

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MIRANDA MOSER,

Claimant,

v.

ROSAUERS SUPERMARKETS INC.,

Employer/
Self-Insured,
Defendants.

IC 2016-027914

**ORDER ON PETITION FOR
DECLARATORY RULING**

Filed 4/4/2018

INTRODUCTION

On February 15, 2018, Claimant filed her Petition for Declaratory Relief pursuant to JRP 15. Claimant contends that she cannot be required to attend an Idaho Code § 72-433 exam without it first being established that Claimant is in a “period of recovery,” as required by Idaho Code § 72-433. Claimant contends that until there is a finding that Claimant is in a period of temporary or permanent disability, she cannot be required to attend such an exam. Defendants respond now that the statute should not be so narrowly construed.

STATEMENT OF FACTS

Claimant suffered an accident on October 9, 2016. While lifting a 24-pack of soda, she suffered a dislocation of her right shoulder. The claim was accepted by Employer, even though Claimant had a pre-existing history of recurrent instability of the right shoulder. On November 16, 2016, Claimant underwent surgery by J. Adam Jelinek, M.D., to address recurrent capsular laxity of the right shoulder. Claimant continued to suffer from “pseudosubluxation” after this procedure. In June of 2017, Dr. Jelinek recommended that Claimant be seen by an unidentified physician in Seattle, possibly at the University of Washington, for a second opinion.

Instead of authorizing the request for referral, Defendants arranged for Claimant's evaluation by Michael Ludwig, M.D., who saw Claimant on September 7, 2017. Dr. Ludwig noted Claimant's well-documented pre-injury history of right shoulder dislocation. He noted that the surgery performed by Dr. Jelinek in November 2016 had actually been recommended for Claimant approximately one year prior to the industrial accident. He believed that Claimant's October 9, 2016 right shoulder dislocation was simply a likely consequence of her pre-existing condition. At most, the industrial accident aggravated Claimant's pre-existing condition, but she had returned to her pre-injury baseline by the time of Dr. Ludwig's examination. Dr. Ludwig did not believe that Claimant required any further medical care by reason of the industrial accident. He gave Claimant an 11% upper extremity impairment apportioned entirely to Claimant's documented pre-existing condition. He gave Claimant certain permanent limitations/restrictions to protect the right shoulder, but, again, attributed these limitations/restrictions to Claimant's pre-injury condition.

Dr. Jelinek disagreed with many of Dr. Ludwig's conclusions, and continued to lobby for a referral for a second opinion in Washington state. Eventually, however, he acceded to Surety's suggestion that Claimant be seen for such a second opinion by either Joseph Lynch, M.D., or Thomas Goodwin, M.D. Surety attempted to arrange for Claimant's evaluation by Dr. Lynch in Lewiston. Claimant objected to Defendants' request for a second Idaho Code § 72-433 exam, signifying her intention not to attend such an exam.

On or about January 24, 2018, Defendants filed their "Motion for Sanctions" seeking, *inter alia*, the Commission's Order requiring Claimant's attendance at Defendants' IME. Claimant filed a response in opposition dated January 29, 2018, arguing that since Defendants' first IME physician, Dr. Ludwig, had pronounced Claimant medically stable, there was no basis

for another Idaho Code § 72-433 exam because Defendants could no longer assert that Claimant was in a period of disability. A telephone conference was held by the Referee on February 5, 2018, following which the Referee, without much elaboration, entered an Order requiring Claimant's attendance at a second Idaho Code § 72-433 exam to be held as proposed by Defendants. Thereafter, on February 7, 2018 Defendants noticed a second Idaho Code § 72-433 exam by Dr. Lynch, to be held on April 2, 2018.

Shortly after these things happened, Claimant filed the aforementioned Petition for Declaratory Relief, arguing that absent a determination that she is within a period of disability, Claimant cannot be required to attend an Idaho Code § 72-433 exam such as to subject Claimant to the penalties identified at Idaho Code § 72-434.

Pursuant to JRP 15, the Commission may entertain a Petition for Declaratory Ruling where it is demonstrated that an "actual controversy" exists over the construction of a statute which directly affects the interests of the Petitioner. Here, Claimant has identified Idaho Code § 72-433 as the particular statute over which she claims there is a controversy. She further claims to have an interest which is directly affected by the statute, i.e., if she is correct in her interpretation of the statute, then she cannot be made to attend the exam and cannot suffer the consequences of failing to attend. Claimant's arguments in this regard are developed in her memoranda of February 20, 2018 and March 5, 2018.

Defendants filed a February 21, 2018 response, in which they disputed that Claimant must be in a period of disability before she can be asked to attend an Idaho Code § 72-433 exam.

The Commission concludes that the issue raised by Claimant is an appropriate subject for a Petition for Declaratory Ruling under JRP 15; the issue raised by Claimant appears to be one

of first impression, the resolution of which will be of benefit not only to the parties to this proceeding, but to other practitioners as well.

DISCUSSION

Idaho Code § 72-433 gives to Employer and the Commission the power to request of an injured worker that she submit at “reasonable times and places” for examination by a physician or surgeon of the Defendants’ or Commission’s choice. The statute provides in pertinent part:

After an injury or contraction of an occupational disease and during the period of disability the employee, if requested by the employer or ordered by the commission, shall submit himself for examination at reasonable times and places to a duly qualified physician or surgeon. The employee shall be reimbursed for his expenses of necessary travel and subsistence in submitting himself for any such examination and for loss of wages, if any. For purposes of this section, the reimbursement for loss of wages shall be at the employee’s then current rate of pay if the employee is then working; otherwise, such reimbursement shall be at the total temporary disability rate. Reimbursement for travel expenses, if the employee utilizes a private vehicle, shall be at the mileage rate allowed by the state board of examiners for state employees; provided, however, that the employee shall not be reimbursed for the first fifteen (15) miles of any round trip, nor for traveling any round trip distance of fifteen (15) miles or less. Such distance shall be calculated by the shortest practical route of travel. (Emphasis supplied).

Idaho Code § 72-433(1). An injured worker’s obligation to cooperate with such an exam is enforced by the provisions of Idaho Code § 72-434 which provides:

If an injured employee unreasonably fails to submit to or in any way obstructs an examination by a physician or surgeon designated by the commission or the employer, the injured employee’s right to take or prosecute any proceedings under this law shall be suspended until such failure or obstruction ceases, and no compensation shall be payable for the period during which such failure or obstruction continues. (Emphasis supplied).

Idaho Code § 72-434. The right conferred upon Defendants and the Commission pursuant to Idaho Code § 72-433 is not unfettered. Such an exam must take place at a reasonable time and place. This may mean, depending on the facts of a particular case, that Defendants are not

entitled to repetitive Idaho Code § 72-433 exams. *Pincenti v. Bonner General Hospital, Inc.*, 2016 IIC 0049 (2015).

However, the reasonableness of the exam by Dr. Lynch is not challenged on this basis. Rather, Claimant argues that as a prerequisite to requiring Claimant to attend an Idaho Code § 72-433 exam, it must be demonstrated that Claimant is in a “period of disability” per the unambiguous language of Idaho Code § 72-433. In her opening brief, Claimant argues that the term period of disability is the equivalent of “period of recovery,” as used in Idaho Code § 72-408. Therefore, Claimant argues that it must be demonstrated that Claimant is in a “period of recovery” and has not reached medical stability before she may be ordered to attend an Idaho Code § 72-433 exam. In her reply brief, Claimant acknowledges that the term “period of disability” encompasses not only periods of temporary disability, but periods of permanent disability as well. However, she continues to take the position that it is only during periods in which Claimant is receiving either temporary or permanent disability benefits that she can be required to attend an Idaho Code § 72-433 exam. If Claimant is not receiving disability benefits at the time of an Idaho Code § 72-433 exam, Claimant argues that before such exam can take place, the Commission must find that Claimant is entitled to disability. (*See* Claimant’s reply brief at 4-5).

Claimant’s argument depends on the proposition that the statute is unambiguous; that the phrase “period of disability” obviously means “while receiving disability benefits.” Some of the terms found in Idaho Code §72-433 are statutorily defined. Some are not. In such cases, the Commission is bound to apply the plain and ordinary meaning to the words in a statute:

Statutory analysis must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. This Court interprets statutes according

to their plain, express meaning and resorts to judicial construction only if the statute is *ambiguous, incomplete, absurd, or arguably in conflict with other laws*. Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to construe the language. An unambiguous statute would have only one reasonable interpretation. An alternative interpretation that is unreasonable would not make it ambiguous.

State v. Neal, 159 Idaho 439, 444, 362 P.3d 514, 519 (2015)(internal citations omitted, emphasis added). The term “period of disability” is not defined. Claimant argues that it must refer to the time period within which disability benefits are being paid. “Disability” is defined. Per Idaho Code § 72-102(11) the terms is defined as follows:

(11) "Disability," for purposes of determining total or partial temporary disability income benefits, means a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Therefore, for purposes of temporary disability, “disability” means an accident caused decrease in wage earning capacity.¹ The “period of disability,” for purposes of an injured worker’s entitlement to temporary disability benefits, would be the period during which he has suffered a decrease in his wage earning capacity. Therefore, the argument goes, a prerequisite to an employer’s ability to order an I.C. §72-433 exam, is proof that Claimant is in a period of decreased wage earning capacity. However, as Claimant has recognized, disability may be temporary or permanent. Permanent disability is, by definition, a permanent condition:

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

¹ Idaho Code § 72-102(11) is not a model of clarity. Though ostensibly treating the definition of temporary disability, i.e. disability which occurs during a period of recovery, it references the contribution of PPI and Idaho Code § 72-430 criteria, factors generally recognized as being relevant to assessing permanent, not temporary, disability.

Idaho Code § 72-423. Idaho Code § 72-426 specifies that permanent disability shall be paid for a finite period as a percentage of the “whole man.” However, as the definition of permanent disability makes clear, a permanent disability is necessarily one which is a lifetime impediment to employment; otherwise, it would not be “permanent.” Suppose that an injured worker suffers a work-related knee injury which requires a total knee arthroplasty. Claimant’s case is adjudicated, and he is eventually found entitled to a 40% disability rating which is paid out over a period of 200 weeks following his date of medical stability. Let it further be supposed that ten years later, Claimant’s physician recommends that he is in need of a revision surgery for his TKA. By this time, his permanent disability has long been paid, and the statute of limitations has long since run on any further claim for disability associated with his right knee injury. In this example, Claimant would evidently have us conclude that Defendants would not be entitled to require Claimant to be seen by a physician of their choosing to evaluate whether Claimant does need a TKA revision, and if so, whether the same is related to the original industrial accident. We are urged to conclude that this result must follow because at the time of Claimant’s need for a TKA revision he could no longer be said to be in a period of disability since he is no longer being paid disability benefits.

We find this argument untenable in view of the statutory definition of permanent disability, from which flows the conclusion that one’s permanent disability does not evaporate after the periodic payment of a disability award is completed. Therefore, we reject Claimant’s argument that it is only during the period that an injured worker is actually receiving temporary or permanent disability benefits that Surety has the right to require the injured worker’s attendance at an I.C. §72-433 exam.

Claimant has recognized that it will frequently be the case that an employer desires to require a claimant's attendance at an Idaho Code § 72-433 exam where there has yet been no determination by the finder-of-fact that claimant has a compensable condition, much less an entitlement to medical care and temporary/permanent disability. This case perfectly illustrates the problem. Notwithstanding that the Defendants have accepted the subject claim, a dispute exists over the extent and degree to which Claimant's ongoing problems are causally related to the subject accident. There has been no Commission determination as to whether or not Claimant's need for future care is related to the accident. There has been no Commission determination as to whether or not Claimant is medically stable, and if so, whether she is entitled to disability. There has been no Commission determination as to whether or not Claimant, if in a period of temporary disability, is temporarily disabled because of the work accident. Indeed, one of the objectives of Idaho Code § 72-433 is to allow Employer the opportunity to obtain medical opinions necessary to investigate defenses to a claim and to assist the Commission in sorting out these issues. To say that the Commission must first make a determination on the question of whether Claimant is in a period of temporary or permanent disability before Defendants are entitled to require Claimant's attendance at an Idaho Code § 72-433 exam puts the cart before the horse, and would make Idaho Code § 72-433 exams largely pointless.

It gets more problematic than that. Following Claimant's argument, Idaho Code § 72-433 also anticipates that Defendant's right to require an exam is dependent on there first being an injury or occupational disease. "Injury" is a term of art, and means personal injury "caused by an accident." Idaho Code § 102(18). "Occupational disease" is a term of art and refers to a disease that is casually related to Claimant's employment, the hazards of which are characteristic of and particular to that employment. Idaho Code § 72-102(22). In any case, Claimant bears the burden

of proving all elements of an accident/injury or occupational disease. Accepting Claimant's argument would mean that before Employer would be allowed to obtain a medical opinion addressing the cause of a claimed "injury" or "occupational disease," the Commission would have to first determine that Claimant suffered an "injury" caused by an accident, or that she had an "occupational disease" related to her employment, and that she suffered related disability. The statute is not in the disjunctive.

Furthermore, we conclude that if Idaho Code §72-433 means what Claimant says it means, it is in conflict with the related provisions of Idaho Code § 72-434, which defines the penalties for failure to submit to a reasonable request for an Idaho Code § 72-433 exam. That statute specifies that an injured worker who unreasonably refuses to submit to an Idaho Code § 72-433 exam shall suffer the suspension of her right to "prosecute any proceedings under this law." Claimant argues that until it is determined by the finder of fact that an injury produced by an accident has occurred and that Claimant has suffered temporary/permanent disability as a result, no right to an Idaho Code § 72-433 exam exists. In other words, after Claimant proves her case, Defendants may ask Claimant to submit to an exam. This is inconsistent, and in conflict, with the provisions of Idaho Code § 72-434, which clearly anticipates that exams may take place before a hearing on the merits, or similar determination, takes place. Otherwise, there would be no point to the penalty of suspending Claimant's right to prosecute her claim.

In the recent Supreme Court of *Melton v. Alt*, 163 Idaho 158, 408 P.3d 913 (2018), the Court reversed a district court's finding of ambiguity because the district court considered the probate code 'as a whole' in finding one statute ambiguous. The Court explained:

Idaho Code section 15-3-111 specifically references 15-3-108; therefore, it makes sense to read the statutes together. Alternatively, Idaho Code section 15-3-111 makes no mention of Idaho Code section 15-3-803; therefore, it does not make sense to read the statutes together. This Court is reluctant to insert words into a

statute that the Court believes the legislature left out, be it intentionally or inadvertently. The legislature has provided no indication that Idaho Code sections 15-3-111 and 15-3-803 are related, other than the fact that they both address the general topic of probate.

Id. at 919 (internal citations omitted, emphasis supplied).

Even though Idaho Code § 72-433 fails to specifically reference Idaho Code § 72-434, and even though Idaho Code § 72-434 fails to specifically reference Idaho Code § 72-433, a casual perusal of the statutes will satisfy the reader that they are interrelated, and that it “makes sense” to read the statutes together.

Further, while “permanent disability” is defined in the Act, the term “period of disability,” upon which Claimant relies in support of his interpretation of I.C. §72-433, is not. The term does, however, appear here and there in the Act, but in a context which lends no support to Claimant’s arguments. As previously noted, per I.C. §72-426, an injured worker’s disability is calculated against the “whole man,” defined as a “period of disability” of 500 weeks. For example, if an injured worker’s disability is assessed at 30% of the whole man, he will receive 150 weeks (500 x 30%) of benefits at 55% of the average state weekly wage. While Claimant’s individualized “period of disability” is 150 weeks, I.C. §72-426 lends no support to the proposition that Claimant’s permanent disability lasts for only 150 weeks. As noted above, this would be completely contrary to the definition of “permanent disability” contained in I.C. §72-423.

The term “period of disability” also makes an appearance in I.C. §72-316. That section provides that if benefits have been paid during a “period of disability,” which were not due and payable when made, surety may deduct such overpayments from income benefits yet owed. This statute anticipates a surety’s voluntary payment of benefits prior to any Commission determination of Claimant’s actual entitlement to those benefits. It may turn out, following a

Commission determination on Claimant's entitlement to benefits, that surety has overpaid certain benefits to Claimant. In such cases, that overpayment can be applied to shorten the period during which disability is paid. This is all to the good of the system; where it is unclear that Claimant is entitled to certain benefits, surety should nevertheless be encouraged to pay those benefits and will be more willing to do so if it is understood that overpayments may be recovered. The term "period of disability" as used in the statute cannot refer to a period of time for which there exists a Commission determination of an injured worker's disability status. It clearly refers to a period of time during which there has yet been no judicial determination of Claimant's entitlement to disability benefits.

At the end of the day, the reading of the statute urged by Claimant is altogether nonsensical, and would deny employers the opportunity to investigate fundamental components of a Claimant's entitlement to benefits until Claimant is found entitled to these benefits by the Commission. Only after there has been judicial confirmation that an injury or occupational disease occurred and that Claimant is entitled to temporary/permanent disability would Employer be allowed to undertake a medical evaluation intended to help it defend the Claim, at which time such an undertaking would be pointless. Such a construction would hamstring any defense to a claim for benefits, perhaps impermissibly, since it seems tantamount to a denial of due process or equal protection.

We recognize that abuses of Idaho Code § 72-433 exams occur from time to time, and if they do, such issues can be addressed by the Referee, as they were in this case. However, it cannot have been the intention of the legislature to require that the question of whether Claimant has suffered an "injury" or "occupational disease," or is temporarily or permanently disabled, be adjudicated before Defendants are allowed to conduct the examination(s) that they feel are

necessary to defend exactly those claims. Such a strange interpretation of the statute would yield an indefensible result. Employers must have timely access to an injured worker in order to promptly investigate a claim, and to defend cases in litigation.

Because we find the statute ambiguous, we apply rules of statutory construction to ascertain the legislature's intent; "[i]n interpreting a statute, it is [the Commission's] duty to ascertain and give effect to legislative intent by reading the entire act, including amendments." *St. Luke's Magic Valley Reg'l Med. Ctr., Ltd. v. Bd. of Cty. Comm'rs of Gooding Cty.*, 149 Idaho 584, 588, 237 P.3d 1210, 1214 (2010).

Considering the provisions of Idaho Code § 72-433 in light of Idaho Code § 72-434, we conclude that following the claim of an accident/injury or occupational disease, an employer may require a claimant's attendance at a medical exam per Idaho Code § 72-433.

DATED this ___4th___ day of ___April___, 2018.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
Aaron White, Commissioner

ATTEST:
_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April , 2018, 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:

MICHAEL T KESSINGER
PO BOX 287
LEWISTON ID 83501

ALAN GARDNER
PO BOX 2528
BOISE ID 83701

_____/s/____