuring out whether that component of the injury is causally related to the 2015 accident, so that issue is not ripe for adjudication. Therefore, causation of the shoulder injury is withheld from consideration, as is the question of Claimant's medical stability vis-à-vis the left shoulder. The parties' discussion does not seem to foreclose the possibility that if the 2015 accident is later shown to have aggravated, i.e. worsened, a pre-existing rotator cuff tear, Defendants could be held responsible for the aggravation as part of the 2015 claim. Nothing in Claimant's on the record concession prohibits this. In all, the discussion makes it clear that the only thing before the commission for consideration was disability relating to the bilateral finger injuries, and the Commission's decision reflects that these were the only injuries considered in evaluating Claimant's disability. The aforementioned issues relating to the left shoulder, including the

question of disability relating to the left shoulder, were left for future determination by the agreement of the parties and the consent of the referee.

Defendants urge the Commission to rule that the previous hearing forecloses Claimant's efforts to further litigate the reserved issues. We think the answer to this is straightforward, and found in I.C. § 72-718, which provides:

A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724, Idaho Code.

I.C. § 72-718.

The Idaho Supreme Court has explained, "The legislature, by adding the phrase 'as to all matters adjudicated' when they enacted this section in 1971, intended that decisions of the commission be final and conclusive only as to those matters actually adjudicated; this is a departure from the concept of pure res judicata, applied prior to 1971, which accorded decisions by the commission finality and conclusiveness as to all matters which were, or could have been, adjudicated." *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 720–21, 682 P.2d 1263 (1984).

Therefore, the doctrine of res judicata that applies to decisions of the Commission is unique; decisions of the Commission are only res judicata as to matters adjudicated. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 288, 207 P.3d 1008, 1019 (2009). While it is true that the Commission did not entertain, as it normally does in such cases, a motion to bifurcate the hearing in order to try less than all of the issues in a case, the colloquy from which we have quoted above makes it clear that the parties were in agreement that certain aspects of the claims relating to the left shoulder were reserved for future resolution. The referee endorsed this. The

absence of a formal declaration from the Commission, in the form of an order bifurcating the case for hearing, is neither here nor there. Whether the “other component” to Claimant’s left shoulder condition, if extant, is causally related to the 2015 accident was reserved, and must be resolved before one can consider whether Claimant is entitled to disability for that condition.

The party’s discussion even admits the possibility that an extant rotator cuff tear may yet figure in Claimant’s claim for additional indemnity unless medical evidence shows that it predated the 2015 accident. Depending on how the threshold causation questions are resolved, the Commission may also have before it additional issues relating to the left shoulder including entitlement to medical care, medical stability, impairment and disability. Defendants need not have agreed to this treatment of issues relating to the left shoulder. The alternative would likely have meant vacating the hearing until all issues were ripe, but for reasons we are not privy to, the parties decided on another path forward.

Based on the foregoing, the Commission concludes that Claimant is entitled to pursue his left shoulder injury under the 2014 and 2015 claims, as discussed *supra*.

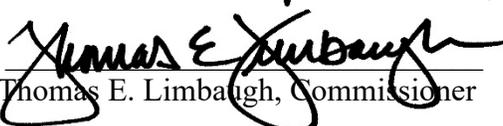
In summary, the Commission concludes that the question of whether Claimant has a right to time loss benefits relative to the 2014 claim is best addressed at a hearing on the merits of the 2014 claim. The Commission further concludes that Claimant is not barred from pursuing his claim for left shoulder injury related to the 2014 and 2015 accidents.

DATED this 3rd day of February, 2021.

INDUSTRIAL COMMISSION

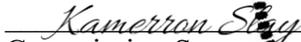


Aaron White, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST:


Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2021, a true and correct copy of the foregoing **ORDER ON PETITION FOR DECLARATORY RULING** was served by email upon each of the following:

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